Hilary Charlesworth and Jean-Marc Coicaud (eds.). ***Fault Lines of International Legitimacy***. Cambridge: Cambridge University Press, 2010. Pp. 416. £70. ISBN: 9780521764469.

Jutta Brunnée and Stephen J. Toope. ***Legitimacy and Legality in International Law. An Interactional Account***. Cambridge: Cambridge University Press, 2010. Pp. 434. £31. ISBN: 9780521706834.

Chris Thornhill. ***A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective***. Cambridge: Cambridge University Press, 2011. Pp. 466. £65. ISBN: 9780521116213.

Individual Contributions to Fault Lines of International Legitimacy

Legitimacy has become a popular subject in international law and international relations in the last decade. If previously the issue of legitimacy was addressed only subsidiarily to other issues, today books and articles taking the issue of legitimacy as their main subject abound. The books under review illustrate this trend. They all address 'legitimacy', but approach the notion from different perspectives.

The growing number and complexity of the challenges faced by international law as well as its responses to these challenges appear to be two of the main explanations for the increased importance of the issue of legitimacy in international law, politics, and scholarship. In his introduction to the volume entitled *Fault Lines of International Legitimacy*[1] Jean-Marc Coicaud mentions a number of events including the redistribution of power following the end of the Cold War, September 11, and the 2003 US intervention in Iraq which in his view are responsible for the popularity and importance of legitimacy in international law. He also provides a useful overview of the literature on the concept of legitimacy and its development in the past 20 years (at 2–6).

The books under review include a number of approximations to the fluid and multi-faceted notion of legitimacy. They do not, however, provide one conclusive definition of legitimacy. Jean-Marc Coicaud in his contribution 'Legitimacy, Across Borders and Over Time' attempts to define legitimacy in general and international legitimacy in particular in a systematic way. He stresses that the concept establishes an important link between justice and power (at 17–19) and sets out the reasons for the growing pre-eminence of the notion of political legitimacy as well as the fact that it is traditionally discussed in relation to state power exercised within a state (at 19–21). These reasons include the fact that in the past four centuries social integration has taken place principally at the national level, the need to justify the differentiation between the government and the governed, the necessity to justify the monopoly of the use of force by the state, and finally the growing importance of democratic values and human rights protection within states. Through a number of historical examples from Ancient Greece to the Versailles treaties of 1919 he demonstrates that despite the secondary status of legitimacy in international relations as compared to the national level, it has still been 'part of the stakes and structure of international relations' (at 21ff.). According to Coicaud, the UN is the most recent regime producing international legitimacy. In the next chapter, entitled 'Deconstructing International

---

[1]   This volume is a collection of essays resulting from a research project conducted within the framework of the Peace and Governance Programme of the United Nations University. It is a follow up to a first volume published in 2001 entitled *Legitimacy of International Organizations*.

Legitimacy', he attempts to provide a critical view of key aspects of international legitimacy revealing some of its inherent contradictions and conundrums in such areas as the notion of right holders, hierarchy of right holders, and rightful conduct. After having emphasized the link between the growing importance of legitimacy and the socialization of international life (at 33) Coicaud explains that the main task of international legitimacy in a socialized international community is to justify the existing disparities of power among states but also between states as principal actors of international relations and non-state actors, such as individuals or international organizations. He stresses that inequalities of power cannot be eliminated, but only mitigated (at 33), because all systems of social interaction are based on a complex web of inclusion and exclusion (at 33–34) but also because socialization does not guarantee the elimination of hierarchies of power (at 34–35). Since inequalities of power persist, the responsibility of legitimacy is 'to articulate and align them with the requirements of justice' (at 35). Therefore, the greater the socialization of international relations, the heavier are the demands on international legitimacy and the more this legitimacy itself is challenged (at 36). What follows is an account of the construction of international legitimacy in international order through such matters as international community membership (at 37–42), right holding (at 42–47), hierarchy of right holders (at 48–56), international rightful conduct (at 56–67), and international authority (at 67–86). Coicaud distinguishes international authority from public authority as a notion developed with reference to the centralized authority within states. International authority 'being not as institutionalized, centralized, unified and hierarchical' (at 68) as public authority within states, legitimacy could be easily overlooked at the international level. Coicaud also stresses that international authority tended to be *ad hoc* until the 20th century (at 72).[2]

