the early twenty-first century literature on constitutionalism at the global level.

ANDREW LANG
London School of Economics

Legitimacy and Legality in International Law: An Interactional Account. By Jutta Brunnée and Stephen J. Toope. Cambridge, New York: Cambridge University Press, 2010. Pp. xviii, 411. Index. $112, cloth; $58, paper.

The concept of "legitimacy" has had a difficult decade in international legal scholarship. Dominant rationalist approaches in North America have dismissed, bracketed, or downplayed it, while most formalists in Europe have continued to treat it as an issue of international politics rather than law. Attention to legitimacy has emanated largely from constructivist takes on international relations, though typically not with a focus on the legal sphere.

In their new book, Jutta Brunnée and Stephen Toope seek to tackle this gap and move legitimacy back to center stage. Brunnée is a professor of law at the University of Toronto; Toope is the president and vice-chancellor of the University of British Columbia. Both have long been at the forefront of engagements between international law and international relations, and in this book they take this interest a significant step further. They develop an "interactional" account of international law that uses constructivist work to elucidate the role of legitimacy in the practice of international law and international politics. They also seek to infuse the notion of international "law" with elements of procedural legitimacy by drawing on the legal theory of Lon Fuller, the legal philosopher and Harvard law professor (1902–78). Brunnée and Toope's undertaking is ambitious: it not only opens up new directions for international legal scholarship, but it also challenges rationalists, positivists, and formalists alike. As such, their work is bound to provoke resistance. But *Legitimacy and Legality* is also so well argued and thought-provoking that even staunch opponents of its starting points will draw much benefit from it. It has already won the American Society of International Law's 2011 Certificate of Merit, and it will surely inspire enough followers to remain a focal point in the literature for some time to come.

The book pursues two main, interwoven lines of argument, one concerning the dynamics of international law, the other concerning its concept. Both center on the interactional quality of the law and on the importance of the relationship between a system of rules and its subjects and participants. Fuller placed much emphasis on this aspect. Unlike what he perceived to be the background understanding of the positivists of his time, he did not see law as a "one-way projection of authority,"[1] but, instead, as dependent on a common engagement of government and citizens. Without such engagement, a system of rules would neither be effective nor, ultimately, deserve to be called law.[2] This approach offers a link with constructivist insights into the interactive shaping of the structures of international politics, a link that Brunnée and Toope take up and develop further. It provides them with a rich account of how, in the international sphere, norms are developed through the construction of shared understandings, and it serves as the basis for their own conceptualization of obligation in international law. Their approach enriches constructivist international relations scholarship through its focus on the distinct character of legality, and it develops Fuller's work further by transferring it to the international sphere and by using it to distinguish legal obligations from nonlegal norms. In Brunnée and Toope's interactional account, international law depends on a basis in shared understandings for its effectiveness, obligatory character, and quality as "law."

All three dimensions are linked through reference to Fuller's eight criteria of legality— generality, promulgation, nonretroactivity, clarity, noncontradiction, realism in demands, constancy, and congruence between rules and their administration—which reflect the "internal morality of law."[3] For Fuller as well as for Brunnée and Toope, these eight criteria serve to ground legitimacy and obligation in a normative sense, to provide the

[1] LON L. FULLER, THE MORALITY OF LAW 221 (rev. ed. 1969).

[2] *Id.*

[3] *Id.* at 200.

basis for citizens' actual fidelity to the law, and to establish conditions for the quality of a normative structure as "law." Consequently, they carry a heavy burden, and their different roles are distinguished and explicated in the first three chapters of the book and then applied in three case studies on the international law relating to climate change, torture, and the use of force. In this review, I cannot do justice to the richness of the book but will confine myself to a few points that highlight general traits—and problems—of Brunnée and Toope's argument.

