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The Work of International Law

Monica Hakimi*

This Article crystallizes and then critiques a prominent view about the role of international law in the global order. The view—what I call the “cooperation thesis”—is that international law serves to help global actors cooperate, specifically by: (1) curbing their disputes, and (2) promoting their shared goals. The cooperation thesis often appears as a positive account of international law; it purports to explain or describe what international law does. But it also has normative force; international law is widely depicted as dysfunctional when it does not satisfy the thesis. In particular, heated or intractable conflict is thought to betray the limits of international law—to show that, on some issues, international law is not serving its functions.

That view of international law is conceptually flawed. It incorrectly assumes that conflict is an impediment to international law or a problem for international law to mitigate. As scholars from other disciplines have shown, however, conflict is symbiotic with the very functions that the thesis prizes. Even as international law enables global actors to curb their disputes and work toward their shared aims, it also enables them to do the opposite: to hone in on their differences and disagree—at times fiercely and without resolution. It does so because the two kinds of interactions are interdependent, and the legal mechanisms for both are the same. To put the point more starkly, conflict does not necessarily reveal deficiencies in international law because enabling it is inherent in the project of international law.

I. INTRODUCTION

International law touches almost every aspect of modern governance, from economic integration to environmental protection, security, and human rights. But what role does it actually play in the global order? I argue in this Article that one vision for international law—what I call the “cooperation thesis”—dominates the field. This vision is sometimes made explicit but is more often just assumed. And it is, if not altogether wrong, seriously flawed.

The cooperation thesis starts from the premise that the global order is by default chaotic and decentralized. Governance is conducted not by one world body but by many diverse and largely uncoordinated actors. These actors naturally compete for resources and other forms of power. But they can also

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benefit from collaborating with one another. According to the cooperation thesis, the role of international law is to help them collaborate—specifically, by: (1) curbing their disputes, and (2) promoting their shared agendas.¹ I call this the cooperation thesis because international lawyers most often use the word “cooperation” to communicate the idea. What matters, though, is the idea, not the word. International lawyers who say that international law fosters something other than cooperation—like justice, human protection, or public order—still tend to endorse the cooperation thesis. They usually still equate the work of international law with the reduction of conflict and the promotion of certain common goals.²

Those two functions intersect in ways that can be opaque, so for analytic clarity, we can tease out a weak and a strong variant of the cooperation thesis. Both variants assume that conflict—by which I mean disagreement and discord—betrays the limits of international law, especially when it gets heated or persists without resolution. According to the weak variant, curbing conflict is itself the shared agenda; the principal function of international law is to deter, defuse, or settle cross-border disputes. That work is not insubstantial. Preventing war is a tall order and widely considered to be the bedrock goal of modern international law.³ Because of its centrality, scholars sometimes suggest that it explains international law’s general disposition against conflict. International law might neutralize even disputes that do not involve military force so that these disputes do not escalate into war.⁴ But to be clear, the weak variant of the cooperation thesis is not con-

1. These agendas are variously described as interests, values, goals, and outcomes. The key is that their substantive commitments are shared. *E.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005) (“International law emerges from states’ pursuit of self-interested policies . . . [and] can play an important role in helping states achieve mutually beneficial outcomes. . . .”); ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 1 (1994) (describing “international law as a normative system, harnessed to the achievement of common values”); MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 14 (2008) (“Through international law, diverse cultures can reach consensus about the moral norms that we will commonly live by.”).

2. *E.g.*, STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS* 2, 73–76 (2015) (arguing that the “core norms of international law” promote justice and then defining justice in terms of the advancement of peace and the respect for basic, generally accepted human rights); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 *RECUEIL DES COURS* 195, 238 (1993) (“The fundamental human rights treaties . . . constitute [a] core element of the [international community’s] body of shared values.”); Jochen Von Bernstorff & Volker Roeben, Review, *International Law as Public Law: On Recent and Historical German Approaches to International Law*, 103 *AM. J. INT’L L.* 609, 619 (2009) (describing as common in German legal scholarship the idea of “an international public order based on shared values and fundamental principles”).

3. U.N. Charter art. 1; *see also* HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 64 (1933) (“The first function of the legal organization of the community is the preservation of peace. Its fundamental precept is, ‘there shall be no violence.’”); Mary Ellen O’Connell, *Peace and War*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 272, 272 (Bardo Fassbender & Anne Peters eds., 2012) (“Law is valued for providing an alternative to the use of force in the ordering of human affairs. In this sense, all of international law is law of peace, peace being the antithesis of force, violence, and armed conflict.”).

4. *E.g.*, MATH NOORTMANN, *ENFORCING INTERNATIONAL LAW: FROM SELF-HELP TO SELF-CONTAINED REGIMES* 3 (2005) (“[T]he obligation to settle disputes by ‘peaceful means’ has a confining

cerned only with conflict that plausibly threatens human security. It presupposes that conflict generally falls outside of international law, in the domain of politics,⁵ or is a problem for international law to mitigate.⁶

In the twenty-first century, most international lawyers expect international law to do more than just curtail conflict. The strong variant of the cooperation thesis is that defusing conflict is both a standalone goal and a means for achieving many other shared goals—on the economy, the environment, and so on. The intuition here is that global actors achieve their common ends by overcoming their differences and working together. Of course, some conflict is inevitable. Actors who share an agenda might still disagree on its implementation. But these disagreements are thought to hamper international law so long as they persist.

The cooperation thesis often appears as a positive account of international law—of the work that international law does or the reasons that global actors engage with it.⁷ Many scholarly descriptions or explanations of international law reflect the thesis.⁸ So too do foundational texts. For example, the United Nations (“UN”) Charter asserts that the organization’s functions include fostering “co-operation in solving international problems,” “harmony

impact upon the right of states to resort [to non-forcible] measures of self-help”); RATNER, *supra* note 2, at 2 (arguing that many international legal norms, including those that are not on their face about security, promote peace); Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT’L L. 19, 22 (2000) (“[P]eace is secured through developing friendly relations among states, which are established specifically through cooperation. . . .”).

5. E.g., ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 29 (2008) (“[P]olitical considerations are inherently subjective and can be subjectively manipulated, unlike agreed and accepted rules of law. . . .”); MALCOLM N. SHAW, *INTERNATIONAL LAW* 12 (6th ed. 2008) (“Power politics stresses competition, conflict and supremacy . . . [while] law aims for harmony and the regulation of disputes.”).

6. E.g., Rosalyn Higgins, *Peaceful Settlement of Disputes*, 89 AM. SOC’Y INT’L L. PROC. 293, 293 (1995) (“There is now a considerable feeling, resting upon quite discrete norms of public international law and upon good common sense, that even disputes whose continuance can not be said to endanger international peace should be settled as harmoniously as possible.”); Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 EUR. J. INT’L L. 1, 9–11 (2003) (asserting that a “dispute itself implies disagreement and non-cooperation,” and must be overcome to avoid “the danger of an impasse in dispute settlement”) (emphasis added).

7. Other scholars have identified a related but more abstract account: that international law is a force for good and progress in the world. See Tilmann Atwicker & Oliver Diggelmann, *How is Progress Constructed in International Legal Scholarship?*, 25 EUR. J. INT’L L. 425 (2014); Ian Hurd, *Enchanted and Disenchanted International Law*, 7 GLOBAL POLICY 96 (2016).

8. E.g., RATNER, *supra* note 2, at 1 (“International law represents a system of norms and processes for resolving competing claims.”); Anthony D’Amato, *Groundwork for International Law*, 108 AM. J. INT’L L. 650, 652 (2014) (“The international legal system . . . tends to evolve norms that reduce friction and controversies among states and to foster systemic equilibrium by prescribing how controversies may be avoided, mitigated, or resolved.”); Tanya Ogilvie-White, *International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance*, 18 EUR. J. INT’L L. 453, 458 (2007) (explaining that international law establishes “norms, rules and institutions that constrain the competitive dynamics of anarchy”); Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1152 (2011) (“The purpose of international law, conventionally viewed, is to reduce interstate conflict and facilitate interstate cooperation. . . .”); Erika de Wet, *The International Constitutional Order*, 55 INT’L & COMP. L.Q. 51, 53 (2006) (describing as “fact” that the purpose of establishing an international organization is “to create a new subject of international law with a certain (law-making) autonomy, to which the States parties entrust the task of realizing common goals”).

nizing the actions of nations in the attainment of [their] common ends,” and peacefully settling disputes.⁹ The UN General Assembly tied those functions to international law in the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation*.¹⁰ As Rüdiger Wolfrum explains, the Declaration uses the word “cooperation” to mean “voluntary co-ordinated action of two or more States which takes place under a legal regime and serves a specific objective.”¹¹ These texts purport to describe what the UN—and implicitly what international law—is for. They embody the cooperation thesis.

While the thesis is partly descriptive, it also has incredible normative force. Indeed, it drives a longstanding debate about the value of international law.¹² Critics charge that international law is pathological in that it does not do what the thesis envisions. In particular, they contend that international law is: (1) illegitimate because it promotes objectives that are not shared but rather contentious and foisted by the powerful on the weak,¹³ and (2) ineffective because, even if it expresses a shared agenda, it does not actually advance that agenda by deterring the contentious conduct that gets in the way.¹⁴ These attacks are thought to cut at the very heart of international law, so the responses have been adamant. Defenders of international law habitually insist that it *does* or *can* satisfy the cooperation thesis. Many scholars address the illegitimacy claim by identifying the legal mechanisms for neutrally settling disputes or advancing goals that are truly shared.¹⁵ They

9. U.N. Charter art. 1.

10. G.A. Res. 2625 (XXV), at annex, art. 1 (Oct. 24, 1970).

11. Rüdiger Wolfrum, *Cooperation, International Law of*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, www.mpepil.com (last updated Apr. 2010).

12. For further evidence of the thesis's normative force, consider the many legal instruments that obligate states to cooperate or negotiate on discrete issues. These obligations are interpreted to require states to work toward the cooperation thesis's ideal—to try to settle their disputes and advance their common aims. *E.g.*, Whaling in the Antarctic (Austl. v. Japan; N.Z. Intervening), Judgment, 2014 I.C.J. 226, ¶¶ 83, 137, 144, 240 (Mar. 31) (duty to cooperate required Japan to try to act consistently with decisions that were collectively made); Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment on Preliminary Objections, 2011 I.C.J. 70, ¶ 157 (Apr. 1) (duty to negotiate required “a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute”); North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 85(a) (Feb. 20) (“[T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement. . .”).

13. *E.g.*, Stephen D. Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 CHI. J. INT'L L. 93, 94 (2000) (“If there were rules at all, they would be set by powerful states, and these rules would change if the distribution of power changed.”); Makau Mutua, *What is TWAAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000) (“[I]nternational law is illegitimate. It . . . reproduces and sustains the plunder and subordination of the Third World by the West.”).

14. *E.g.*, GOLDSMITH & POSNER, *supra* note 1, at 13 (2005) (“[I]nternational law does not pull states toward compliance contrary to their interests, and the possibilities for what international law can achieve are limited by the configurations of state interests and the distribution of state power.”); JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 364 (2001) (“The rhetoric . . . of international institutions notwithstanding, there is little evidence that they can get great powers to act contrary to the dictates of realism.”).