In his next contribution, 'The Evolution of International Order and Fault Lines of International Legitimacy', Coicaud addresses the core notion of the volume, namely the fault lines of international legitimacy. Fault lines, denoted by Coicaud as the 'pending problems, open wounds' (at 100), can be understood in the context of the volume as means of adapting international legitimacy to the context and the peculiarities of specific situations, and thus of allowing legitimacy to acquire a dynamic character. This dynamic character of legitimacy is particularly important in the context of the author's articulation of legitimacy as a tool for striking a right balance between stability and change (at 87). The author emphasizes the capacity of legitimacy to play a stabilizing role, to provide for the 'stabilization of instability' (at 90–92). In this light the current international system's power of accommodation and resilience can be viewed as its most important strength (at 93–96). The main components of the current international order which help it to fulfil its stabilizing function in the context of constant change and challenge mentioned by Coicaud are the following: keeping open channels of communication between competing powers despite tensions and conflicts (at 93), and the fact that the UN contribution to the socialization of international life is an inclusive work in progress (at 94–95). The inclusiveness of the UN work in progress is visible, according to Coicaud, at two levels: at the level of process and at the level of content. Inclusiveness as far as process is concerned is reflected in the ability of the UN to ensure that countries come together despite their differences and conflicts. Inclusiveness with regard to content is ensured through sufficient openness of the normative and political content of rules.

[2] There is certain similarity between Coicaud's understanding of international authority and Armin von Bogdandy and Philipp Dann's conceptualization of international public authority as composite administration (see, e.g., von Bogdandy and Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority', in A. von Bogdandy, R. Wulfrum, J. von Bernstorff, P. Dann, and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2010), at 883–912). However, it seems that for Coicaud it is still too early to speak about public authority at the international level. Therefore, he uses the term 'international authority' to avoid any immediate parallels and transposition of meanings from one concept to the other.

Finally Coicaud defines four ideal-type fault lines of international legitimacy: normative, geo-political, temporal fault lines, and fault lines concerned with the extent of the challenge that a fault line constitutes. These ideal types can be useful as analytical categories, whilst in the daily life of the international community they overlap and merge (at 101). Normative fault lines relate to competing right claims of various international actors (at 101–106).[3] Geopolitical fault lines concern the unfolding of right claims in particular geographical locations (at 106–107). Temporary fault lines address the duration of conflicts (at 107–113).

Some of the ideas expressed by Coicaud in these introductory chapters are deepened and con-textualized in Nathaniel Berman's contribution. In a historical-political analysis he stresses that legitimacy can 'only ever be a provisional achievement – an achievement arrived at through internationalism's wrestling with its doubles, be they ideological adversaries, heterogeneous ele-ments in local conflicts, or spectres of its own unsavory past' (at 145).

Fault lines of legitimacy, or the crisis of international legitimacy as it appears in the relationship between the old imperial military and the new humanitarian military intervention, are analysed by Vasuki Nesiah. This analysis pays particular attention to the use of the cosmopolitan values and language of the responsibility to protect, as well as humanitarianism as a legitimating device.

