Acknowledgements

In writing this book I have accumulated many debts. First, I would like to thank the School of Law at the University of Bristol for providing me with an exceptionally friendly intellectual environment in which to work. The University also provided me with research leave in the year 2005–2006, some of which was spent at the Universities of Melbourne and Cambridge, which provided me with the time to get this book started.

Many of my colleagues at the University of Bristol have been subjected to the ideas set out in this book and I am grateful for their thoughts in response. Specifically, I would like to thank Chris Bertram, Malcolm Evans, Steven Greer, Dean Machin, Harry McVea, Oliver Quick, Bronwen Morgan, Marc Moore, Lisbeth Witthofft Nielsen, Tony Prosser, Phil Syrpis, Tonia Novitz, John Parkinson, Achilles Skordas and Brenda Sufrin. I must also single out Julian Rivers who has read drafts of this book many times and has provided encouragement every step of the way. In broader academia, I should mention friends and colleagues who have read portions of this book or discussed my ideas with me: Philip Allott, Samantha Besson, Deryck Beyleveld, Roger Brownsword, Basak Cali, Tony Carty, Rob Cryer, Keith Graham, Dino Kritsiotis, Therese O'Donnell, Henrik Palmer-Olsen, Stanley Paulson, Amanda Perreau-Saussine, Arthur Ripstein, John Tasioulas, Stuart Toddington, Stephen Tierney, Colin Warbrick and Chanaka Wickremasinghe. My publisher, Richard Hart, has been incredibly supportive of the project and patient with me as an author. Kate Grady's help with the editing process was first rate.

This book is based upon some essays which have already been published. Some of the methodological claims I defend in Chapters 1 to 5 of this book were first written about in the articles 'Incommensurability, Purposivity and International Law' (2000) 11 *European Journal of International Law* 637, 'Methodological Legal Positivism in Law and International Law' in K Himma (ed), *Law, Morality, and Legal Positivism* (Stuttgart, F Steiner, 2004) 9–19 and 'Sovereignty and the Identity of Legal Orders' in C Warbrick and S Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (London, British Institute of International and Comparative Law, 2006) 19–73. The substantive arguments made in Chapters 5 to 10 were first written about in 'The Kantian Project in International Legal Theory' (2001) 12 *European Journal of International Law* 1003 and 'The Rejection of the Universal State' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge, Cambridge University

Press, 2007) 17–43. The ideas set out here have also been presented in a number of papers delivered at the University of Bristol, Brunel University, the University of Copenhagen, the University of Edinburgh, the University of Lund, the University of Nottingham, the University of Sheffield and also at University College, London and the London School of Economics and Political Science. What is offered here substantially elaborates on the arguments found in these essays and papers.

Finally, I would like to thank my family. Specifically, I must mention my parents, Alan and Naomi Capps, as well as my brother, Ben Capps. It is Lisa Branney, however, who should receive my principal thanks. I have found this a difficult project and at no point has her support wavered. I am immensely grateful to her.

Bristol, February 2009

Contents

Acknowledgements vii
Introduction 1

1 Philosophical Problems for International Lawyers 9
Conceptions of International Law in Space and Time 11
Scepticism in the Philosophy of International Law 16
Theory and Practice 18
Conclusion 20

2 The Methodological Problem 23
The Methodological Problem in Legal Science 25
The Methodological Problem 25
Is International Law Racist? 27
The Ontological Problem 33
Conceptual Analysis and Focal Analysis 39
Conceptual Analysis 40
Focal Analysis 43
Conceptual Analysis, Focal Analysis and the Raw Data 45
The Legal Scientist 47
Conclusion 49

3 The Conceptual Analysis of International Law 51
Hart's *The Concept of Law* as a Form of Conceptual Analysis 52
Legal Positivism 53
Hart's Concept of Law 56
Hart's Non-ambitious Concept of Law 57
Hart's Ambitious Concept of Law 59
International Law as an Indeterminate Form of Law 61
Usages and Conventions 65
The Legal Scientist, the Ordinary Language User and the Legal Official 65
Law as a Social Practice 68
Theoretical Values 69
Law as a Conventional Practice 70
Paradigm Cases and the Internal Point of View 74
Conclusion 75