15. For examples, see the discussions at Part III.A.1 and notes 101, 218–220 and accompanying text.

counter the inefficacy claim by studying how international law actually shapes behavior toward a common agenda, as instantiated in substantive legal rules.¹⁶ This entire debate presupposes that the cooperation thesis is the right metric for assessing international law—and thus that international law is lacking when it does not satisfy the thesis.¹⁷

I argue in this Article that the cooperation thesis is specious because its core premise is flawed. It assumes that conflict impedes cooperation and is a problem for international law to overcome. As scholars from other disciplines have shown, however, conflict and cooperation are actually symbiotic.¹⁸ Even as international law enables global actors to work past their differences and toward their shared ends, it also enables them to hone in on those differences and disagree—at times fiercely and without resolution. It does so because the two kinds of interactions are interdependent. Rather than foster cooperation at the expense of conflict, international law fosters both simultaneously.

To be clear, the conflicts that international law enables are not merely discursive or confined to legal arenas. International law is a social phenomenon that interacts with the material world.¹⁹ Just as it facilitates real-world collaborations, so too does it facilitate real-world conflicts—conflicts that play out through, for example, economic restrictions, deteriorated diplomatic relations, and at times even the use of armed force. To say that international law enables conflict is to say that it sometimes contributes to these things happening in the world. It does so because it gives global actors new reasons to disagree and an institutional and normative infrastructure for having and sharpening their disputes. The key conceptual point is conflict and cooperation are synergistic. Even when a conflict lacks substantive resolu-

16. *E.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 4–7 (1995) (explaining that states comply with their treaty obligations largely because the treaties accommodate “a broad enough range of the parties’ interests”); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 13, 25, 29 (2008) (presenting a theory of how “international law affects the behavior of states . . . and facilitate[s] cooperation,” and then defining “cooperation” in terms of compliance and the attainment of shared gains); JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 97, 103 (2015) (explaining that participants “gravitate toward a particular legal norm and choose ‘compliance’ as their strategy” because “[d]efectors . . . lose all the benefits of cooperation”); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 *AM. J. INT’L L.* 1, 6 (2012) (“In the rational institutionalist paradigm, international institutions facilitate state cooperation by reducing the transaction costs of negotiating international agreements with multiple parties, and by promoting compliance with them through monitoring and enforcement.”).

17. *See infra* Part III.

18. *E.g.*, DON HERZOG, *HOUSEHOLD POLITICS: CONFLICT IN EARLY MODERN ENGLAND* 137 (2013) (“[W]hat we share enables conflict.”); CHANTAL MOUFFE, *ON THE POLITICAL* 52 (2005) (arguing that democracies require “a sort of ‘conflictual consensus’ providing a common symbolic space among opponents”); GEORG SIMMEL, *CONFLICT: THE WEB OF GROUP AFFILIATIONS* 16 (1955) (“There is a misunderstanding according to which one of these two kinds of interaction [unity and discord] tears down what the other builds up.”).

19. *Cf.*, Robert Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 4–5 (1983) (“Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”).

tion, it does not necessarily detract from—and can instead further—both the ends that the cooperation thesis envisions and the broader project of international law.

My argument has seeds in the existing literature. Important strands of scholarship highlight that international law is, like all law, often contentious in its operation.²⁰ This scholarship implicitly undermines the cooperation thesis because it shows that cooperation and conflict comingle in international law, and that the thesis's conception of cooperation is too cramped. International law is cooperative, even when it is contentious, in that it establishes ground rules that the participants all accept and use to structure their interactions. Arguing through international law is itself a kind of cooperation. But scholars who hint at these points have not questioned and at times seem to endorse the cooperation thesis. In particular, they have left intact the thesis's core premise that conflict detracts from cooperation and is a problem for international law to curtail. I argue that that premise is wrong.

The Article proceeds as follows. Part II shows that the cooperation thesis is a positive account of international law with broad support in the literature. Although some scholars have begun to resist the thesis, and others might retreat from it if pressed, its presence is pervasive and has gone almost completely unchallenged. Part III contends that the thesis also animates how the vast majority of international lawyers appraise international law. International law is widely depicted as deficient when it does not do what the thesis says—particularly when it does not curb conflict. The inevitable conclusion is that much of the international legal order is dysfunctional.

Part IV then argues that the problem lies not with international law but with the cooperation thesis itself. According to the thesis, curtailing conflict is necessary for cooperation and central to international law's mission. Thus, heated or intractable conflict is said to evince the limits of both cooperation and international law. In reality, the opposite is often true: international law facilitates conflict. It does so even as it fosters consensus and compromise. And the fact that it does is not inherently pathological. Enabling conflict is integral to the kind of cooperation that the cooperation thesis envisions and can be beneficial in its own right. The ultimate goal of the Article is to craft a new research agenda on international law—one that stops incessantly asking whether or how international law can satisfy the cooperation thesis, and instead examines conflict as part of the project of international law. I conclude by identifying several questions for further study.

20. See *infra* Part II.B.

II. THE COOPERATION THESIS

Although the cooperation thesis permeates the literature on international law, it rarely comes fully into focus. It tends instead to be taken for granted and to seep out piecemeal. In this part of the Article, I crystallize the thesis as the positive account of international law that most strongly radiates from the literature. I anticipate that some readers will object to this distillation of the field. They might even contend that I am depicting a straw man. Any contention to this effect must overcome the extensive evidence to the contrary that I present. International lawyers regularly say things that reflect the thesis and produce work that embodies the thesis. Moreover, as I show in Part III of the Article, the support for the thesis is not just cosmetic or evident in stray comments. It influences, at a deep level, how most international lawyers think about international law.

A. *Broad Support*

The cooperation thesis finds support in both doctrine and theory. Although some of this support might be interpreted as endorsing only the weak variant of the thesis, most of it tilts heavily toward the strong one. Consider the doctrine on the sources of international law. This doctrine roots international law in state consent,²¹ reinforcing the thesis's account that international law reflects certain shared precepts.²² To satisfy the doctrine and qualify as international law, a norm must be, at the very least, broadly shared. The two principal sources of international law are treaties and custom.²³ States must consent to a treaty to be bound by its terms.²⁴ As treaties cover many substantive issues, they are thought to reveal that states use international law to achieve many common aims—not just to defuse conflict.²⁵ The same is true of customary international law, which though not requiring an affirmative demonstration of consent, is said to reflect a general consensus.²⁶

21. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14 ¶ 135 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the State concerned. . . .”); ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 4 (2005) (“[International law] is based on the consent (express or implied) of states.”).

22. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 420–21 (1983).

23. See Statute of the International Court of Justice, art. 38, ¶ 1, *annexed to* U.N. Charter; Hugh Thirlway, *The Sources of International Law*, in *INTERNATIONAL LAW* 115, 116–17 (Malcolm D. Evans ed., 2006) (“The generally recognized formal sources are identified in Article 38 . . . but the two most important sources in practice are treaties and international custom.”).

24. Vienna Convention on the Law of Treaties arts. 11, 14, May 23, 1969, 1155 U.N.T.S. 331.

25. *E.g.*, CHAYES & CHAYES, *supra* note 16, at 4 (“A treaty is a consensual instrument. . . . It is therefore a fair assumption that the parties’ interests were served. . . .”).

26. See Michael Wood (Special Rapporteur), Second Report on Identification of Customary International Law, U.N. Doc. A/CN.4/672, at n. 199 and accompanying text (2013) (reviewing literature and explaining that “acceptance of a certain practice as law . . . [can be determined] by a general consensus of States”). Although the doctrinal standard for customary international law (“CIL”) has long been criti-

The cooperation thesis is also evident in much international legal theory. In his 1964 book, *The Changing Structure of International Law*, Wolfgang Friedman famously argued that international law was shifting from a “law of coexistence” to a “law of cooperation.”²⁷ Friedman’s two categories of international law encapsulate the thesis’s weak and strong variants. The law of coexistence reflects the weak variant; it is about minimizing conflict, especially war.²⁸ The law of cooperation aims to achieve other common ends.²⁹ Significantly, Friedman assumed that conflict would detract from cooperation.³⁰ He worried that insurmountable disagreements would limit international law’s cooperative potential by impeding states from identifying and achieving their shared goals.³¹

Since Friedman, scholars from diverse theoretical camps have continued to embrace the cooperation thesis. Prosper Weil’s influential article, *Relative Normativity*, exemplifies a positivist approach to international law.³² The article’s central premise is that international law has always had “two essential functions.”³³ The first is “to reduce anarchy through the elaboration of norms of conduct enabling orderly relations to be established among sovereign and equal states.”³⁴ Anarchy usually connotes an environment that lacks any governmental authority and is replete with conflict; reducing it means limiting conflict.³⁵ International law’s second function, according to

cized, almost all theories of CIL accept that it is consensual. The theories differ not on whether CIL requires a consensus but on how to identify that consensus—specifically, on what weight to give states’ operational practice versus their verbal pronouncements. See Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 757–758 (2001).

27. WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 60–61 (1964).

28. *Id.* at 16.

29. *Id.* at 9 (describing new “attempts to regulate and promote, by positive co-operation, interests of common concern”); *id.* at 367 (“[C]o-operative international law requires a *community* of interests.”) (emphasis in original).

30. *Id.* at 45 (asking “whether co-operation or conflict will prevail in the relations between nations”); *id.* at 53 (“Despite the gradual advance of organised effort in world-wide co-operation, conflict . . . is still by far the predominant pattern of international relations.”); *id.* at 54 (“[C]onflicts of national interest . . . may merely indicate inability . . . to arrive at a positive agreement, at co-operation in regard to the matter at issue”); *id.* at 366 (describing a “tension between co-operation and conflict”).

31. *Id.* at 380 (describing as a “threat to the universality of international law”, “conflicts of political ideology,” which “certainly prevent more than a limited degree of co-operation in the many fields presupposing a degree of harmony in the interests and values of the participants”).

32. Weil, *supra* note 22, at 421.

33. *Id.* at 418.

34. *Id.* at 418–19.

35. See, e.g., Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT’L ORG. 485, 488 (1988) (“[S]tates in anarchy are preoccupied with power and security, are predisposed towards conflict and competition, and often fail to cooperate even in the face of common interests.”). For a recent review of the thinking that associates anarchy with war and conflict, and treats modern international law as a partial antidote, see David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 YALE L.J. 618 (2016). As Helen Milner has explained, however, the word “anarchy” lacks a single or precise definition in the literature. Helen Milner, *The Assumption of Anarchy in International Relations Theory: A Critique*, 17 REV. INT’L STUDIES 67, 69–71 (1991).

Weil, is “to serve the common aims of members of the international community”—to advance their shared objectives.³⁶

Many international lawyers resist Weil’s form of positivism but still accept the cooperation thesis that informs his thinking. For example, in 2006, Thomas Franck characterized the mainstream view among American international lawyers as follows: “for more than a century, it has been the common belief among American international lawyers . . . that the promotion of international law . . . will promote the peaceful settlement of disputes and a common, cooperative approach to the resolution of global issues.”³⁷ Franck underscored that, by helping global actors overcome their disagreements and act collaboratively, international law blocks against “the descent into anarchy.”³⁸ Anthony D’Amato recently made a similar claim in his article, *Groundwork for International Law*: international law consistently works to “reduce friction and controversies” because “the greatest threat to the viability of the international law-system is anarchy.”³⁹

Over the past two decades, the influence of other disciplines on international legal theory has grown. This trend has, if anything, reinforced the cooperation thesis. In international relations, two schools of thought—realism and institutionalism—directly engage with and unflinchingly endorse the cooperation thesis. Both schools presuppose that the role of international law is to curb the conflict and competition that would otherwise prevail so that states can cooperate on their shared interests.⁴⁰ The two schools differ because realists deny that international law actually plays that role.⁴¹ Institutionalists insist that it sometimes does.⁴² Thus, in an early piece on interdisciplinary work, Anne-Marie Slaughter underscored that institutionalism

36. Weil, *supra* note 22, at 419.

37. Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88, 89 (2006).

38. *Id.* at 91.