Three essays address the United Nations Security Council (hereinafter UNSC) and its role as a promoter of international legitimacy. While Ian Johnstone attempts to demonstrate how legal deliberation and argument practices surrounding UNSC's decision-making support its legitimacy, the persuasive force of his analysis is relatively weak especially when contrasted with the con-cise statements by Chimni in his illuminating essay on legitimacy of humanitarian intervention. Johnstone affirms that while the UNSC is not an ideal deliberative setting, 'for the time being, it is the *only* institution capable of conferring legitimacy' (at 202, emphasis mine). Chimni coun-ters, 'The general image of the UNSC in the Third World is one of an organ in which power and not dialogue prevails and in which rules of discourse ethics are overcome by various threats and incentives' (at 323). Nishkala Suntharalingam's analysis of the involvement of regional arrange-ments in peacekeeping operations underlines the difficulty of sustaining the image of the UNSC as an organ that confers legitimacy. While she does not directly question the legitimating func-tion of the UNSC, her overall conclusion contradicts Johnstone's position. Thus she proposes that 'cooperation between regional arrangements and the UN should be encouraged because it ... lends credence to the UN's accretion of universal legitimacy' (at 238). The last essay in this section on the UNSC by Diane Otto provides some explanation for these contradictory statements on the legit-imacy and legitimating role of the UNSC. The UNSC for a long period did not address the specific situation of women despite numerous criticisms made by feminist international scholars (at 254). Moreover, women peace activists being traditionally anti-military in the eyes of many members of the UNSC lacked the required strength and 'masculinity' which had a delegitimizing effect on any of their actions relating to issues traditionally addressed by the UNSC (at 257 in particular). Through her analysis of the relationship between the ways of addressing deficiencies in gender legitimacy of the UNSC on the one hand and the political legitimacy of women's peace activism she demonstrates paradoxes involved in the mutual attempts of the UNSC and feminist peace activists to advance their goals while using the other (UNSC for feminist peace activists and femi-nism for the UNSC) and its language. For example, while the UNSC attempted to create a symbolic capital of gender legitimacy through its engagement with issues relating to the place of women in peace building[4] it did not want to give up its traditional militarist orientation. Nevertheless, fem-inist peace activists have been able to use the space created by this rather limited engagement of

---

3   Unfortunately, Coicaud's analysis of the ways of overcoming tensions linked to normative fault lines is quite narrow as it refers almost exclusively to the role of the Security Council.

4   The main point of reference is UNSC resolution 1325, 'Women, Peace and Security', adopted 31 Oct. 2000, S/RES/1325.

the UNSC with gender issues to 'transform the relationship between the Council and feminist ideas so that the paradigm shift in security thinking might occur. This development potentially poses a great threat to the legitimacy of the Security Council's military mindset ...' (at 273).

The remaining essays discuss the issue of legitimacy in relation to various forms of intervention: humanitarian military intervention (L. Elliot and B.S. Chimni), international territorial administration (R. Wilde), or economic sanctions (J. Matsukuma). Ralph Wilde emphasizes an important distinct aspect of legitimacy and its operation at the international level. Discursive academic practices play an important role in legitimating as well as obscuring certain aspects of international practices. As he puts it, 'How commentators describe international intervention – why it happens, what it is trying to achieve – involves important political choices because these descriptions have an important role in determining how debates on the legitimacy of such interventions are conducted' (at 328).