4 Focal Analysis and Ideal-Types 77
Purposivity and International Law 80
Human Dignity and the Purpose of International Law 80
Normative Positivism and International Law 83
Focal Analysis and Ideal-Types 84
Action and Axiology 85
Ideal-Types 86
The Ideal-Type and Collective and Institutionalised Social Practices 88
General Concepts 91
Weber on International Law 93
Ideal-Types and Practical Reasonableness 93
The Concept of International Law Relies upon the General Concept of Law 94
Purpose and Meaning 98
Practical Reasonableness and Ideal-Types 101
Components of the Concept of International Law 102

5 Practical Reasonableness and Human Dignity 103
The Idea of Human Dignity 106
Human Dignity as Empowerment 108
The Substantive Question 109
Generic Features of Agency 112
Distributive and Authoritative Questions 114
The Authoritative Question 115
Action and the Generic Features of Agency 117
The Universalisation of Generic Rights 119
The Distributive Question 121
The Concept of International Law 122
Dignity in the Kingdom of Ends 122
From the Kingdom of Ends to Positive Law 123
Conclusion 125

6 The Logic of the Autonomy Thesis 127
The Autonomy Thesis 130
Structure of the Autonomy Thesis 131
Hobbes' Version of the Autonomy Thesis 132
Kant's Version of the Autonomy Thesis 136
Oppenheim's Version of the Autonomy Thesis 139
Weil's Version of the Autonomy Thesis 141

Failure of the Autonomy Thesis 142
Adjudication and Function 143
Legitimacy as a General Condition for the Success of the Autonomy Thesis 145
The Autonomy Thesis and International Law 146
Public Practical Reasons 149
Practical Reasonableness and the Law 151
Conclusion 154

7 Law as a General Concept 157

The Bare-Autonomy Thesis and the Integrated-Autonomy Thesis 159
Moral Reasoning and Law 161
Ideal and Non-ideal Theory 162
Justification of the Autonomy Thesis 164
Immorality of the State of Nature 164
Law as a Community Governed by an Omnilateral Will 168
Kant's Justification for Law 169
Enforcement 173
Justification of the Integrated-Autonomy Thesis 175
Law Constitutes our Freedom from Dependency 177
Rousseau's Concept of Law 182
The General Concept of Law 183
Conclusion 185

8 The Foundations of the International Legal Order 187

A Justification for International Law 188
Civil Incorporation and the Sovereign State 190
The State and Civil Incorporation 191
Sovereignty and Collateral Moral Rights 193
The State and Agency 195
International Legal Order 197
Kant's 'State of War' 197
Why is the State of War Not-rightful? 199
The Integrated-Autonomy Thesis and the Sovereignty of International Law 201
Institutional Design 203
International Legal Order as a Suprastate System 204
International Legal Order as an Interstate System 205
Interstate or Suprastate Institutional Design? 208

Conclusion 210
Lauterpacht and the Progressive Interpretation of International Law 210
Unanswered Questions 212

9 The Discontinuity Thesis 215
Alternatives to International Legal Order 218
Sovereign States are Not Similar, in Relevant Ways, to Human Agents 218
A Rejection of the Universal State, Not International Legal Order 220
The Sovereign State Cannot be Considered an Agent 222
Transgovernmental Law Instead of International Law? 226
Rejection of International Legal Order 229
Sovereign States are Not Similar, in Relevant Ways, to Human Beings 229
Prudence and International Legal Order 230
The Environment in which Sovereign States Find Themselves is Not Similar in Relevant Ways to the Environment in which Human Beings Find Themselves 232
Are International Relations Not Unreasonable? 234
Approximations to International Law 235
Surrogates, Analogues and Approximations 237
The Possibility of Perpetual Peace 239
Conclusion 241

10 International Legal Order in Ideal and Non-ideal Theory 243
Ideal Theory 245
Norm-Creation 246
Custom 248
Interpretation 250
Enforcement 255
Failure of Interstate Design for Ideal Theory 255
Non-Ideal Theory 257
Juridical and Moral Concepts of the State 258
Institutional Architecture and Norm-Creation 265
Enforcement 268
Self-Defence 269
The Concept of International Law and the Role of the International Lawyer 270

Conclusion 273
Bibliography 277
Index 291