39. D’Amato, *supra* note 8, at 652.

40. See, e.g., Richard H. Steinberg, *Wanted—Dead or Alive: Realism in International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 146 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) [hereinafter INTERDISCIPLINARY PERSPECTIVES] (reviewing the realist literature); Daniel W. Drezner, *The Power and Peril of International Regime Complexity*, 7 PERSPECTIVES ON POL. 65, 65 (2009) (“The primary goal of neoliberal institutionalism was to demonstrate that even in an anarchic world populated by states with unequal amounts of power, structured cooperation was still possible.”).

41. E.g., ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 9 (2013) (describing international law as just “the manifestation of international cooperation”); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 241 (1993) (describing the realist claim that international law does not “provide incentives or constraints capable of producing outcomes significantly different from those that a pure power theory would predict”); Steinberg, *supra* note 40, at 165 (“Without elaboration from other disciplines and approaches, it is hard to identify what ‘work’ law is doing—how and why it affects behavior and outcomes, and the contexts in which it does so.”).

42. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 244–45 (1984) (arguing that international law can “enhance the likelihood of cooperation” by, for example, reducing the costs of negotiation, defining “legitimate standards of behavior,” and helping detect and deter violations, which are depicted as inherently uncooperative).

overlaps considerably with the prevailing view among international lawyers.⁴³

A third school of interdisciplinary thought—constructivism—also engages with the cooperation thesis. Constructivism’s key insight is that international institutions, norms, and processes affect how the participants perceive their own interests. In other words, these interests are not pre-conceived and then rationally pursued; they are constructed through the participants’ social interactions.⁴⁴ That insight does not hinge on the cooperation thesis, but it also does not resist the thesis. Most of the interdisciplinary scholarship on constructivism and international law actually reflects the thesis’s strong variant. It examines international law’s capacity to help global actors converge on and realize their shared objectives, as reflected in substantive rules of law.⁴⁵

B. *Seeds of Dissent*

The cooperation thesis thus is a constant drumbeat in the literature on international law. I show in Part III of the Article just how pervasive it is—and that it inevitably leads to the conclusion that much of international law is lacking. Before doing so, I examine two approaches to international law that implicitly resist the thesis. One conceives of international law as an argumentative practice. The other examines international law through a pluralist lens. These two approaches are in tension with the cooperation thesis because they recognize that conflict and cooperation comingle in international law. However, both approaches ultimately can be—and are often presented as being—compatible with the thesis. I discuss them here to show that any resistance to the cooperation thesis in the existing literature is only incipient. In Part IV of the Article, I draw on these approaches to challenge the cooperation thesis.

1. *International Law as an Argumentative Practice*

The first approach that butts up against the cooperation thesis is part of a jurisprudential debate about the attributes of law. Recall that the sources doctrine defines international law consistently with the cooperation thesis: as that which states share to govern their relations.⁴⁶ Given that definition,

43. Slaughter Burley, *supra* note 41, at 221.

44. See Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”: Richer Views of Law and Politics*, 55 INT’L ORG. 743 (2001); John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855, 870 (1998).

45. E.g., IAN JOHNSTONE, *THE POWER OF DELIBERATION* 7 (2011) (“[I]nternational law operates in large part through a process of justificatory discourse. . . [that] generates pressure on states to behave in accordance with the law. . . .”); Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law*, in *INTERDISCIPLINARY PERSPECTIVES*, *supra* note 40, at 119, 129–136 (reviewing this interdisciplinary work and concluding that “the bulk of the scholarship explored in this chapter is preoccupied with compliance issues”).

46. *Supra* notes 21–26 and accompanying text.

many scholars suggest that highly contentious arrangements are simply not law and belong instead to the political domain—which they depict as disharmonious, heavily influenced by material power, and opposed to law.⁴⁷ This view reflects the cooperation thesis because it associates international law with settlement and consensus; it assumes that intractable conflict either detracts from or falls outside of the law. However, there is a prominent counterview, according to which international law is itself an argumentative practice.

Martti Koskenniemi is probably the best known proponent of this counterview.⁴⁸ Koskenniemi argues that international law is not necessarily consensual or removed from the kinds of conflict that are often depicted as political.⁴⁹ International law is a political project because it is susceptible to external sources of power and highly contestable.⁵⁰ For Koskenniemi, these qualities are inherent in the very nature of law; law establishes a shared language for argumentation and debate.⁵¹ Because this language is malleable, it can be used both to justify and to contest specific decisions.⁵²

Other scholars get at similar themes using sociology. Like Koskenniemi, these scholars emphasize that international law is not just a collection of consensus positions. It is, more fundamentally, a shared language—as Harlan Cohen puts it, a “set of spoken and unspoken ground rules”—that structure governance debates.⁵³ The ground rules consist of specific texts, methods, processes, sources of authority, and so on. Disparate actors use these rules as they struggle for preeminence within the law.⁵⁴ Whereas Kos-

47. See *supra* note 5 and accompanying sources.

48. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 5, 7 (1990); see also, e.g., Jeremy Waldron, *The Rule of Law as a Theater of Debate*, in DWORKIN AND HIS CRITICS 319, 330 (Justine Burley ed., 2004) (“A society ruled by law, according to Dworkin, is a society committed to a certain method of arguing about the exercise of power.”).

49. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 565, 590 (2d ed. 2005).

50. *Id.* at 601, 610, 616.

51. *Id.* at 567–68, 591; see also DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 176 (2016) (“[L]aw is relevant for people in struggle because legal ideas, rules, and institutional arrangements structure the balance of power among individuals or groups, shaping the terrain on which they come into conflict with one another.”). To be clear, the idea that international law is a common language that transcends national, political, or cultural differences is mainstream. Koskenniemi departs from the mainstream view by arguing that this language does not necessarily reflect shared substantive commitments.

52. KOSKENNIEMI, *supra* note 49, at 589.

53. Harlan Grant Cohen, *International Precedent and the Practice of International Law*, in NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LEGAL PLURALISM 172, 174 (Michael A. Helfand ed. 2015); see also, e.g., Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049, 1067 (2012) [hereinafter Cohen, *Finding International Law II*] (“Law provides a medium for debate and agreement, requiring actors to engage with each other in very specific fora and using very specific language and procedures.”); Ingo Venzke, *Semantic Authority, Legal Change and the Dynamics of International Law*, 12 NO FOUNDATIONS 1, 2, 11 (2012) (“The law provides the battleground for competing claims,” in which “different actors with varying degrees of semantic authority struggle” over its meaning).

54. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 816–17 (1987).

kenniemmi tends to characterize such conflicts as just “politics,” the sociological literature studies them as a particular kind of politics, with its own logic, processes, and experts.⁵⁵

Conceiving of international law as an argumentative practice is in tension with the cooperation thesis because it suggests that conflict is inherent in, not opposed to, international law. However, this scholarship does not directly challenge the cooperation thesis. It focuses on different questions: what international law is or how it operates as a discursive medium, not what role it actually plays in the global order.⁵⁶ Moreover, the scholarship is ultimately compatible with the thesis. One might define international law as an argumentative practice but assume that the point of engaging in the practice is to defuse disputes and work toward settlement.

In fact, that assumption often surfaces.⁵⁷ Koskeniemi himself says that the only plausible test for a legal decision is whether it helps resolve the underlying problem or dispute.⁵⁸ Thus, in response to the criticism that he “exaggerate[s] the role of conflict in international law,”⁵⁹ Koskeniemi insists that he never aimed to deny the “constant move to reconciliation” in international law.⁶⁰ He recognizes that many international legal arrangements “remain unchallenged” or “attain a solid professional consensus.”⁶¹ In fact, his normative critique is that international law is *too* solidified and not conflictual enough. He argues that, although international law provides

55. E.g., Venzke, *supra* note 53, at 16 (“The concept of semantic authority attempts to capture those actors who are influential in . . . [the] struggle for the law”); Yves Dezalay & Mikael Rask Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 ANN. REV. L. & SOC. SCI. 433, 436–38 (2012); see also Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT’L ORG. 661, 661 (2000) (“Legalization, in creating new institutional forms, mobilizes different political actors and shapes their behavior in particular ways.”).

56. E.g., KOSKENIEMI, *supra* note 49, at 589 (“The descriptive project of *From Apology to Utopia* was to reconstruct the argumentative architecture of international law . . . [I]t is not an account of how legal decisions are made—it is about how they are *justified* in argument.”).

57. For evidence of the assumption in the sociological literature, see the piece by Bourdieu, who is the father of much of this literature, at *supra* note 54. Bourdieu insists that law is a domain of ongoing struggle. But he also suggests that the entire point of law is to resolve conflict. For example, he says that law offers “established procedures for the resolution of any conflicts between those whose profession is to resolve conflicts.” *Id.* at 819. And he explains that “[e]ven though jurists may argue with each other concerning texts whose meaning never imposes itself with absolute necessity, they nevertheless function within a body strongly organized in hierarchical levels capable of resolving conflicts . . .” *Id.* at 818.

58. KOSKENIEMI, *supra* note 49, at 585; see also Martti Koskeniemi, *What is International Law For?*, in INTERNATIONAL LAW 57, 69 (Malcolm D. Evans ed., 2d ed., 2006) (“The very ideas of treaty and codification make sense only if one assumes that at some point there emerges an agreement The point of law is to give rise to standards that are no longer merely ‘proposed’”).

59. KOSKENIEMI, *supra* note 49, at 596, citing David J. Bederman, Book Review, 23 N.Y.U. J. INT’L L. & POL. 217, 225 (1990) (reviewing MARTTI KOSKENIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989)).

60. KOSKENIEMI, *supra* note 49, at 596, quoting Vaughan Lowe, Book Review, 17 J. L. & SOC’Y 384, 386 (1990) (reviewing MARTTI KOSKENIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989)).

61. KOSKENIEMI, *supra* note 49, at 597.

a language for contestation, legal decisions usually reinforce the status quo.⁶² In the end, then, Koskeniemi and other scholars who conceive of international law as an argumentative practice have just begun to chip away at the cooperation thesis; they have not questioned the thesis's core premise that international law is a practice for curtailing conflict.

2. *Global Legal Pluralism*

That premise is also evident in much of the work on global legal pluralism. Legal pluralism focuses on the coexistence of multiple legal orders in the same social or political space.⁶³ As applied globally, the emphasis has been on the intersection between: (1) international and national legal systems, (2) legal systems of different countries, and (3) distinct substantive areas of international law, like trade and human rights. The key insight of legal pluralism is that different communities inevitably disagree on how to order themselves. In other words, global governance disputes are often intractable and cannot simply be wished away.⁶⁴ The implication is that international law is limited in its capacity to resolve substantive conflicts or advance objectives that are truly shared.⁶⁵ That insight does not question the cooperation thesis *per se*. It questions international law's capacity to satisfy the thesis.

To be sure, many global legal pluralists make normative claims that are in tension with the thesis. They argue that international law should not always try to resolve conflicts between contending legal orders.⁶⁶ Their reason for tolerating conflict is that the cooperation thesis cannot fully be realized. They underscore that, because conflict is inevitable, the alternative to creating space for it is not a shared agenda but rather hegemony.⁶⁷ Still, most of these scholars assume that the cooperation thesis accurately describes

62. *Id.* at 606; see also KENNEDY, *supra* note 51, 5 ("The puzzle is how so much struggle fades from view as experts embody the voice of reason and outcomes are assimilated as facts rather than contestable choices.").

63. See Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y. REV. 869, 870 (1988).

64. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507 (1988) (explaining that pluralism "doubts or denies our ability to communicate such material in ways that move each other's views on disputed normative issues towards felt (not merely strategic) agreement without deception, coercion, or other manipulation").