The first point concerns the relationship of "legality" and compliance. The importance of Fuller's eight criteria as explanatory factors comes into relief most clearly in the book's third chapter, on compliance and "law's hidden power" (p. 88). Brunnée and Toope build here on their elaboration in the previous chapter of how international norms rest on shared understandings in international society. *Legal* norms gain their particular status by being fused with a "practice of legality" rooted in Fuller's criteria, and law exerts a particular compliance pull and engenders a "felt sense of obligation" that goes beyond that triggered by nonlegal norms (p. 124). *Legitimacy and Legality* here contrasts most openly with rationalist accounts of compliance in its emphasis on action out of respect for the law and out of a sense of appropriateness as "a conscious sense of obligation rooted in a special form of legal legitimacy" (p. 97).

With this approach, Brunnée and Toope follow constructivist theory, yet they assume, rather than demonstrate, that this logic of action forms as important a part of international politics as they claim. Their references to empirical observation remain somewhat thin, even though they acknowledge that the actual role of law could only be illuminated by "careful empirical work" (p. 93). The case studies in the book do not really undertake such work—they have a different focus—but this gap leaves the reader uncertain about the basis of the authors' further claim that international law's "hidden power" stems from accordance with Fuller's criteria of legality (p. 96). These criteria overlap in part with factors suggested by other accounts of legitimacy and compliance, such as works by Tom Franck.[4] Yet, why it is these and not other factors that may instill a sense of obligation in governmental agents (and other actors in international affairs) would seem to require further investigation. This issue is raised particularly by the elevated place that Brunnée and Toope grant Fuller's criterion of *congruence*. They regard the accordance of norms with existing shared understandings, as well as with continuous practices in international society, as key for the fidelity of actors and, as a consequence, for compliance. Their view involves some skepticism about the transformative power of law, and it has important implications for lawmaking and compliance mechanisms. But the reasons for placing so much emphasis on congruence and not on, say, characteristics of the lawmaking process, remain rather vague.

Legitimacy and Legality devotes considerable energy to improving our thinking about—and our strategies for improving—compliance, and it provides important insights in this regard. The book stresses that, because of the dominant rationalist lens on international law, ensuring compliance is often equated with particular institutional mechanisms like monitoring, incentives, and sanctions. In line with their general approach, the authors regard as more important the grounding of law in the "practice of legality" over time (p. 103), and especially in the creation of shared understandings about the need for and meaning of particular norms. This practice includes providing institutional spaces for interaction as well as efforts for the establishment, maintenance, and strengthening of communities of practice, so as to make norms and social practices "congruent" in a Fullerian sense. Otherwise, they claim, the norms would enjoy only formal validity and lack the desired compliance pull.

This emphasis on the "hard work of international law" is important, especially as it highlights the importance of a deeper social and ideational transformation for law to have a meaningful impact (p. 72). Before this hard work can be operationalized, however, it requires more specification and, in particular, a clearer picture of which actors

[4] *E.g.*, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

should be its targets, as well as which communities of practice and which audiences hold the key to compliance in different issue areas. The answers to these questions might vary depending on the circumstances: sometimes, government officials may matter most, and at other times domestic civil society or businesses may be more important.[5] It may be easy to agree that international law needs more "hard work" than merely formal adoption, but it is less easy to understand what kind and direction are needed.

Yet the focus on supporting social practices and on the interactional character of normative processes also holds lessons for our broader conceptualization of compliance itself. It warns against understanding compliance as unidirectional and urges us to study the feedback of later practice on the content of rules. This perspective usefully complicates a picture of compliance that all too often starts from the image of clear and stable rules and misses the reflective processes by which law acquires social meaning and importance. It also highlights the potential of an international law that, grounded in such processes, may break free from the shackles of rational self-interest calculation.

