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.[1] 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'.[2] A protester in Boston described the Iraq war as 'unjust' and 'a war of aggression'.[3] 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

[1] BBC News Service, *Worldwide Protests Mark Iraq War,* 21 March 2004, at 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.irq.protests.main/index.html?iref=newssearch; see also, Chapter 6 on the use of force, text accompanying note 21.

[2] 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.

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

wrong … The U.N. inspectors, they didn't get much time, and Bush is just bringing, like, flimsy evidence.'[4]

An 11-year-old invoking UN-mandated weapons inspections and the 'evidence' for war, joining with other 'ordinary' people and world leaders to call for respect for international law. Does this tell us anything about how international law might shape global society? Does it signal anything important about the changing face of international law? We believe so, and it is our purpose in this book to explain that changing face, to understand how international law influences the behaviour of actors in contemporary international society.

'Just a minute,' sceptics will interject, 'doesn't the Iraq War show the total failure of international law? Despite the protests all around the globe, the war went ahead. Power trumps law every time.' In this book, we will challenge the conception that law only 'works' when it is an explicit constraint matched with a sanction. It is too early to trace out the entire argument, but the short answer to the sceptics' objection is that the effects of international law were felt throughout the Iraq crisis, and those effects proved to be stronger than the massed military power of coalition armies. The street protests did not prevent the war, but they helped to bolster norms of international law on the use of force and the protection of human rights.

International law really only emerged as a 'discipline' in the nineteenth century. The founders of international law were philosophers and theologians with wide-ranging interests in law and international relations. Indeed, the disciplines were not separate, as they became in the nineteenth century. Aquinas, Grotius, Pufendorf, Suarez – they cannot have imagined themselves as building an edifice of 'pure' law to 'govern' all inter-state relations, much less the relationships amongst states, corporations, international organizations, non-governmental organizations, and individuals. Given the politics of the era, the space for international law was highly restricted. This early international law was at most a law of coexistence, not co-operation, to borrow Wolfgang Friedmann's later Cold War classification of international law.[5] There was certainly no 'common law of mankind' as Wilfred C. Jenks was to imagine.[6]

The aspirations of early international lawyers were ambitious for the time, but modest in retrospect: to provide guidance to monarchs in their

[4] Quoted in CNN News Service, above note 1.
[5] Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964).
[6] Wilfred C. Jenks, *The Common Law of Mankind* (London: Stevens, 1958).

international intercourse and to provide a framework for trade and some constraints on war. It was only with the nineteenth-century colonial project, when international lawyers began what Martti Koskenniemi calls their 'civilizing mission', that international law took on a transformative calling.[7] These origins are cause for concern for contemporary internationalists. International law as it developed in the nineteenth and twentieth centuries was inextricably linked to social and political processes of domination and control. It was accorded all too easily with raw power, and often seemed to be the mere handmaiden of the national interests of the 'great powers'. This legacy should not be ignored, but neither should it preclude the re-imagining of the international law project today.[8]

The human imagination has never been dictated to by history; history is both limit and promise, as the source of warnings, lessons and hints of possibility. In recent years the history of international law has emerged as a fresh field of scholarly study,[9] but too often the result has been a paralysis in thinking. The burden of the past, the undoubted hypocrisy and constant abuse of law, are served up to suggest that international law is fundamentally flawed, that it can never be more than a mask for power relationships.

In popular parlance, the world is a jungle, and the law of the jungle is simple: the strongest win. In the early twentieth century, liberal internationalists argued that the jungle could be turned into a zoo, with legal institutions acting as the zookeeper. The appetites of states for land, power and glory could be tamed. By contrast, self-styled 'realists' argued that the strongest animals would never allow themselves to be captured and caged.[10] The realists saw their view confirmed in the demise of the League of Nations. After 11 September 2001, the pattern seemed to be repeating. Hope placed in the deliberative forum of the United Nations was said to be naïve idealism.[11] A realist could rely only on material power, not

[7] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001), p. 71.

[8] Philip Allott, *Eunomia: New Order for a New World* (Oxford University Press, 1990).

[9] See e.g. Koskenniemi, above note 7; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); and generally the *Journal of the History of International Law.*

[10] Robert Jackson and Georg Sørensen, *Introduction to International Relations* (Oxford University Press, 1999).