65. *E.g.*, NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 69 (2010) ("In pluralism, there is no common legal point of reference to appeal to for resolving disagreement; conflicts are solved through convergence, mutual accommodation—or not at all."); Cover, *supra* note 19, at 40 ("Courts, at least the courts of the state, are characteristically 'jurispathic.'").

66. *E.g.*, PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 145 (2012) ("[N]ormative conflict is unavoidable and so, instead of trying to erase conflict, [we should adopt tools to] manage it . . .").

67. *E.g.*, MIREILLE DELMAS-MARTY, ORDERING PLURALISM 17 (Naomi Norberg trans., 2009) ("Law can be internationalised without any pluralism whatsoever, through the simple extension of a hegemonic system."); CHANTAL MOUFFE, *For an Agonistic Model of Democracy, in THE DEMOCRATIC PARADOX* 80 (2000) (arguing that claims of consensus actually reflect the preferences of powerful actors whose dominance is concealed by the arrangement's apparent neutrality).

the role of international law. Some simply concede that irresolvable conflict frustrates international law's cooperative potential.⁶⁸ Others suggest that, while conflict is inevitable, international law does and should try to defuse it.⁶⁹ Their overall message is that the cooperation thesis captures the work of international law, and that international law must somehow manage pluralism to do that work.

III. CONFLICT AS THE INDICTMENT OF INTERNATIONAL LAW

I have argued so far that the cooperation thesis is a positive account of international law that has both doctrinal and theoretical support. That support is significant, but it is not exhaustive. Because the cooperation thesis tends to be taken for granted, it usually operates beneath the surface. I turn to showing that it animates how most international legal scholars think about international law. Scholars regularly assume that the thesis describes the role of international law and—this is their normative leap—that, insofar as is possible, international law should play that role. After all, what would be the point of international law if it did not serve its purpose? With this logic, the cooperation thesis has become *the* metric for assessing interna-

68. E.g., KRISCH, *supra* note 65, at 234 (“Any claim that pluralism might have the potential to foster stable cooperation faces an uphill battle: it has to cope with the widespread view that undecided supremacy claims tend to breed instability and chaos.”); André Nollkaemper, *Inside or Out: Two Types of International Legal Pluralism*, in *NORMATIVE PLURALISM AND INTERNATIONAL LAW: EXPLORING GLOBAL GOVERNANCE* 94, 134 (Jan Klabbers & Touko Piiparinen eds., 2013) [hereinafter *NORMATIVE PLURALISM*] (claiming that a pluralist order lacks “the stability that is needed for deep international cooperation.”); cf. Turkuler Isiksel, *Global Legal Pluralism as Fact and Norm*, 2 *GLOBAL CONSTITUTIONALISM* 160, 180–88 (2013) (criticizing the literature on global legal pluralism for its failure to address the risk of sliding toward anarchy).

69. See BERMAN, *supra* note 66, at 10 (arguing for mechanisms that “help mediate conflicts by . . . seeking ways of reconciling competing norms, and by deferring to alternative approaches if possible”); DIRK PULKOWSKI, *THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT* 20 (2014) (presenting a pluralist approach that focuses on the role of international law in “bridging conflicting regimes” and limiting normative conflicts); Nico Krisch, *Pluralism in International Law and Beyond*, in *FUNDAMENTAL CONCEPTS FOR INTERNATIONAL LAW: THE CONSTRUCTION OF A DISCIPLINE* (Jean d’Aspremont & Sahib Singh eds., forthcoming 2016) (manuscript at 16), <http://ssrn.com/abstract=2613930> (reviewing literature and concluding that “many pluralist accounts reflect a particular normative mission, often focused on respect for diversity and . . . a minimization of jurisdictional conflicts”); Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 356, 375 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (arguing that courts must “try[] to reconcile the potentially conflicting claims between the legal orders” or “interpret the law, as far as possible, in a manner that minimizes potential jurisdictional conflicts”); Nollkaemper, *supra* note 68, at 136 (“In view of the open and disputed nature of principles in the interface between legal orders, a key role at the interface is . . . willingness to avoid conflict by anticipating conflict and trying to resolve it.”); Anne Peters, *Constitutional Fragments: On the Interaction of Constitutionalization and Fragmentation in International Law* 41 (Centre for Global Constitutionalism, Working Paper No. 2, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591370 (offering constitutionalism as a corrective to pluralism for “refining the techniques for the avoidance of conflict, and for designing clever mechanisms for resolving the unavoidable ones, in the absence of a clear normative hierarchy”).

tional law. The inevitable conclusion is that large swaths of the legal order are pathological.

A. *The Metric for Assessment*

The cooperation thesis's normative force is perhaps nowhere more evident than in the longstanding debate about the value of international law. This debate takes as a given that international law is deficient—that it is either illegitimate or ineffective—if it does not curb the participants' disputes or advance their common aims. The debate centers on whether, when, and how international law does that work.

1. *The Legitimacy Frame*

Attacks on the legitimacy of international law vary,⁷⁰ but the most prominent one reflects the cooperation thesis. International law is said to lack legitimacy on the ground that it promotes goals that are contested, rather than shared.⁷¹ Recall that global legal pluralists make a similar claim: if no norm is truly universal, then insisting on any one will offend some groups.⁷² Further, remember that many scholars label as “politics” and “not law” regulatory arrangements that are highly conflictual.⁷³ The implication is that these arrangements lack legitimacy as law because their normative commitments are contested. The basic claim, then, is that intractable disagreements put international law's legitimacy at risk.

The usual response is to concede that conflict poses a legitimacy problem for international law and then to identify mechanisms for overcoming that problem. Consider again the sources doctrine. This doctrine is known to have difficulties,⁷⁴ but some scholars insist that its emphasis on consent is critical to keeping international law legitimate.⁷⁵ It helps ensure that a subset of states do not capture the law to advance their own contested aims.

70. See Allen Buchanan, *The Legitimacy of International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 79, 85–87 (Samantha Besson & John Tasioulas eds., 2010); cf. Hilary Charlesworth, *Conclusion: The Legitimacies of International Law*, in *FAULT LINES OF INTERNATIONAL LEGITIMACY* 389, 396 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010) (describing a “lack of precision of the use of the concept [of legitimacy] in international law and politics”).

71. See *supra* note 13 and accompanying text; see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 *AM. J. INT'L L.* 596, 597 (1999) (“Theories of legitimacy focus on the problem of domination, the imposition of one's will on another.”).

72. *Supra* Part II.B.2.

73. *Supra* notes 5 and accompanying text.

74. Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 *IOWA L. REV.* 65, 70 (2007) (“[There] is a disconnect between the rules identified as law by the doctrine of sources and the rules actually treated as law by the actors in the international system.”); Thirlway, *supra* note 23, at 117 (recognizing that the doctrine “has attracted enormous amounts of . . . criticism” and “presents some anomalies and difficulties”).

75. E.g., Jan Klabbers, *Law-making and Constitutionalism*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 81, 114 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009) (“[A]nything else would be dictatorial”). For example, these scholars sometimes bemoan that so-called “soft” arrangements, which do not formally qualify as law, risk delegitimizing the whole enterprise by blurring the distinction

Many other scholars resist the sources doctrine but do not challenge the underlying cooperation thesis—or, therefore, the idea that international law lacks legitimacy when it does not embody a shared agenda. For example, Joost Pauwelyn, Ramses Wessel, and Jan Wouters have recently argued that the sources doctrine presents its own legitimacy problem.⁷⁶ Because the doctrine is satisfied by “thin state consent,” it validates norms that do not reflect all of the relevant constituents’ interests and are, on this basis, lacking in legitimacy.⁷⁷ The authors thus advocate for what they call “informal law.” As they describe it, informal law consists of “new forms of cooperation” that do not satisfy the doctrine but are made through more inclusive processes and “supported by a broader consensus.”⁷⁸ The article claims that, compared to norms that formally qualify as law, informal law can be more legitimate because it can be more deeply or broadly accepted, including by actors other than states.⁷⁹ Again, the underlying assumption is that the legitimacy of a regulatory arrangement turns on the extent to which it is shared; contentious arrangements are depicted as inherently deficient.

2. *The Efficacy Frame*

Unlike the legitimacy frame, the efficacy one usually assumes—with the sources doctrine—that international law reflects a shared agenda. The attack here is that international law cannot actually promote that agenda because it

between law, which is supposed to be consensual, and politics, which is not. *E.g.*, JEAN D’ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW* 30, 32 (2011) (“[T]he impossibility of drawing a distinction between law and non-law would irremediably strip international legal rules of their normative character,” and risk causing “the authority of international law [to] be gravely enfeebled.”); Jan Klabbers, *The Undesirability of Soft Law*, 67 *NORDIC J. INT’L L.* 381, 391 (1998) (“[S]oft law contributes to the crumbling of the entire legal system,” because without criteria for distinguishing law from non-law, “law loses its relative autonomy from politics or morality and therewith becomes nothing else but a fig leaf for power.”); Weil, *supra* note 22, at 423 (asserting that blurring the boundaries risks “destabiliz[ing] the whole international normative system and turn[ing] it into an instrument that can no longer serve its purpose”).

76. Joost Pauwelyn et. al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 *EUR. J. INT’L L.* 733 (2014).

77. *Id.* at 748–49.

78. *Id.* at 749.

79. By the same token, efforts to enhance the legitimacy of international law often focus on broadening its base of support—expanding the constituents whose interests are reflected in the collective agenda. For example, the literatures on global administrative law and global constitutionalism focus on the mechanisms for enabling otherwise marginalized groups to participate in or have their interests accommodated by global regulatory arrangements. Such mechanisms are thought to increase the legitimacy of international law by improving the likelihood that it will advance an agenda that is broadly shared, rather than one that is contested and foisted on the disenfranchised. On global administrative law, see, for example, Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT’L L.* 1, 1, 4 (2006); and Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 *AM. J. INT’L L.* 211, 211–12 (2014). On global constitutionalism, see Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUR. J. INT’L L.* 907 (2004); Anne Peters, *The Merits of Global Constitutionalism*, 16 *IND. J. GLOBAL LEGAL STUD.* 397, 397–99, 410 (2009); and Christine Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, 13 *GERMAN L.J.* 1, 13–14 (2012).

cannot inhibit the contentious conduct that gets in the way.⁸⁰ In particular, it cannot deter legal violations, which are thought to detract from cooperation because they betray the collective agenda that has been prescribed in law.⁸¹

Scholars who address the inefficacy critique generally insist that international law can deter violations and promote a shared agenda.⁸² And they concede that, when international law does not do that work, its efficacy is impaired.⁸³ Two recent contributions to the literature—one theoretical, the other empirical—are illustrative. Jens Ohlin's *The Assault on International Law* presents a theoretical account of “why it would be rational for a state to follow international law even when it could defect with impunity.”⁸⁴ For Ohlin, compliance with international law is almost synonymous with cooperation. He argues that international law fosters compliance by benefitting states that cooperate. For example, international law can enhance these states' reputations, trust levels, and material opportunities.⁸⁵ Ohlin says that the “*whole point* of international law” is to overcome the impediments to such cooperation—in his words, “to create a structure whereby the cost of shifting strategy away from compliance becomes higher than it would be without legal regulation in that particular area.”⁸⁶ If international law does not do that work, Ohlin concedes, “[t]he status of international law as law is seriously called into doubt.”⁸⁷

A 2012 article by Gregory Shaffer and Tom Ginsburg uses quantitative methods to make a similar point.⁸⁸ Like Ohlin, Shaffer and Ginsburg understand compliance and cooperation to be closely linked. Their article notes

80. See *supra* notes 14, 40–41, and accompanying text.

81. E.g., KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 111–12 (1979).

82. See *supra* note 16 and accompanying text.

83. E.g., GUZMAN, *supra* note 16, at 32 (explaining that, if “both sides will choose to violate” an agreement, the agreement will have “no impact on behavior,” and “cooperation will fail”); O’CONNELL, *supra* note 1, at 11 (“[S]anctions . . . help to ensure that international law compliance is occurring on a level sufficient to consider it effective law.”); George W. Downs, et. al., *Is the Good News about Compliance Good News about Cooperation?*, 50 INT’L ORG. 379, 397 (1996) (explaining that “deeper cooperation . . . can be ensured without much enforcement . . . [if] there is less incentive to defect from a given agreement”). Some scholars argue that compliance is too narrow a test for assessing international law’s efficacy; international law might influence behavior that is noncompliant or might fail to influence behavior that is compliant. Scholars who push this point still suggest that international law is effective when it shapes behavior toward their collectively prescribed goals and curbs conduct that contravenes those goals. E.g., Lisa L. Martin, *Against Compliance*, in INTERDISCIPLINARY PERSPECTIVES, *supra* note 40, at 591, 593; Kal Raustiala, *Compliance and Efficacy in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387, 388 (2000); but cf. Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL. 127, 130 (2010) (arguing that, although “understanding compliance is obviously important if we care about whether the law realizes its purposes, . . . [compliance] is much too narrow a lens for conceiving the wide range of effects that can be produced by international law,” and then discussing some of these effects).