As noted above, in discussing legality and law, Brunnée and Toope use Fuller's eight criteria not just for explaining compliance and for normatively assessing existing practices but also for determining when it is justified to speak of "law." They summarize: "[W]hat distinguishes legal norms from other types of social norms is not form or pedigree, but adherence to specific criteria of legality" (p. 351). As the authors acknowledge, Fuller himself was not primarily interested in the distinction between different types of norms; he saw his criteria as providing the yardstick for assessing whether or not a country had a legal system at all. Though his perspective provoked an outcry among positivists,[6] it has certainly sharpened our sense for features typically associated with the law but left out of more formal analyses. Taking this approach to the international level can help us to appreciate that more is at stake in the label of "law" than mere considerations of function or form.[7]

Legitimacy and Legality uses Fuller's criteria to reconceive the notion of international law as "interactional international law," a demanding idea that requires norms to be broadly in accordance with the eight criteria mentioned above to deserve to be called law. As in Fuller's work, Brunnée and Toope's theory collapses legality and certain procedural aspects of legitimacy into one and thus deliberately presents a nonpositivist approach based on a notion of procedural natural law. I want to leave aside here the general problems of such an approach[8] and focus instead on Brunnée and Toope's particular formulation and application of the idea to international law.

The direction of their thinking best comes to light when seen in the context of the case studies on climate change, torture, and the use of force, which, in three densely argued chapters, take up more than half of the book. Apart from a masterly summary of the law, politics, and shared understandings in the different areas, these chapters provide a careful analysis of the law based on Fuller's eight criteria and highlight particular problems, especially as regards the generality and clarity of the norms at play. Yet their main focus lies—in line with the similar emphasis in the compliance part—on the element of congruence.

What this focus implies becomes clearest with respect to the prohibition of torture. Here, the authors note that the actual practice of many countries does not show respect for the prohibition, that congruence is therefore lacking, and thus that "the absolute prohibition on torture does not meet the standards of interactional international law. The rule is rhetorically strong

[5] *See, e.g.*, BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 112–58 (2009).

[6] *See, e.g.*, H. L. A. Hart, Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing LON L. FULLER, THE MORALITY OF LAW (1964)).

[7] *See also* David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, *in* ACTA JURIDICA 2009, at 3.

[8] *See, e.g.*, Matthew Kramer, *Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders*, 18 OXFORD J. LEG. STUD. 235 (1998).

but practically weak . . ." (p. 269). The prohibition on torture has suddenly dropped out of international law.

Their assessment is, of course, startling, given that the anti-torture norm is one of the few to be regularly included among customary and even *ius cogens* norms. Brunnée and Toope also regret their conclusion but feel compelled by the facts. Yet they fail to use this element of irritation to ask some harder questions about the utility of their broader framework and, in particular, of their conceptualization of the central notion of congruence.

For Fuller, congruence denotes the consistent application of the law by the officials charged with its administration.[9] However, Brunnée and Toope understand this concept on the international level as "congruence amongst the actions of a majority of international actors" (p. 35). This reformulation reflects and operationalizes the emphasis on shared understandings as a basis of international normativity, but it may well capture quite a different rationale than Fuller's original conception. In Brunnée and Toope's reading, rather than being subjected to an inconsistent and unpredictable application of the law, the subjects themselves create the inconsistency through their diverging interpretations as well as their outright noncompliance. The analogy here is fragile at best, and this fragility may explain why the criterion of congruence proves particularly problematic in most of the case studies in the book. While rules can indeed be "destroyed through the continuing practice of states and other international actors" (p. 270), this fact need not entail an abolition of the distinction between normative-legal aspiration and actual behavior. Otherwise, international law would be all "apology"[10]—its rules would merely mirror state action and lose all critical distance—and the corrosive effects of defiance and of the legal exceptionalism of powerful states (to which Brunnée and Toope point at page 40), would determine norms and obligations. Just as "[t]he real demands of justice are not determined by our present understanding of them,"[11] the potential of law is not limited to what is already widely practiced.