[11] John Bolton, 'Address before the Federalist Society at the 2003 National Lawyers Convention', 13 November 2003, at www.fed-soc.org/doclib/20070324_bolton.pdf; see also, John Bolton, 'Is There Really "Law" in International Affairs?' (2000) 10 *Transnational Law and Contemporary Problems* 1; Thomas Shanker, 'Rumsfeld Rebukes the U.N. and NATO on Iraq Approach', *The New York Times*, 9 February 2003, p. A14; and David E.

on international law, which was seen to have no real purchase, or even explanatory power, in international relations.[12]

Realism has been powerful in shaping the popular image of international law. In moments of crisis, international law is often invoked in the western popular media. Yet, more often than not it is portrayed as notionally relevant, but practically without impact. Nevertheless, at these same moments of crisis, cynicism is tempered by expressions of hope and expectation. This point returns us to the Iraq War protests of 2003. Aside from the resistance to the war itself, when the first pictures emerged recording sessions of abuse at Abu Ghraib, much of the world's population reacted with horror. Outrage was provoked not just by the scenes of physical brutality and humiliation, but also by the evident violations of fundamental legal norms against torture and the treatment of prisoners of war.[13] One would be hard-pressed to find more media references to humanitarian law in any previous international conflict.

Similar public engagement occurred around the issue of climate change. Public concern was galvanized by the findings of the Intergovernmental Panel on Climate Change and the parallel communication efforts of former US Vice-President, Al Gore.[14] The world's environmental non-governmental organization (NGO) community banded together in support of the Kyoto Protocol, despite its weaknesses, because it was the only legal framework available to test the commitment of states. The refusal of some key states to take on legally binding emission reduction commitments became a touchstone for those who saw a failure to come to grips with the reality of climate change.

The scholarly literature needs to catch up with the perception of international law's role amongst people on the street. In debates over intervention in Iraq, over ratification of the Kyoto Protocol, over the use of torture to fight terrorism, and over 'humanitarian intervention' in Darfur, Sudan, the public discourse has been about values and interests, of course; but it has also been explicitly about law, and the effects of law upon human and state behaviour. This should not be surprising. Intuitively, people sense

Sanger, 'Iraq Makes U.N. Seem "Foolish", Bush Asserts', *The New York Times*, 29 October 2002, p. A15.

[12] Bolton, 'Is There Really Law', above note 11; and Michael J. Glennon, 'The UN Security Council in a Unipolar World' (2004) 44 *Virginia Journal of International Law* 91.

[13] Neil MacFarquhar, 'Revulsion at Prison Abuse Provokes Scorn for the U.S.', *The New York Times*, 5 May 2004, p. A18; and Dana Priest and R. Jeffrey Smith, 'Memo Offered Justification for Use of Torture', *The Washington Post*, 8 June 2004, p. A1.

[14] CNN News Service, *Gore: Nobel Win a Chance 'to Change the Way People Think'*, 12 October 2007, at www.cnn.com/2007/POLITICS/10/12/nobel.gore/index.html.

that law is more than a reflection of state interests or a measure of who has the biggest stick. If law were nothing more than enforcement by self-interested states, the very concept would not be needed. Power would do its own work.

The central argument of this book is that there is law in the jungle. It is made through the interactions of a variety of actors, including elites, the media, NGOs and 'ordinary' citizens. States – though still dominant – are not the only animals in the jungle, and the law of the jungle is not made only by the strongest: nor is it broken with impunity. The law of the jungle is often unrecognized by the very people who help to make it. We want to confront that dynamic and suggest new ways of imagining the role of law in constructing and shaping global society.

For scholars, policymakers and citizens, it has never been more important to understand how international law enables and constrains international politics. Without a rich understanding of how international law influences the behaviour of key actors, one cannot design effective political and legal strategies to accomplish shared, or even individual, goals. Promoting specific norms matters. Building them in legitimate ways matters. Cultivating their application in particular contexts matters. Understanding the diverse ways in which legal norms can be effective matters. We therefore outline a framework to assist international lawyers and policymakers in identifying the most promising avenues for normative and institutional development. This framework is built primarily upon a theory of international law, but it is supplemented by insights from international relations (IR) theory. We believe that international lawyers have much to gain from IR perspectives on the role of law in international society. In turn, IR scholars stand to gain from exploration of the concept of international legal obligation.

1. An interactional account: the hard work of international law

In thinking and writing about international law over the years, we found ourselves increasingly dissatisfied with the prevailing theoretical accounts of the field. None of these accounts, it seemed to us, provided a theoretical framework that fully resonated with the contemporary practice of international law-making and application, satisfactorily explained the strengths and weaknesses of international law, or illuminated the idea of legal obligation in international society. Our goal in this book is to sketch out a theory that does meet these challenges – an interactional theory of international law. More specifically, we articulate a theory of

international legal obligation. We believe that the key to understanding the role that law plays in international society lies in understanding the nature and operation in practice of legal obligation.