84. OHLIN, *supra* note 16, at 96.

85. *Id.* at 103.

86. *Id.* at 98 (emphasis added).

87. *Id.* at 101 (emphasis in original omitted).

88. Shaffer & Ginsburg, *supra* note 16.

that “traditional international legal scholarship . . . tended to *assume*, rather than examine, the efficacy of international law and cooperation”⁸⁹ Shaffer and Ginsburg then review the quantitative work that “takes the reach and efficacy of international law as empirical matters to be assessed.”⁹⁰ Throughout, Shaffer and Ginsburg indicate that international law is effective—that it “matters”—to the extent that it shapes behavior toward its prescribed terms.⁹¹ The strong suggestion is that international law is *ineffective* when it fails to do that work or, more generally, to inhibit violations, which are depicted as inherently contentious and impediments to the shared agenda that international law prescribes.

B. Perceived Problem Areas

Although scholars debate whether and why international law is up to snuff, their appraisals almost always reflect the cooperation thesis. In practice, however, much of international law fares poorly under that metric. I examine below three features of the legal order that regularly inhibit it from satisfying the cooperation thesis: (1) indeterminate legal texts, (2) customary international law, and (3) a fragmented normative structure. These features cut across substantive bodies of law and are central to, not at the periphery of, the legal practice. The majority view, even among scholars who are committed to international law, is that each feature undercuts the legitimacy or efficacy of international law by limiting its capacity to defuse or resolve disputes.

That view is often implicit and variously expressed. Some scholars simply concede the deficiency. Others propose fixes to bring the features more in line with the cooperation thesis. Still others argue that the features are not as problematic as they might appear because they usually do not hamper international law from satisfying the thesis. All of these arguments reflect the cooperation thesis. They make sense on their own terms only if one assumes that intractable conflict is an impediment to international law’s mission and a problem for international law to overcome. Intentionally or not, the arguments paint much of the international legal order as deficient.

1. Indeterminate Legal Texts

By indeterminate texts, I mean texts that lack shared meaning for many contexts in which they apply. Such texts are fairly routine in international law (as in domestic law) because they allow multiple actors to accept an instrument without first resolving outstanding differences or deciding how

89. *Id.* at 2 (emphasis in original).

90. *Id.* at 5.

91. *E.g., id.* at 34 (“Two questions stand out regarding whether and, if so, how WTO law matters: does membership affect trade liberalization, and do states comply with dispute settlement findings affecting trade patterns?”).

to address concrete cases.⁹² Over time, some of these texts gain more precise content as authoritative bodies interpret them or global actors otherwise converge on specific meanings.⁹³ But indeterminacy in many other texts lingers. Interpretive authority in international law is for the most part decentralized, so a text's "true" meaning can be contested for decades.

Indeterminate legal texts are inherently limited in their capacity to satisfy the cooperation thesis because any shared agenda is still amorphous. Global actors are likely either to ignore the texts or to disagree about their application in concrete settings. The prevailing view in the literature is that they are dysfunctional for this reason.⁹⁴ Indeterminate texts are often depicted as ineffective on the grounds that they do not establish meaningful terms of cooperation and can easily be argued away at the point of application.⁹⁵ They are said to lack legitimacy because they can be applied opportunistically, to advance one group's contentious interests to the detriment of another.⁹⁶

That discomfort drives three persistent moves to try to make indeterminate texts more precise. These moves might work in specific cases or at the margins, but they are not wholesale correctives to the "problem" of indeterminacy. First, some scholars focus on refining the available methods of interpretation, especially for treaties under the Vienna Convention on the Law of Treaties ("VCLT").⁹⁷ The VCLT lists several interpretive methods, without prioritizing among them or resolving discrepancies when they point in different directions.⁹⁸ Most efforts to refine the VCLT seek to reduce that methodological flexibility and, with it, the room for contesting the meaning of accepted legal texts.⁹⁹ However, these efforts on the VCLT go only so

92. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 184 (1st ed. 2000) ("For multilateral treaties, the greater the number of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests. The process inevitably produces much wording which is unclear or ambiguous.")

93. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

94. Some scholars go further and suggest that indeterminate texts lack defining attributes of law. *See, e.g.*, JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 351 (2010) (explaining that the criteria of law include clarity in content and consistency in application and implementation); Kenneth W. Abbott et. al., *The Concept of Legalization*, 54 *INT'L ORG.* 401, 414 (2000) ("[P]recision and elaboration are especially significant hallmarks of legalization at the international level.")

95. This point is central to many compliance theories. *E.g.*, CHAYES & CHAYES, *supra* note 16, at 10 ("[A]mbiguity and indeterminacy of treaty language lie at the root of much of the behavior that might seem to violate treaty requirements."); Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT'L L.* 705, 714 (1988) ("A determinate rule is less elastic and thus less amenable to such evasive strategy than an indeterminate one."); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CALIF. L. REV.* 1823, 1863 (2002) ("As the uncertainty of an obligation increases, the reputational cost from a violation decreases.")

96. *E.g.*, Martti Koskeniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 72 *BRIT. Y.B. INT'L L.* 337, 341 (2001) ("[V]ague clauses would give too much room for political abuse."); Franck, *supra* note 95, at 716 ("The degree of determinacy of a rule directly affects the degree of its perceived legitimacy.")

97. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

98. *Id.* arts. 31, 32.

99. *E.g.*, ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES* 19 (2007) ("[T]he ultimate purpose of this work is to investigate whether, and to what extent, greater clarity can be achieved with

far.¹⁰⁰ The VCLT cannot by itself increase the determinacy of a text that evidently lacks much shared content.

Second, international lawyers commonly look to international institutions to imbue indeterminate texts with more precise content.¹⁰¹ Though institutional decisions sometimes help resolve or deescalate interpretive disputes, their ability to perform this function is limited. International institutions are not always available to interpret a given text.¹⁰² When they are available, they might not be used. When they are used, their interpretive authority might be unclear or contested.¹⁰³ And even when their authority is undisputed, they might have independent reasons for issuing decisions that are themselves open-ended.

The judgment of the International Court of Justice (“ICJ”) in the *Gabčíkovo-Nagymaros* case is illustrative.¹⁰⁴ The case arose out of a 1977 treaty between Hungary and Czechoslovakia about the joint construction of various installations along the Danube River. The ICJ found that each party had acted unlawfully—Hungary by abandoning the project, and Czechoslovakia by unilaterally implementing an alternative plan.¹⁰⁵ The question became what to do prospectively. (By this time, Czechoslovakia had dissolved, and Slovakia had inherited its claim.) The ICJ recognized that the treaty’s “literal application” was no longer feasible.¹⁰⁶ But rather than give the text new meaning, the ICJ directed the parties to sort out that meaning them-

regard to the content of the currently existing regime for the interpretation of treaties. . . .”); ORAKHELASHVILI, *supra* note 5, at 286 (claiming that “interpretive methods must be those which deduce the meaning exactly of what has been consented to” and thus which “ensure that the determinate meaning . . . is not neglected or hijacked”); Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 L. & PRAC. INT’L CTS. & TRIBUNALS 443, 446 (2010) (“[A] degree of order in these doctrines of treaty interpretation over time would go a long way to buttressing stability, certainty, and legitimacy in the law and political relations of international treaties.”). Significantly, even scholars who resist the VCLT’s mechanical application argue for interpreting treaties in ways that implement the parties’ shared agenda—as if that agenda already exists and can objectively be discerned. See e.g., George Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT’L L. 509, 534–35 (2010).

100. See e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 602 (6th ed. 2003) (“Many of the ‘rules’ and ‘principles’ [on treaty interpretation] are general, question-begging, and contradictory.”); RICHARD K. GARDINER, *TREATY INTERPRETATION* 7 (1st ed. 2008) (“[T]he rules are not a set of simple precepts that can be applied to produce a scientifically verifiable result.”); *but cf.* LINDERFALK, *supra* note 99, at 373 (“[I]nternational law to some extent also determines what weight the different [methods] shall be afforded . . .”).

101. E.g., Abbott et al., *supra* note 94 (arguing that delegating to third parties the authority to interpret legal texts and settle legal disputes increases the law’s capacity to shape and legitimize behavior); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88, 102 (2006) (“The more indeterminate a norm, the more essential the process by which, in practice, the norm can be made more specific.”).

102. See Andrew T. Guzman, *Against Consent*, 52 VA. J. INT’L L. 747, 786 (2012); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 83 (2009).

103. See Cohen, *Finding International Law II*, *supra* note 53, at 1051.

104. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25).

105. *Id.* at ¶¶ 59, 77, 87–88.

106. *Id.* at ¶ 142.

selves.¹⁰⁷ Hungary and Slovakia still disagree about how to handle the Danube River installations.¹⁰⁸

Finally, international lawyers often look to reduce the indeterminacy of specific texts by defining their substantive content. A high-profile example concerns the use of armed force under Article 51 of the UN Charter. Article 51 recognizes the “inherent right of individual or collective self-defence if an armed attack occurs. . . .”¹⁰⁹ Article 51 does not identify whether, and if so under what circumstances, a state may use defensive force against a non-state group that takes root in another state. Moreover, the available sources for answering those questions are replete with ambiguities and inconsistencies. Although the ICJ has strongly suggested that Article 51 licenses defensive force only when the initial attack is committed by a state,¹¹⁰ states’ operational practice over the past fifteen years has been considerably more ambivalent. States regularly tolerate or support defensive operations against nonstate actors, but most do so without articulating a legal standard under Article 51.¹¹¹ The dominant response in the secondary literature has been to recognize and then try to resolve that lack of clarity.¹¹² This response reflects the intuition that Article 51’s shared content must be discerned, lest it lose

107. *Id.* at ¶ 141 (“[I]t is not for the Court . . . [but] for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way.”).

108. Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT’L L. 815, 833–35 (2007); Jana Liptáková, *State Takes Control of Gabčíkovo*, SLOVAK SPECTATOR (Mar. 23, 2015), <http://spectator.sme.sk/c/20056626/state-takes-control-of-gabcikovo.html>. Unsurprisingly, the court’s decision has been criticized for this reason. See Phoebe N. Okowa, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 47 INT’L & COMP. L.Q. 688, 697 (1998).