The conclusion on the prohibition of torture also raises questions about the broader conceptualization of law and legality in the book. For Fuller, a complete failure of a normative order on any of his eight criteria would deny it the quality of a legal system, but, beyond that, the fulfillment of these criteria is part of a morality of aspiration rather than duty and affects only the extent to which one can speak of a "legal" system. Law here comes in shades of gray.[12] Brunnée and Toope radicalize this theory. First, they focus on single norms rather than the legal system as a whole. And second, they see legality in binary terms: either a norm is law, or it is not. This approach follows more classical conceptions of law and responds to the desire to distinguish "between what is legally required and what is desirable or acceptable" (p. 46). As a consequence, they miss the advantage of a conception that identifies legality and obligation. The focus on obligation would allow an analysis of the varying strengths of obligation in a way that more traditional accounts with a concentration on "validity" could hardly accommodate. Practically, Brunnée and Toope's radicalization also means that many norms typically thought to be "legal" would lose this label because of lack of congruence or clarity or because of contradictions with other norms. The prohibition on torture is just one example here.

Legitimacy and Legality radicalizes Fuller in yet another problematic respect. As we have seen, its use of the eight criteria of legality leads to a restriction of the range of accepted international legal norms. In other respects, though, it also leads to an extension of this range. Soft law, for example, can turn into interactional law: "When norms [regardless of their formal source] are rooted in shared

[9] FULLER, *supra* note 1, at 81–91.

[10] See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (rev. ed. 2005).

[11] WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 232 (1989) (critiquing Michael Walzer's attempt to ground morality in shared social understandings as set forth in MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983)).

[12] FULLER, *supra* note 1, at 198–200; *see also* Peter P. Nicholson, *The Internal Morality of Law: Fuller and His Critics*, 84 ETHICS 307, 309–11 (1974).

understandings and adhere to the conditions of legality, they generate fidelity" and can consequently gain obligatory force (p. 51). The precautionary principle and the principle of common but differentiated responsibilities in international environmental law thus seem to gain legal status, yet less benign norms may also benefit from this shift. What difficulties result emerges from the discussion of the decision by the plenary body under the Kyoto Protocol to establish a noncompliance procedure. Brunnée and Toope point out that such a decision would normally have required a formal amendment; as the latter was out of reach, the less demanding route via an institutional decision was chosen. What seems plainly unlawful, however, turns into good interactional law: the cumbersome amendment route would have "undercut the generality and predictability of the compliance procedure," and the decision route "was more conducive to legality, ensuring both immediate operation and its applicability to all parties. . . . [A]dherence . . . to the requirements of interactional law is more important than . . . formal legal status" (p. 201). Other formal thresholds—such as consensus decision-making under the Kyoto Protocol or the veto power in the UN Security Council—equally seem to vanish under the weight of "legality."

In this way, interactional international law becomes a serious challenge to traditional international law and its procedures, a challenge far more radical than Fuller would have probably accepted. For him, the criteria of legality served to qualify existing formal legal norms, not to create new ones, and they operated largely as minimum requirements and on a systemic level, not on the level of individual norms.[13] Brunnée and Toope move beyond Fuller's constraints and create an order in which the moral evaluation of procedure, coupled with an assessment of congruence, replaces formal modes of lawmaking. As any such deformalization, this move leaves law's content largely in the eye of the beholder.

Brunnée and Toope's attempt at taking Fuller's theory to the international sphere faces yet more fundamental obstacles. At first sight, drawing on Fuller to analyze international law is appealing as it highlights virtues that, in the eyes of many, distinguish law from the power play of international politics. In this line, Brunnée and Toope begin their book with an invocation of the role that international legal argument arguably played for many of the millions of protesters against the 2003 invasion of Iraq. As in Fuller's famous contrast between proper legality and the deficient rule of a (benevolent) King Rex,[14] law here appears as the antidote to unprincipled, arbitrary exercises of power.

Fuller himself, though, did not write specifically on international law. As Brunnée and Toope note, he may have thought it outside the realm of his theory.[15] Much the same could be said for many legal philosophers of the past, and it should not necessarily keep us from using their insights in a different realm. This proviso seems especially true in the case of Fuller, who placed such emphasis on the interactional character of law—the involvement of its subjects in its construction—that parallels with the horizontal nature of classical international law appear evident. And it is these parallels that inspire much of the argument in *Legitimacy and Legality*.