In developing our thesis, we draw on the work of one of the foremost legal theorists of the twentieth century, Lon Fuller, although we extend his insights in directions that he might not have imagined. Fuller himself hinted that international society was not ready for the rule of law, and perhaps in the early 1960s, at the height of the Cold War, it wasn't. Today, however, we think that Fuller's insights are actually borne out powerfully in the international area. Yet, there is some irony in our turn to Fuller's theory of domestic law to think about international law. After all, dutiful incantations of caution notwithstanding, international lawyers and commentators on international law (both friendly and unfriendly) frequently draw on domestic law in their assessments of or prescriptions for its international relative. The resulting picture of international law is rarely good, often ugly, and always distorted. That is precisely why Fuller's theory is so important for understanding international law.[15] It reveals that the problem with the domestic law analogy is not necessarily the analogy as such, but the assumptions that commonly shape it. When we assume that the defining features of domestic law – and by extension of all law – are formal enactment by a superior authority, application by courts, and centralized enforcement, we are bound to see international law as a poor cousin. Most importantly, we risk misjudging how law operates in international society, obscuring its potential power, and misdirecting even the best-intentioned efforts to improve it.

What distinguishes law from other types of social ordering is not form, but adherence to specific criteria of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action.[16] When norm creation meets these criteria and is matched with norm application

[15] Although Fuller himself did not engage with international law in any detail, he did highlight the implications of legal positivism, and a domestic law optic, for international law. See Lon L. Fuller, *The Morality of Law*, rev. edn (New Haven: Yale University Press, 1969), pp. 232–7. In Fuller's most direct engagement with international law, he grappled with the limits of adjudication in international society, observing that if international law existed at all, 'it exists imperfectly – it is still in process of being born'. See Lon L. Fuller, 'Adjudication and the Rule of Law' (1960) 54 *American Society of International Law Proceedings* 1 at 1. See also Karen Knop, 'The Hart–Fuller Debate's Silence on Human Rights', in Peter Cane (ed.), *The Hart–Fuller Debate: 50 Years On* (Oxford: Hart Publishing, 2010), p. 61.

[16] See Fuller, *The Morality of Law*, above note 15, pp. 39 and 46–90.

that also satisfies the legality requirements – when there exists what we call a 'practice of legality' – actors will be able to pursue their purposes and organize their interactions through law. These features of legality are crucial to generating a distinctive legal legitimacy and a sense of commitment – what Fuller called 'fidelity', – among those to whom law is addressed. They create legal obligation. By focusing our attention on markers of legality that are internal to law, Fuller's theory provides a helpful lens through which to reflect on international law. It shows that the formal and hierarchical manifestations typically associated with domestic law, such as tests of 'validity', are not sufficient to characterize 'law', domestic or international, and indeed may not always be required.[17]

Fuller's legal theory explains law as a purposive enterprise that is both shaped by human interaction and aimed at guiding that interaction in distinctive ways. Law does not depend on hierarchy between law-givers and subjects, but on reciprocity between all participants in the enterprise. By 'reciprocity' we mean that law is not a 'one-way street'. It can exist only when actors collaborate to build shared understandings and uphold a practice of legality. This conception of reciprocity is at the very heart of the interactional account of international law that this book sets forth. Understanding this dynamic is the key to appreciating the nature of legal obligation. In short, we argue that the distinctiveness of law lies not in form or in enforcement but in the creation and effects of legal obligation.

The interactional framework enables international lawyers to take a fresh look at their discipline. Taking that fresh look does not mean that we must dismiss as unimportant state consent, or 'sources' of international law, the creation of courts and tribunals, or better enforcement mechanisms. Rather, it places these elements in the broader context of the international legal enterprise, so as to better appreciate the roles they

[17] For an extended critique of the 'positivist canon', see Fuller, *ibid*., esp. Chapter V. In summary, Fuller objected to positivism's preoccupation with the pedigree of rules (sources) and to its attendant hierarchical conception of law creation, which Fuller believed to facilitate authoritarianism. He similarly rejected the idea that law is principally an exercise in 'social control', and the linked tendency, evident even in Hart's sophisticated positivism, to view law as co-extensive with the power of the state. Much of his criticism retains great force. We would only caution that Fuller's attempt to paint H.L.A. Hart into the corner of those who would support 'immoral law' is unfair. One of the explicit desires of the analytical positivists was to provide for an external critique of law rooted in morality. Even if something was law, it could still be wrong. See H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593 at 618. Fuller simply thought that the critique would be more effective, and loyal to the purposes of legality, if internal rather than external.

play, their potential, and their limitations. It also reveals that building and maintaining the reciprocity that grounds legal obligation requires sustained effort. As we will illustrate throughout this 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 a step in the continuing interactions that make, remake or unmake international law.