One of the major limitations of the book is its almost exclusive focus on humanitarian intervention. As a consequence, many other important areas of international law and international relations are neglected. Only one essay, for example, addresses the role of human rights in establishing or compromising legitimacy, and not a single essay is devoted to the issue of legitimacy of human rights themselves. Further neglected areas include refugees and migrants, economic justice, and environmental issues. In part this shortcoming is explained by Hilary Charlesworth's conclusions. She points out how the issues of legitimacy and humanitarian intervention reinvigorated each other in the realm of international law (at 389–391). She touches on two further important aspects. First, she notes that in attempting to understand and adapt the notion of legitimacy in international law scholars adopt different stands leading to different conclusions as to the legitimacy of particular actions or questions arising on international arena. She distinguishes three ways of approaching legitimacy: the essentially procedural understanding of legitimacy; legitimacy based on ideas of justice and moral justifications; and legitimacy as a subjective assessment linked to normative beliefs 'that a rule or institution ought to be obeyed'.[5] Hilary Charlesworth herself suggests that it 'may be useful for international lawyers to consider legitimacy not as a source of legal compliance or as a moral benchmark but rather as a process by which institutional or social inequalities can be justified' (at 398). In this way legitimacy is distinguished from compliance with international obligations (even though it may affect compliance) as well as from legality. In the very last paragraphs of the book, legitimacy understood as a mechanism of deflecting attention from disparities raises questions 'about how international law is made and whose interests are embedded in it' (at 398). Some tentative answers are given by the authors for the particular contexts they address (military humanitarian intervention, international territorial administration, economic sanctions). The book, however, does not contain a systematic analysis of these crucial issues. In particular, the question about whose interests international law reflects and defends could be explored in a more detailed and systematic way.

Brunée and Toope in their co-authored book *Legitimacy and Legality in International Law*[6] provide an interesting answer to the question how international law is made. Their goal being to formulate a theory of international legal obligation, the focus is not primarily on legitimacy. However, legitimacy plays an important role in their presentation of an interactional account of international legal obligation. According to their interactional theory a legal obligation (as opposed to a moral or social rule) emerges only 'when states and other actors perceive law-making to be legitimate' (at 55). In explaining their understanding of the nature of international legal obligation they

---

5   At 392. For this last quotation Charlesworth refers to I. Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (2007), at 7.

6   This book was reviewed previously in this journal: see book review by Philip Liste at 22 *EJIL* (2011) 589. Therefore, I will limit myself to some comments on the authors' analysis of legitimacy.

distinguish two types of legitimacy: social legitimacy and legal legitimacy (at 53). Social legitimacy plays an important role in the creation of widely shared understandings of the role of law and of particular norms. These shared understandings are a first but not a sufficient step towards the creation of an international legal obligation. In order for a legal obligation to emerge it requires a specific 'legal legitimacy'. This legal legitimacy comprises three elements: the first consists in the building up of the above-mentioned shared understandings; the second requires international actors to work 'to ensure that the specific criteria of legality are met'[7] (at 55); finally, 'shared understandings and rules that adhere to the criteria of legality must be reinforced through a continuing practice of legality' (*id.*). Legitimacy is not a fixed or static notion but develops and sometimes vanishes to re-emerge later through a complex continuous process. Legitimacy and legality are so interwoven in the analysis by Brunée and Toope that at times it is hard to distinguish them. The question arises whether according to their vision of international legal obligation illegitimate law can exist. The answer seems to be in the negative if we take into account Brunée and Toope's understanding of law as arising only when actors perceive law-making as legitimate. However, then a number of puzzles appear: How can one deal with the many instances of illegal but legitimate or legal but illegitimate actions described in the volume by Coicaud and Charlesworth? Might Brunée and Toope go too far in linking international obligation to legitimacy? While they do provide a very detailed account of international legitimacy this need not at the same time be an explanation for the source of international legal obligation. The authors propose that their interactional account provides 'a more objective, less mythical, account of how customary legal norms become binding' (at 47) – more objective and less mythical since 'it is practice itself that grounds continuing obligation, but practice rooted in the criteria of legality' (*id.*) without reference to the 'artifice' (*id.*) of *opinion juris* as a 'belief'. However, many of the criteria of legality seem no less artificial and as difficult to apply within the framework of international law as the notion of *opinion juris*. For instance, nowhere in the book do the authors explain how the criterion of promulgation works in relation to custom. But it is exactly promulgation which in the interactional account has a function very similar to the *opinion juris* in the traditional vision of custom.