109. U.N. Charter art. 51.

110. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9) (asserting that Article 51 applies “in the case of an armed attack by one State against another State”) (emphasis added); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. Rep. 168, ¶¶ 146–47 (Dec. 19) (finding that any attack was “non-attributable to the DRC” and then concluding that “the legal and factual circumstances for the exercise of the right of self-defence by Uganda against the DRC were not present”); see also Albrecht Randelzhofer & Olver Dörr, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 213 (Bruno Simma et. al eds., 3d ed. 2012) (“In its recent jurisprudence the ICJ made it clear that acts of violence by non-State actors can only become relevant as amounting to an armed attack, if they are attributable to a State. . . .”); but cf., e.g., Armed Activities, 2005 I.C.J. Rep. 168 (separate opinion of Simma, J., ¶ 7) (claiming that the judgment is ambiguous on this question).

111. See Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INT’L L. STUD. 1 (2015) (reviewing practice); Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT’L L. 257, 278–86 (2016) (describing discrepancies between institutional pronouncements and operational actions).

112. E.g., NICO SCHRIJVER & LARISSA VAN DEN HERIK, LEIDEN POLICY RECOMMENDATIONS ON COUNTER-TERRORISM AND INTERNATIONAL LAW ¶ 29 (2010) (“[The] aim of the following policy recommendations” is to “clarify[] the state of international law on the use of force against terrorists”); Daniel Bethlehem, *Self-Defense Against Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 773 (2012) (“The hope . . . is [to] . . . attract a measure of agreement about the contours of the law relevant to the actual circumstances in which states are faced with an imminent or actual armed attack by nonstate actors.”); Elizabeth Wilmshurst, *The Chatbam House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 963 (2006) (“The Principles that follow are intended to provide a clear statement of the rules of international law ‘properly understood’ governing the use of force by states in self-defence.”).

its efficacy or legitimacy in regulating the use of force. But of course, the inconsistencies in the practice reveal that Article 51's content in this context is contested. States have different, conflicting objectives on the use of defensive force against nonstate actors.

2. Customary International Law

Customary international law ("CIL") presents some of the same issues as indeterminate texts because it is an amorphous source of law. The doctrinal standard for CIL is a widespread state practice, plus a sense that the practice reflects the law (*opinio juris*).¹¹³ That standard provides only rudimentary guidance for determining whether particular norms qualify as CIL. As such, the CIL status or content of many norms is ambiguous.¹¹⁴ This ambiguity is widely perceived to be CIL's weakness.¹¹⁵

Jack Goldsmith and Eric Posner have famously argued that CIL is ineffective—by which they mean that it does not shape state behavior toward mutually advantageous ends.¹¹⁶ States can too easily manipulate the raw data to advance dubious CIL claims that justify their own contentious conduct. Several scholars have offered modest defenses of CIL. Their overall message is that CIL is better than nothing but not nearly as effective as it ought to be.¹¹⁷ For example, George Norman and Joel Trachtman contend that "CIL

113. See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 207 ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitates*.").

114. See, e.g., *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/68/10, at 95 (2013) ("The view was expressed that the ambiguities surrounding the identification of customary international law had given rise to legal uncertainty and instability.").

115. E.g., Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 124 (2005) ("[T]he lack of precision in CIL rules does indeed undermine the force of the rules and generate skepticism about their importance."); Timothy Meyer, *Codifying Custom*, 160 U. PENN. L. REV. 995, 1003 (2012) ("The uncertainty injected into customary law by these practical difficulties raises serious questions about the utility of customary law in regulating interstate relations."); K. Wolfke, *Some Persistent Controversies Regarding Customary International Law*, 24 NETH. Y.B. INT'L L. 1, 15 (1993) (asserting that "the frequently expressed doubts about the present usefulness of customary international law . . . seem to be fully justified," given CIL's "complexity, imprecision and relative slowness"). To be clear, some international lawyers argue that the flexibility in CIL is an asset because it allows CIL to adapt to new circumstances or sensibilities. E.g., Jeremy Pearce, *Customary International Law: Not Merely Fiction or Myth*, 2003 AUSTL. INT'L L.J. 125, 125, 128 (2003); Int'l L. Comm'n, Provisional Summary Record of the 3148th Meeting, U.N. Doc. A/CN.4/SR.3148, at 9 (2012) (comments of Mr. Tladi). That argument does not address the problems that are associated with CIL's ambiguity. One might take the view that CIL's flexibility is a strength if CIL can be identified at any given moment but that it becomes a weakness so long as CIL remains too amorphous to pin down. For a rare statement that CIL's ambiguity is itself a strength, see Mr. Murase's statement, *id.* at 7.

116. GOLDSMITH & POSNER, *supra* note 1, at 36–37 ("[G]enuine multistate cooperation is unlikely to emerge [in CIL]."); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640 (2000) ("The faulty premise is that CIL . . . influences national behavior.").

117. E.g., Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 622 (2002) (suggesting "that customary international law is least likely to exist where it would be most helpful" because "[t]he greater the potential benefits of cooperation, the greater the incentive of individual states to defect, and the greater the need for draconian enforcement mechanisms—mechanisms absent in the case of custom.");

is a special branch of cooperation” that “may independently affect the behavior of states,” “even if it only does so at the margins.”¹¹⁸ Similarly, Andrew Guzman and Timothy Meyer argue that reputational sanctions for CIL violations “can support a cooperative system of norms.”¹¹⁹ But they concede that “[a] lack of clarity as to the content of rules of CIL is likely to be a major factor in weakening” CIL.¹²⁰

CIL’s ambiguity is also said to undercut its legitimacy.¹²¹ Because CIL is malleable, it can easily be used to press contested positions on actors who disagree.¹²² Thus, Jean d’Aspremont asserts that CIL is so “*dangerously* indeterminate” that its “authority is gravely enfeebled.”¹²³ Derisive comments about the opportunism and political excess in CIL appear throughout the scholarly literature¹²⁴ and have largely gone unaddressed.¹²⁵

The perceived problems with CIL motivate two persistent efforts to bring it more in line with the cooperation thesis. First, international lawyers have long tried to refine the method for identifying CIL.¹²⁶ Their goals are to

Carlos M. Vásquez, *Withdrawing from International Custom: Terrible Food, Small Portions*, 120 YALE L.J. ONLINE 269, 286–287 (2011) (explaining that CIL “fares poorly on the determinacy scale,” which undercuts its efficacy by increasing the “opportunities for evasion or contestation” and “the difficulty of identifying violations”); *but cf.* Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT’L L. 389, 390 (2014) (arguing that CIL is effective *because* it reflects a shared agenda—in other words, because a state “knows its decision to defect creates a precedent that may undermine a cooperative norm it values”).

118. George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541, 541–43 (2005).

119. Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century*, in PROGRESS IN INTERNATIONAL LAW 197, 201, 207 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

120. *Id.* at 207.

121. *E.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 451 (2000) (asserting that, because CIL is indeterminate, “it cannot function as a legitimate source of substantive legal norms. . . .”).

122. *See, e.g.*, Weil, *supra* note 22, at 443 (describing “a danger of imposing more and more customary rules on more and more states, even against their clearly expressed will” and thus of a “domination of the minority by the majority”).

123. D’ASPREMONT, *supra* note 75, at 164 (emphasis added).

124. *E.g.*, Fernando R. Tesón, *Fake Custom*, in CUSTOMARY LAW, (manuscript at 2) (Brian Leppard ed., forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527523 (arguing that “fake custom”—that is, “pieces of advocacy disguised as law”—is deeply damaging to international law); Verdier & Voeten, *supra* note 117, at 413 (“[S]tates often appear to assess state practice opportunistically”).

125. *See* Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT’L L. 1, 5 (2010) (“[M]ost defenders of CIL have responded by simply ignoring the critiques.”). John Tasioulas has presented a partial response to the illegitimacy claim. Tasioulas argues that CIL can be legitimate, even if the supporting practice and *opinio juris* are less robust than the traditional doctrine seems to require. His goal is not to defend the perceived opportunism in CIL but to argue that CIL can be in the common interest, despite inconsistencies in the supporting data. *See* John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85 (1996); John Tasioulas, *Customary International Law and the Quest for Global Justice*, in THE NATURE OF CUSTOMARY LAW 307 (Amanda Perreau-Sassine & James Bernard Murphy eds., 2007).

126. *E.g.*, Int’l Law Comm’n, First Report on the Formation and Evidence of Customary International Law, (Michael Wood, Special Rapporteur), ¶¶ 22, 94–101, U.N. Doc. A/CN.4/663 (May 17, 2013) [hereinafter *Wood’s First Report*] (reviewing this literature and describing the International Law Commis-

help resolve whether norms that are claimed to be CIL are really CIL, and thus to reduce the perceived volatility and political excess in CIL. Recently, the UN International Law Commission took up the cause; it explained its decision in these terms:

The view was expressed that the ambiguities surrounding the identification of customary international law had given rise to legal uncertainty and instability, as well as opportunistic or bad faith arguments regarding the existence of a rule of customary international law. The proposed effort to clarify the process by which a rule of customary international law is identified was thus generally welcomed.¹²⁷

The commission's work is not yet complete, but it will not fundamentally alter CIL's amorphous character. It will at best provide basic guidelines, and global actors will continue to disagree about how to apply the guidelines in specific contexts.¹²⁸

Second, many international lawyers favor codifying particular CIL norms. The intuition is that codification strengthens CIL by increasing its determinacy and thus reducing the room for self-interested manipulation.¹²⁹ Although codification has helped settle some CIL norms,¹³⁰ it is not a comprehensive solution to the perceived deficiencies in CIL. For codification to reduce the ambiguity and contestation in CIL, states and other actors must be willing to converge on and then sustain the codified texts. CIL is often volatile because such convergence is infeasible; states disagree about what the CIL rule should be.

3. *Fragmented Normative Structure*

A third feature of international law that belies the cooperation thesis is its fragmented normative structure. International law consists of a patchwork of

sion's goal of "provid[ing] guidance on how to identify a rule of customary international law"); INTERNATIONAL LAW ASSOCIATION, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 4 (2000) [hereinafter *ILA Report*] ("[I]t was felt that what would be most useful was . . . some practical guidance" for finding CIL.).

127. Int'l Law Comm'n, Report of the Sixty-Fifth Session, ¶ 75, U.N. Doc. A/68/10 (2013).

128. See *Wood's First Report*, *supra* note 126, at 7 ("It should not be expected that the outcome of the Commission's work will be a series of hard-and-fast rules for the identification of rules of customary international law."). For an argument that these efforts to contain CIL are misconceived, see Monica Hakimi, *Custom's Process and Method: Lessons from Humanitarian Law*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 148 (Curtis Bradley ed., 2016).

129. E.g., OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 66 (1991) ("The text brings clarity and precision where there had been obscurity and doubt."); Timothy Meyer, *Codifying Custom*, 160 U. PENN. L. REV. 995, 1012 (2012) ("The chief benefit of ex ante clarification is increased cooperation.").