For example, sources discourse in law provides a useful shorthand to distinguish law from other types of norms, facilitating the daily calculations of participants in a legal system. Although a duly concluded treaty is formally binding on the parties, when it fails to meet the legality requirements we noted above, the treaty may not generate a sense of obligation. Interactional law helps us to understand that the formal indicator of a rule, in this case a treaty, is not necessarily co-extensive with the legality and practice that generates obligation. A particular treaty rule might satisfy the requirement of promulgation, and yet fail to meet other criteria of legality such as clarity. Failure to meet these requirements at the outset does not mean that legality can never be built through the application and development of the treaty. Indeed, gradual build-up will often be the only way to establish genuine and resilient international legality. By the same token, legality can be squandered through careless practice under a treaty. Either way, states' consent to a treaty, its formal existence, and the presence or absence of judicial or enforcement practice are but reference points for efforts to understand, build or maintain the treaty's potential to bind. Each presents opportunities for international law; but opportunities must be seized. The concept of a truly 'interactional' international law, then, is at once sobering and empowering.

Unlike the prevailing accounts of international law, an 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 commitments. The fundamental commitment is to enabling participants to pursue their own ends while being guided by law. In other words, while 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,[18] particularly the return to a 'culture of formalism'.[19] But we will 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, precisely because the commitment to autonomous actor choices and diversity is internal to the framework itself (rather than merely an external justification for the framework).

2. IR theory and legal obligation

Political scientists share with international lawyers a concern to understand how norms function in a horizontal normative order such as international society.[20] It is, of course, trite to describe the international order, including international law, as 'horizontal' in structure. The essence of the characterization is that there is no legislative or executive hierarchy within the system. Yet, as Michael Barkun argued in the 1960s, social scientists tend to look at international society through the prism of domestic legal systems and to find international law under-developed or wanting. This approach is not surprising. Indeed, it is characteristic of much of the scholarship that, in recent decades, has sought out new insights in cognate disciplines. In looking for such interdisciplinary insights, scholars have often adopted reductionist definitions of the 'other' discipline because they have not been actively involved in the constitutive internal disciplinary debates and processes that lead to healthy uncertainty and nuance. In the case of social scientists viewing law, the distorting optic of the domestic law analogy was not exclusively a result of these pitfalls of interdisciplinarity but, as Barkun rightly observed, was actually fed by professional deformation within the discipline of law itself. As we have already suggested, many legal theorists and practising lawyers have had trouble understanding – much less articulating – how international law can be law, when viewed from the perspective of seemingly hierarchical domestic legal systems.

[18] See Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401 (discussing 'political positivism').

[19] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new Epilogue (Cambridge University Press, 2005), p. 616.

[20] See Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887 at 887–8.

The reason for what Barkun called the 'uncritical appropriation' of the domestic law paradigm is not hard to discover:[21] it is the strongly positivistic stance of legal theory throughout much of the late nineteenth and twentieth centuries.[22] For outsiders, even more than for lawyers, positivism promises easy intelligibility: law can be found, defined and labelled.[23] Yet, if law is viewed (as it is in various strands of positivist thinking), as a hierarchically ordered imposition of social control emanating from a *de facto* sovereign,[24] a purely theoretical '*Grundnorm*',[25] or even a 'rule of recognition',[26] then the persistently horizontal structure of international law will prove troublesome. International law will either be declared non-existent, or its operation will have to be distorted to fit the theoretical framework. It was therefore natural for IR scholars in the realist tradition, who were trying to cleanse their discipline of all normative ideas, to ignore international law (or perhaps in their self-conception to grow beyond it).[27]

Historically, realists are the dominant school in IR theory. For realists of all stripes, law is virtually irrelevant, as is the concept of legal

[21] See Michael Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community* (New Haven: Yale University Press, 1968), p. 11; cited in Fuller, *The Morality of Law*, above note 15, p. 237.

[22] A thoughtful description of the appropriation of positivist legal theory by public international lawyers is found in Roberto Ago, 'Positivism', in Rudolph Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. VII (Amsterdam: North-Holland, 1984), p. 385.

[23] For this formulation of the attraction of positivism in law, we are indebted to Rod Macdonald. A clear example of this tendency is found in the 'legalization' project. See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, 'The Concept of Legalization' (2000) 54 *International Organization* 401.

[24] John Austin, *Lectures on Jurisprudence*, 5th edn (London: John Murray, 1885), pp. 86–103. For Austin, the command, to be law, must also be 'general' and matched with a potential sanction in the event of non-compliance.

[25] Hans Kelsen, *General Theory of Law and State*, Anders Wedberg (trans.) (New York: Russell & Russell, 1961); and *Principles of International Law* (New York: Rinehart & Company, 1952).

[26] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 89–96 and Chapter 6; and H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983). Hart's analysis of law was explicitly hierarchical, with primary rules (imposing obligations) rooted in secondary rules (of recognition, change and adjudication), and the entire system of law nesting in a fundamental 'rule of recognition' generated through the practice of state officials.

[27] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 2nd edn (New York: Knopf, 1954), p. 8. See also Martti Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations', in Michael Byers (ed.), *The Role of Law in International Politics* (Cambridge University Press, 2000), p. 17.