The impression that the analysis contained in the book by Brunée and Toope does not really add to the understanding of international legal obligation is reinforced by the close link between what Brunée and Toope call social legitimacy and the process of international norm creation. Thus social legitimacy frequently appears indistinguishable from the authors' concept of 'legal legitimacy'. The contribution made by Brunée and Toope to the deepening of our understanding of legitimacy is an important one. However, there is a need further to examine and refine the distinction and relationship between legitimacy and legality. In particular the interactional account does not adequately address the question of power inequalities in the interaction. The authors recognize that '[s]tronger actors will have more resources at their disposal to influence the evolution of law' (at 353, similarly, at 55). They add that within an interactional account of international law 'all participants in the community of practice can exert *some* normative influence' (at 353, emphasis added). However, they do not explain why, for example, some powerful states should be able to strip a norm contained in one of the recognized sources of international law of its legal character through some sort of interaction while less powerful states will merely be able to exert 'some normative influence'. Brunée and Toope mention briefly their disagreement with Martti Koskenniemi's advocacy of a 'culture of formalism' – the insistence upon the validity of formal rules as a way of protecting international law against domination by great powers (at 51–52). However, their response is limited to the following statement: '[i]n our view

---

7   These specific criteria of legality are taken by the authors from L.L. Fuller, *The Morality of Law* (revd edn, 1969) upon which they build their theory. They are: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official actions (at 6).

formalism provides far less protection against the undermining of law by power and politics than an interactional approach to law; in the absence of legal legitimacy, formal law cannot generate fidelity' (at 52). In my view a more nuanced and detailed explanation of the reasons behind this view of Brunée and Toope would be required. They emphasize that all actors are able to participate in an interaction which creates legal legitimacy, but they do not explain how differences in power affect the outcomes and the legitimating effect of this interaction.

A deep and nuanced understanding of legitimacy and its relationship to legality is presented in the book by Chris Thornhill. Thornhill's objective is to 'illuminate the fabric of legitimacy using socially internalistic paradigms' (at 7). As he puts it elsewhere, 'modern societies still lack a conclusively sociological vocabulary for explaining their convergence around normatively restricted systems and for elucidating their relatively uniform dependence on stable patterns of public-legal legitimacy, secured in constitutions' (at 6). The insights one gains about the functioning of legitimacy are fascinating. They are important for understanding legitimacy in international law since the international legal system is the result of a particular historical development of Western social ordering. No understanding of its peculiarities, notably of its legitimacy, is possible without paying due attention to this historical process. From this point of view *A Sociology of Constitutions* by Chris Thornhill enriches and complements the debate on legitimacy. It comes closer than any other contribution to understanding legitimacy in relation to constitutionalism. In the conclusion to his book Thornhill proposes a generalized model of political legitimacy which follows from his historic-sociological analysis. According to this model legitimacy of the modern state depends 'first, on the exercise of power through uniform public laws; second, on the constitutional guarantee of equal subjective rights ..., and, third, on constitutional provisions for selective popular/sovereign inclusion' (at 376). With regard to this aspect, it is important to understand that the state cannot regulate adequately all spheres of life. States have to make choices and distinguish between matters subject to state regulation and those which are left unregulated. If a state takes on itself too high a burden of regulation which it is not able to manage, it will very quickly lose its legitimacy. In order to arrive at this conclusion Thornhill analyses constitutional developments from medieval times to the 1990s. His understanding of a constitution is broad. He defines constitution as a 'distinctively political structure, originally and enduringly typified by its function in producing, restricting and refining power utilized by states' (at 11). In order to understand his argument about the nature of political legitimacy and especially the role played by constitutions in creating and sustaining this legitimacy, it is important to capture the point of departure of his analysis. He situates the first developments leading to the creation of modern nation-states in the late medieval period. While in early feudal societies power was located in the 'privatized local and familial milieux' (at 22), in 'the high medieval period ... the decentred legal structure of early feudalism began to be supplanted through a gradual shift towards a societal order in which power was more directly mediated through central political actors, and social relations increasingly became subject to stable administrative control' (*id.*). Simultaneously, the author stresses the importance of the development of a unified positive legal order which arose out of the conflicts over jurisdiction between church and temporal rulers (at 32 ff.). In fact, law became the instrument which allowed both church and state to start separating their functions from 'the local and structural relations of feudal society' (at 37) and thus 'to organize their differentiated autonomy' (at 38). The remainder of the book can be seen as a description of the process by which states as abstract repositories of power differentiated themselves gradually from private power-holders, such as church, nobility, or other individuals holding privileges simultaneously, including more and more members of the society in functions of the state. Constitutions, and in particular constitutional rights guarantees, play a central role in this process. As the author argues convincingly through the chapters of his book that contain detailed descriptions of various European constitutions, the guarantee of constitutional rights converted private rights and privileges into constitutive elements of the public order while simultaneously enlarging the circle of persons who were counted as state's