130. Two well-known examples are the law on the continental shelf and the law on state responsibility. See ZDENEK SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF: A STUDY IN THE DYNAMICS OF CUSTOMARY RULES OF INTERNATIONAL LAW* (1968); Draft Article on State Responsibility, International Law Commission, in Rep. on the Int'l Law Comm'n, 53rd Sess., Supp. No. 10, at 31-143, U.N. Doc. A/56/10 (2001).

regulatory arrangements—each with its own participants, substantive norms, processes, and institutions. For example, the trade regime operates mostly independently from the regimes on human rights and the environment. These arrangements inevitably overlap and butt up against one another. But because they are formally distinct, the tools for mediating those tensions are limited. This fragmented structure inhibits international law from promoting goals that are really shared or settling regulatory disputes. Global actors that participate in many arrangements might in the abstract support the policy goals of each, while disagreeing about how to implement or reconcile those goals when they intersect. Because no one institution can settle these disputes, they tend to fester or to be pressed simultaneously in multiple arenas, without real substantive resolution.¹³¹

The dominant view in the literature is that, so long as such conflicts linger, they damage international law.¹³² The conflicts are said to be “detrimental to the effectiveness of global governance arrangements” because they “undermine institutional commitments . . . and create competition among international institutions.”¹³³ More specifically, “actors will lack clear guidance, or will selectively choose which guidance to adhere to, and hence law will not serve to channel behavior effectively.”¹³⁴ In addition, fragmentation is said to “threaten the stability and legitimacy of the broader ‘system’” because the conflicts are resolved not through impartial legal principles but through political jockeying and negotiation.¹³⁵ The literature thus is replete

131. See *infra* Part IV.B.1.c.

132. Cohen, *Finding International Law II*, *supra* note 53, at 1050 (“The absence of obvious or agreed-upon mechanisms for resolving these disputes has threatened to tear international law apart at the seams.”); Martti Koskeniemi & Päivi Leino, *Fragmentation and International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553, 560 (2002) (“From the perspective of classical public international lawyers, conflicts between normative systems are, however, pathological.”); Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMP. & INT’L L. 349, 350 (2011) (“There exists a widespread normative preference for coherence over fragmentation. . . .”).

133. Thomas Gehring & Benjamin Faude, *A Theory of Emerging Order Within Institutional Complexes: How Competition Among Regulatory International Institutions Leads to Institutional Adaptation and Division of Labor*, 9 REV. INT’L ORG. 471, 472 (2014).

134. Kal Raustiala, *Institutional Proliferation and the International Legal Order*, in INTERDISC. PERSP. INT’L L. & INT’L REL.: THE STATE OF THE ART. 293, 311 (Jeff Dunoff & Mark Pollack, eds., 2012); see also, e.g., Daniel W. Drezner, *The Power and Peril of International Regime Complexity*, 7 PERSP. ON POL. 65, 66 (2009) (arguing that fragmentation undercuts the claim that international regimes effectively foster cooperation).

135. Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions*, 42 CORNELL INT’L L.J. 77, 83 (2009); see also Gerhard Hafner, *Risks Ensuing from the Fragmentation of International Law*, in 2 Y.B. INT’L L. COMM’N 143, 147, UN Doc. A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1 (2000) (asserting that such conflicts threaten the “credibility, reliability and consequently, authority of international law”); Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 2016-19 MPIL RESEARCH PAPER SERIES, 1, 6-7 (2016) (“[W]hat is at stake in fragmentation is unity, harmony, cohesion, order, and—concomitantly—the quality of international law as a truly normative order,” such that the risk is “a loss of legitimacy of international law.”); but cf. José E. Alvarez, *Beware: Boundary Crossings*, in BOUNDARIES OF STATE, BOUNDARIES OF RIGHT: HUMAN RIGHTS, PRIVATE ACTORS AND POSITIVE OBLIGATIONS (Tsvi Kahana & Anat Scolnecov, Eds., 2016) (“Some boundary crossings are desirable, others are not. The legitimacy of

with proposals for mitigating fragmentation-related conflicts and bringing international law closer to the cooperation thesis.¹³⁶

Admittedly, many scholars claim that the anxieties about fragmentation are overblown. Their specific arguments vary. Some contend that the risk of irresolvable conflict is low.¹³⁷ Others claim that conflict is inevitable but can usually be managed through mechanisms that accommodate competing interests.¹³⁸ Still others say that conflicts can in the end produce better substantive norms.¹³⁹ None of these arguments challenges the view that fragmentation is a problem when conflicts continue without resolution.¹⁴⁰

VI. CONFLICT AS THE WORK OF INTERNATIONAL LAW

The cooperation thesis dominates current thinking on international law but paints much of the legal order as pathological. Below, I advance three claims to critique that thesis. My first two claims are positive and analytic; they describe and explain the role that international law actually plays in the global order. First, international law does not persistently curtail conflict, whether as an end in itself or as a means for achieving other shared goals. International law simultaneously curtails and facilitates conflict. Even as it invites global actors to curb their disputes and work toward their common

the ‘international rule of law’ does not always require them.”). A common refrain that relates to the illegitimacy claim is that fragmentation disproportionately benefits powerful states, which have the resources to exploit normative conflicts for their own ends. See Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597 (2007); Raustiala, *supra* note 134, at 313. Some scholars have shown that weaker countries can also benefit from fragmentation, but these scholars have not contested the claim that conflicts arising from fragmentation undercut international law’s legitimacy. For example, Larry Helfer has shown that “developing nations, aided by NGOs and officials of intergovernmental organizations, have [exploited fragmentation] to serve different normative and strategic goals” than the goals that developed countries advance. Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 82 (2004). However, Helfer concedes that the “likelihood of conflicting or incoherent legal obligations . . . [is] an especially grave concern.” *Id.*

136. *E.g.*, Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi); Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHREUER 678 (Christina Binder et al. eds., 2009); Jörg Kammerhofer, *Systemic Integration, Legal Theory and the ILC*, 19 FINNISH Y.B. INT’L L. 157 (2008); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L. Q. 279, 279–84 (2005).

137. *E.g.*, William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 967 (2004); Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT’L L. 69, 73–75 (1996); Jan Klabbbers & Silke Trommer, *Peaceful Coexistence: Normative Pluralism in International Law*, in NORMATIVE PLURALISM, *supra* note 68, at 67–68.

138. See sources at *supra* note 69.

139. See, *e.g.*, Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411, 416 (2008) (“Competition among courts may also lead to better—and perhaps convergent—decisions over the long term.”).

140. *But cf. id.* (arguing that competition helps keep international courts in check).

aims, it also invites them to crystallize their differences and disagree. Second, the conflicts that international law enables are often critical for—not impediments to—cooperation, including the kind of cooperation that the thesis prizes. This is so even of conflicts that become heated or lack substantive resolution.

My third claim is normative. Because conflict is interdependent with cooperation, it is not necessarily evidence of dysfunction of international law. We ought to examine when and why it is constructive, and how it might best be cultivated and structured, rather than just assume that it needs to be overcome. This normative claim is modest. I emphasize that international law's role in facilitating conflict can be valuable, but I do not identify precisely when it is. I intend instead to open that question for further study.

A. *An Account of Conflict in International Law*

Recall that scholars who conceive of international law as an argumentative practice emphasize that it is not just a collection of consensus positions. It is, at bottom, a language or set of ground rules.¹⁴¹ Building on that work, I argue that having shared ground rules enables conflict. This point finds support in literatures that do not specifically address international law. Don Herzog has recently argued in political theory that conflict generally “requires some shared background,” ground rules to structure the participants’ interactions and define their dispute.¹⁴² The ground rules are cooperative in that they are shared; the participants all accept and use them. But the participants use them to disagree. Herzog underscores that the ground rules for any particular conflict can be thick or thin, and that some of these rules might be unclear or contested. Adversaries might disagree about whether specific modes of interacting are acceptable. But without any shared ground rules at all—without a common framework for communicating their discontent and making sense of the other side’s moves—they would not have an intelligible conflict. A situation might still get heated or violent, but there would be confusion about what is happening and why.¹⁴³

141. *Supra* Part II.B.1.

142. HERZOG, *supra* note 18, at 136.

143. *Id.* at 134–41. A similar idea appears, though only in passing, in some constructivist work in international relations. John Ruggie, who is one of constructivism’s pioneers, explains that “any consciously organized social activity” depends on shared constitutive rules to “specify *what counts as* that activity.” Ruggie, *supra* note 44, at 871. Ruggie himself focuses on the constitutive rules for international politics. With language similar to Herzog’s, he notes that these ground rules can be “‘thick’ or ‘thin,’ depending on the issue area” and that they may be “constitutive of conflict or cooperation.” *Id.* at 879. More recently, Emanuel Adler has used the concept of “communities of practice” to get at the same theme. Adler defines communities of practice as having “a repertoire of communal resources”—for example, “routines, words, tools, ways of doing things, stories, symbols, and discourse”—that allow the participants to know “what they are doing and why.” EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 15 (2005). Though Adler focuses on how the participants use their ground rules to thicken their common precepts, he recognizes that they might also use these rules to disagree. *Id.*

Herzog offers the example of Sam and Emma playing chess. The game is “a kind of conflict: each wants, within the world created by the rules of the game, to kill the other.”¹⁴⁴ The rules of chess exist in order to enable that conflict. To be sure, a novice might not know a specific rule. Sam might not realize that, once he touches a piece, he has to move it. He and Emma can then argue about whether not moving the piece is acceptable. This argument about the rules of the game makes sense only because the game’s basic structure is set—because its ground rules are, for the most part, accepted. For example, suppose that instead of moving (or refusing to move) a piece “Sam smashes an overripe banana into the middle of the board” and “glares menacingly but does not reply when Emma complains that smashing a banana isn’t a move.”¹⁴⁵ Herzog explains that, though “[t]here’s some sense of antagonism in the air, . . . it is entirely unclear how Emma is to proceed or even what would qualify as a sensible response.”¹⁴⁶ The game is no longer possible because Emma does not know what Sam is doing or how to react.

At this point, Emma can try to shift the terms of the conflict. She can make an argument about what it means to be a good sport or friend. She can even punch Sam in the face. But if he just sits there, smiling blankly back at her, she will not know what is happening or how to interact with him. They will not have a comprehensible dispute. The point is that adversaries need shared ground rules not just to find consensus or settle their disputes but also to disagree.

The ground rules that are found in law tend to be particularly robust because legal argumentation is such a highly structured activity. Advancing a legal claim means accepting and employing certain common references, processes, and techniques. This is why depicting legal conflict as just politics, and not law, hides as much as it reveals: law creates certain kinds of conflict and structures them in specific ways. It prioritizes certain modes of interacting over others.

In any given legal dispute, some ground rules will be deeply embedded in the legal culture and taken for granted, while others are up for grabs and part of the dispute. A rule’s standing within the shared corpus might even fluctuate over time.¹⁴⁷ For example, in *Gabčíkovo-Nagymaros*, the treaty’s standing as a common referent was initially clear. It became unstable when Hungary tried to terminate the treaty and again solidified when the ICJ determined that the treaty remained in force.¹⁴⁸ Such fluidity between the pockets of cooperation and the pockets of conflict in a legal relationship is routine because law fosters not one or the other but both simultaneously.

144. HERZOG, *supra* note 18, at 134.

145. *Id.* at 135.

146. *Id.*

147. For an excellent discussion of the fluidity of specific ground rules within the shared corpus, see KENNEDY, *supra* note 51, at 135–67.

148. See *supra* notes 104–107 and accompanying text.

The legal ground rules that enable the participants to identify and deepen their areas of agreement also enable them to crystallize and fight over their differences.

To elaborate on this argument, I anticipate and respond to three contrary intuitions: (1) that international law channels but does not affirmatively enable conflict, (2) that even if it occasionally enables conflict, its real work is as the cooperation thesis says, and (3) that intractable conflict is in any event undesirable or unsustainable in a legal order. Each of these positions is indefensible.

1. *International Law Enables Conflict*

Some readers might insist that international law does not facilitate conflict—that if anything, it channels conflicts that would otherwise occur. For these readers, the chess analogy might seem inapt because chess is “only a game.” Its entire point is to construct a conflict. By contrast, international law interacts with a real world that is replete with conflict. The fact that global actors use it to disagree does not mean that it enables their disputes.