Inspiration, however, is one thing; translation of a theory is quite another. Doubts as to the suitability of using Fuller's approach for the international context arise already from the above-mentioned problematic use of the criterion of congruence. As noted above, the reinterpretation of congruence—initially conceived as congruence of a formal rule and the practice of the *officials* that administer it—as correspondence of a rule and the practice of its *subjects* (states) seems to twist the original rationale somewhat.

Yet what precisely is the rationale behind congruence and the other criteria of legality? For Fuller, these criteria contain conditions—conditions that specify the reciprocity relationship

[13] FULLER, *supra* note 1, at 39–44; Nicholson, *supra* note 12, at 309–11, 321.

[14] See FULLER, *supra* note 1, at 33–39, where Fuller uses the imaginary figure of King Rex to highlight eight ways in which a lawgiver can fail so as to provide the ground for his development of the eight criteria of legality.

[15] *But see id.* at 232–33.

between lawgiver and citizen. As he saw it, positivists with their view of law as a "one-way projection of authority" missed the importance of the role of the citizen who could not be expected—as a matter of fact as well as morality—to obey a rule that to her was either unknown or unintelligible or that was disregarded by those charged with its administration. Fuller even invoked the image of a mutual commitment of lawgiver and citizen by which obedience is promised in return for clear rules and consistent application.[16]

The concept of *person* underlying the idea of the citizen in this reciprocal relationship is one of a responsible agent whose dignity is protected by the eight criteria of legality.[17] The analogy with the international sphere, where states rather than individuals are the law's subjects, becomes tenuous at this point. Brunnée and Toope ground it on a parallel between individual autonomy and state sovereignty, considering that states are "collective entities constituted and represented by individual human beings" and that their sovereignty can thus be a proxy for autonomy (p. 36). The authors here take a leap—and perhaps too big a leap—that casts aside the more nuanced and controversial discussion on the moral standing of states in political philosophy.[18]

The translation of Fuller's approach to international law is further complicated by the image of law that lies at its core. As Brunnée and Toope emphasize, Fuller's views are distinguished by his insistence on horizontal elements even in domestic law. Yet this insistence operates in a framework that is still dominated by a vertical account of legal order—a vertical order softened but not replaced by horizontal features. Fuller explains that "[t]here is . . . a horizontal element in what positivism sees as vertically imposed law."[19] On this background, the point of his eight criteria is readily apparent: they protect individuals from the unilateral enactment powers of a government and thus capture essential elements typically associated with the rule of law. Lawgiver and citizen may be closer in Fuller's account than in others of his time, but they are still conceptually distinct, with the former having certain powers of command over the latter.

On this background, it becomes questionable whether, and in what form, Fuller's eight criteria can survive the shift from the domestic to the international context, at least if the latter is conceptualized in its classical, horizontal, private-law mode.[20] Fuller's approach to horizontal systems such as customary or international law remained unclear, but he explicitly distinguished the (vertical) law on which he focused from the world of (horizontal) contracts.[21] The underlying liberal rationale is clear: against the contracts they conclude, individuals need less (or at least a different) protection than against laws and decisions imposed on them. Individuals may well choose contracts with vague and retroactive terms (if they do so freely), and they may decide to change their obligations abruptly from one day to the next—choices Fuller would not allow a government to make in the name of "law" and with the expectation of obedience by its citizens.

What then should the image of international law be, one of "law" or one of "contract"? In the classical picture, the contractual analogy would probably prevail. And, indeed, would countries like the United States or Germany need the protection of Fuller's eight criteria? Should they be kept from entering into treaties with unclear provisions or with terms that lack generality? Or would they deserve to be freed from obligations because of an inconsistent application to which they may have contributed, as in Brunnée and Toope's argument on the anti-torture norm? Probably not.[22] We simply do not see them as "subject" to international law in the same way as we see an individual as subject to domestic law.