addressees. 'Through its constitutional reference to rights, therefore, the state obtained a device in which its sovereign abstraction could be at once asserted and legitimized' (at 156).

Thornhill's detailed analysis of the historical development of many European constitutions serves to illustrate, reinforce, and refine the author's arguments. For example, he convincingly demonstrates how in fascist states the replacement of formal-constitutional democracy by a model of corporate societal management led to a delusion of the distinction between the public and private realm and thus 'a return to the crisis of statehood that characterized the transition from feudal to early modern social structure' (at 326).

It may sound paradoxical, especially to lawyers, but one of the logical conclusions of the book is the following: '[s]ocieties in which power is abstractly concentrated in states … tend to permit higher degrees of social liberty than societies in which the means of social coercion are endemically privatized'(at 373). This is not the case because states are somehow more sympathetic towards individuals and their liberties. In reality all constitutional guarantees have as their primary function the 'holding of a political power at a level of positive abstraction' (*id.*), thus allowing power to circulate evenly across society over long periods of time. Therefore, Thornhiill concludes, 'Liberty, in fact, is only an incidental outcome of constitutional functions' (*id.*).

Given Thornhill's finding that legitimacy is the primary function of constitutions and any legal system it is surprising that neither the notion of constitutionalism nor the legitimating function of international law itself plays a more important role in the two other books under review. Evaluating Thornhill's findings for the understanding of the role of international law as a legitimating device is all the more important as international law is born out of the same historical process described by Thornhill. Thornhill promises to develop his ideas and to explain how his analysis contributes to the understanding of legitimacy of international law in a second book (at 19). For the moment the notion of legitimacy in international law and international relations remains highly contested and fluid.

Individual Contributions

Jean-Marc Coicard, Legitimacy, Across Borders and over Time;

Jean-Marc Coicard, Deconstructing International Legitimacy;

Jean-Marc Coicard, The Evolution of International Order and Fault Lines of International Legitimacy;

Nathaniel Berman, Intervention in a 'Divided World': Axes of Legitimacy;

Vasuki Nesiah, From Berlin to Bonn to Baghdad: A Space for Infinite Justice;

Ian Johnstone, Legal Deliberation and Argumentation in International Decision Making;

Nishkala Suntharalingam, The UN Security Council, Regional Arrangements, and Peacekeeping Operations;

Dianne Otto, The Security Council's Alliance of Gender Legitimacy: The Symbolic Capital of Resolution;

Lorraine Elliott, Cosmopolitan Militaries and Cosmopolitan Force;

B. S. Chimni, Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective;

Ralph Wilde, Determining How the Legitimacy of Intervention is Discussed: A Case Study of International Territorial Administration;

Jun Matsukuma, The Legitimacy of Economic Sanctions: An Analysis of Humanitarian Exemptions of Sanctions Regimes and the Right to Minimum Sustenance.

Ekaterina Yahyaoui Krivenko

Lecturer, Irish Centre for Human Rights,
National University of Ireland,
Galway
Email: ekaterina.yahyaoui@graduateinstitute.ch