[16] *Id.* at 39–40; *see also id.* at 216–17.

[17] *Id.* at 162.

[18] *See* Michael Walzer, *The Moral Standing of States; A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209 (1980); 23 ETHICS & INT'L AFF., Winter 2009 (issue devoted to conference recognizing Michael Walzer).

[19] FULLER, *supra* note 1, at 233.

[20] *See* HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) (1927).

[21] *See* FULLER, *supra* note 1, at 125–29.

[22] *See also* Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315 (2011).

But perhaps *Legitimacy and Legality* is based on a different image of international law, even if not explicitly so. The examples chosen—climate change, torture, use of force—have in common a recent insistence on some form of exceptionalism by the United States, and, despite the conclusions in the torture case, the book often defends the autonomy of interactional law from manipulation by the powerful. Towards the end of the book we read that "interactional law undercuts the ability of powerful actors to put forward self-serving or perverse normative claims because the claims will have to be measured against the eight criteria of legality" (p. 353). As I have pointed out above, it is not clear that the approach succeeds in providing such protection. But Brunnée and Toope may well regard their usage of Fuller's theory as a reaffirmation of a horizontal system in the face of attempts to hierarchize it, that is to move into a more vertical order.[23] In this case, the eight criteria—or at least some of them, duly reformulated—may indeed find a legitimate place.

Another basis for a Fullerian analysis that is not pursued by Brunnée and Toope may lie in the idea of international law as "public" law, recently advanced in the context of global administrative law. Here, the workings of global governance are no longer seen as mere iterations of a horizontal cooperation of states but, instead, as exercises of administration and public authority that demand a particular justification and that have already engendered a series of procedural and substantive adaptations.[24] Some of these adaptations may well be reminiscent of the eight principles of legality, and Fuller's theory has been used to frame them, but it has also served to question the usage of law in this context.[25] It may still be debated to what extent the principles can be made fruitful here; after all, it remains doubtful whether states, rather than individuals, deserve rule-of-law protections.[26] But it is certainly a framework in which Fuller's work might find stronger resonance than in the classical private-law image of international law.

Overall, *Legitimacy and Legality* is a bold and impressive book. It sets out a broad reconceptualization of the dynamics and the idea of international law and presents a major challenge to rationalist international-relations scholars, positivist legal philosophers, and formalist international lawyers alike. As I have sought to outline, I do not think that it succeeds fully in its quest as too many big questions are left unanswered and too many problems remain in the overall framework. But it is a distinct and rare virtue of a book to throw up all these questions and still not lose sight of the detailed arguments through which international law, in all its applications, is shaped and reshaped. Brunnée and Toope force us to confront major issues in international law today, and even if we do not agree with their approach, the engagement with the book is bound to take international legal scholarship a significant step further.

If there is one dimension, however, in which future engagement should furnish what the book itself omits, it would be a historical perspective. Legality/legitimacy is a conceptual pair with so much historical baggage that the authors may have thought it prudent to drop much of this baggage and begin to think afresh. Yet in this particular case, this omission may be too easy an option given that too many struggles about fundamental questions of modern politics and law have been sedimented in the history of this conceptual relationship—not just academic struggles, but eminently political ones too.[27] In the end, we may choose to entangle or disentangle law and legitimacy; after all, both directions have an impressive ancestry and important defenders. But whichever way we decide, we need to know what is, and has been, at stake.

NICO KRISCH
Hertie School of Governance

[23] On hegemons' efforts towards greater hierarchy, see Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

[24] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONT. PROB., Summer-Autumn 2005, at 15.

[25] Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 40 (2009).

[26] Waldron, *supra* note 22, at 322–43.

[27] *See, e.g.*, DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1997).

https://doi.org/10.5305/amerjintelaw.106.1.0203 Published online by Cambridge University Press