However, international law helps these actors disagree by establishing the ground rules for their interactions.¹⁴⁹ The law’s ground rules facilitate both harmonious interactions and conflictual ones. Admittedly, adversaries might not need international law if they have other common references that can serve this purpose. They might argue not through law but in the register of a shared religion, national history, or social relationship. Where those other bonds are weak or absent, law becomes more essential to conflict. International law plays a salient role in enabling conflict because it is the shared language for an incredibly diverse and otherwise only loosely connected set of actors.¹⁵⁰ At the same time, using international law does not necessarily tame a dispute. Legal adversaries do not always reconcile their differences or defuse their tensions. This means that international law facilitates, without necessarily then resolving, disputes.

Further, the idea that international law just channels the conflicts that would otherwise occur misrepresents how law works as a social phenomenon. Law does not simply replicate the world that would exist in its absence. It frames issues, creates expectations, allocates power, and shapes perceptions of right and wrong. Thus, even if the conditions that give rise to a conflict would exist without international law, law might affect how various actors

149. Cf. RONALD DWORKIN, *LAW’S EMPIRE* 13 (1986) (“People who have law make and debate claims about what law permits and forbids *that would be impossible*—because senseless—without law.”) (emphasis added).

150. Cf. Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 *EUR. J. INT’L L.* 105, 130–34 (2003) (explaining that, because of its universality, international law establishes shared frameworks for negotiation and thus serves an important communicative function, even when it does not evidently establish binding substantive norms).

perceive or react to those conditions.¹⁵¹ The point is well developed in the literature on law and social movements: law itself helps constitute these movements.¹⁵² It helps legitimize their grievances and galvanize them to fight for their cause. It provides incentives to fight because winning a legal battle carries material or normative force.¹⁵³

Some scholars have made a similar point about international law but have presented it through the lens of the cooperation thesis. They suggest that international law can be a tool for conflict when it is used to pressure a scofflaw to comply. For example, Beth Simmons argues that human rights treaties can contribute to an “expectations gap” when states ratify but do not comply with them. People come to perceive the noncompliant conduct as unacceptable.¹⁵⁴ That perception might then galvanize them to challenge the noncompliant state.¹⁵⁵ Here, international law invites conflict. It provides a normative framework for and helps justify the confrontation. But Simmons characterizes the conflict as mere “politics,” suggesting that it occurs largely outside and as a byproduct of the law—that it is not really what law is for.¹⁵⁶ Further, in her telling, the conflict is geared toward an agenda that is already widely shared, including by the state that comes under attack.¹⁵⁷ Other scholars tell a similar story about the decisions of international courts and tribunals. A nonpartisan finding of breach can promote compliance by sharpening the criticisms of the scofflaw.¹⁵⁸ Yet here again, law’s role in facilitating conflict is treated as subordinate to its real work—enhancing legal arrangements that are already widely accepted.

2. *Conflict Is Symbiotic With Cooperation*

This brings me to a second possible view: that even if international law at times enables or sharpens conflict, its true mission is ultimately to resolve conflict. This view seeps through not only the compliance literature that I just discussed but also some scholarship on lawmaking. Scholars generally recognize that conflict can help global actors find consensus positions and thereby establish new legal norms.¹⁵⁹ But these scholars usually suggest that

151. See generally STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 133–34, 210–11 (2d. ed. 2004); Cover, *supra* note 19, at 4–5.

152. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804, 876 (2008).

153. See *id.* at 819, 851, 876; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 *CAL. L. REV.* 1323, 1327 (2006) [hereinafter Siegel, *Constitutional Culture*] (“This Lecture shows how constitutional culture enables proposals for change, as well as protest directed at officials who respond to these claims, giving rise to conflict. . . .”).

154. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* 14 (2009).

155. *Id.*

156. *Id.* at 5.

157. *Id.* at 17 (assuming that states ratify treaties “largely because they believe they can and should comply with them”).

158. E.g., KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* 19–23 (2014).

159. E.g., JOHNSTONE, *supra* note 45, at 32 (“Legal argumentation . . . does help to solidify agreement.”); Thomas Risse, “*Let’s Argue!*”: *Communicative Action in World Politics*, 54 *INT’L ORG.* 1, 7 (2000)

consensus itself is the goal and even that the role of international law is to get us there as harmoniously as possible.¹⁶⁰ My claim is that conflict is not just an unfortunate perversion or sideshow. My claim is that conflict is not just an unfortunate sideshow or precursor to the “real” work of international law.

Indeed, conflict is often a key ingredient for the ends that the cooperation thesis envisions. First, an intense or prolonged conflict can be a necessary step in the process of reaching a deal. In other words, enabling a conflict might enhance, rather than reduce, the likelihood that the participants will find and then promote a shared agenda. Second, even when the substantive dispute is irresolvable, having it can defuse tensions that might otherwise fester and erupt in more virulent or less predictable ways.¹⁶¹ Provoking conflict can, in the long run, help defuse it, notwithstanding the lack of substantive resolution.

The recent battle over Iran’s nuclear program is illustrative. The deal that Iran and the United States eventually negotiated was infeasible years earlier; it was tenuous only days before it was signed.¹⁶² Before the two states were willing to agree, they spent years using international law to test each other and jockey for the upper hand.¹⁶³ The United States worked hard in the International Atomic Energy Association (“IAEA”) and UN Security Coun-

(“Arguing implies that actors try to challenge the validity claims inherent in any causal or normative statement and to seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action.”); Stephen J. Toope, *Formality and Informality*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 107, 123 (Daniel Bodansky et al. eds., 2007) (“[T]he process of normative evolution is oftentimes conflictual.”).

160. See sources at *supra* note 159. The suggestion appears in various guises. For example, recall that tendentious CIL claims are depicted as problematic, even though they might eventually garner broad support. *Supra* notes 122–125 and accompanying text. Similarly, many scholars praise the proliferation of international courts and tribunals on the ground that these bodies help resolve legal disputes with limited “political” jousting. *E.g.*, Int’l Law Comm’n, Fifth Report State Responsibility 16, U.N. Doc. A/CN.4/453 (1993); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 90 (2009). For the same reason, many disfavor the practice of states unilaterally imposing unfriendly measures, like economic restrictions, on their adversaries. See Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT’L L.J. 105, 130–35 (2014) (reviewing the literature). Such measures so are intensely disliked, even though they might help resolve a dispute, because they also might exacerbate it or be used to advance contentious positions. *E.g.*, Michael Akehurst, *Reprisals by Third States*, 44 BRIT. Y.B. INT’L L. 1, 15–16 (1970); James Crawford, *Counter-Measures as Interim Measures*, 5 EUR. J. INT’L L. 65, 65 (1995).

161. See *infra* notes 178–179 and accompanying text; *cf.* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1164, 1166 (2007) (arguing that mechanisms that “deliberately seek to create or preserve spaces for conflict among multiple, overlapping legal systems” . . . “can potentially help to channel (or even tame) normative conflict”).

162. See Neil McFarquhar, *U.N. Approves New Sanctions to Deter Iran*, N.Y. TIMES, June 9, 2010, <http://www.nytimes.com/2010/06/10/world/middleeast/10sanctions.html>; David E. Sanger & Michael R. Gordon, *Clearing Hurdles to Iran Nuclear Deal With Standoffs, Shouts and Compromise*, N.Y. TIMES, July 15, 2015, http://www.nytimes.com/2015/07/16/world/middleeast/clearing-hurdles-to-iran-nuclear-deal-with-standoffs-shouts-and-compromise.html?_r=0.

163. See Mark Landler, *United States and its Allies Expand Sanctions on Iran*, N.Y. TIMES, (Nov. 21, 2011), <http://www.nytimes.com/2011/11/22/world/middleeast/iran-stays-away-from-nuclear-talks.html?smid=PL-share>; Sabrina Tavernise, *Russia, Turkey and Iran Meet, Posing Test for U.S.*, N.Y. TIMES (June 8, 2010), <http://www.nytimes.com/2010/06/09/world/09iran.html>.

cil to put pressure on Iran.¹⁶⁴ This work paid off. Between 2006 and 2010, the Council adopted a series of resolutions that created new nonproliferation obligations for Iran and either required or authorized sanctions for Iran's noncompliance.¹⁶⁵ The Council's resolutions helped the United States inflame the conflict by giving it the normative ammunition that it needed to press other countries to impose more severe economic restrictions on Iran.¹⁶⁶ The resolutions also galvanized Iran to try to rally other states behind its position.¹⁶⁷ This protracted and at times heated conflict was not a sideshow. It was critical to clarifying where each side stood and thus what terms each would accept.¹⁶⁸ Iran and the United States used international law to reconcile their differences,¹⁶⁹ but they did so only after and because they used it to challenge and compete with each other.

Moreover, by facilitating that conflict, international law also helped to defuse it. Even as international law enabled states to have and sharpen their dispute, it steered them toward the IAEA and Security Council, and away from the stated, more deleterious alternative—the use of military force.¹⁷⁰

164. See Richard Bernstein, *U.N. Atom Agency Seeks Wider Scrutiny on Iran, but Is Rebuffed*, N.Y. TIMES (June 20, 2003), <http://www.nytimes.com/2003/06/20/world/un-atom-agency-seeks-wider-scrutiny-on-iran-but-is-rebuffed.html>; David Crawford et. al., *U.S. Softens Sanction Plan Against Iran*, WALL ST. J. (Mar. 25, 2010), <http://www.wsj.com/articles/SB10001424052748704266504575142073816248844>; Michael D. Shear & Glenn Kessler, *Russia Supports Iran Sanctions But With Limits*, WASH. POST (Apr. 9, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/08/AR2010040803866.html>.

165. S.C. Res. 1929 (June 9, 2010); S.C. Res. 1803 (Mar. 3, 2008); S.C. Res. 1747 (Mar. 24, 2007); S.C. Res. 1737 (Dec. 23, 2006); S.C. Res. 1696 (July 31, 2006). Here, states with longstanding differences on nonproliferation policy worked together to condemn Iran. The fact that they unified to address a common adversary is further evidence that cooperation and conflict are intertwined. A conflict with Iran galvanized other states to do, amongst themselves, what the cooperation thesis envisions.

166. See Zachary Laub, *International Sanctions on Iran*, COUNCIL ON FOREIGN RELATIONS (June 2015), <http://www.cfr.org/iran/international-sanctions-ran/p20258>; Vivienne Walt, *Is the U.S. Bullying Europe Into Cutting Ties with Iran?*, TIME (Oct. 28, 2010), <http://content.time.com/time/world/article/0,8599,2028046,00.html>.

167. See Jason Burke, *Iranian Minister Calls on Non-Aligned Nations to Resist Sanctions*, THE GUARDIAN (U.K.) (Oct. 10, 2012), <http://www.theguardian.com/world/2012/oct/10/iranian-minister-nonaligned-sanctions>; Thomas Erdbrink, *Iran Preparing to Lead Global Nonaligned Group*, N.Y. TIMES (Aug. 13, 2012), <http://www.nytimes.com/2012/08/14/world/middleeast/iran-to-host-nonaligned-movement-meeting-and-take-leadership.html>; Steven Heydemann, *Iran's Alternative Allies*, U.S. INSTITUTE OF PEACE: IRAN PRIMER, <http://iranprimer.usipi.org/resource/irans-alternative-allies> (last visited Sept. 8, 2015).

168. See John Limbert, *The Obama Administration*, U.S. INSTITUTE OF PEACE: IRAN PRIMER, See <http://iranprimer.usip.org/resource/obama-administration> (last visited Sept. 4, 2015); cf. David E. Sanger & Michael R. Gordon, *Clearing Hurdles to Iran Nuclear Deal With Standoffs, Shouts and Compromise*, N.Y. TIMES (July 15, 2015), http://www.nytimes.com/2015/07/16/world/middleeast/clearing-hurdles-to-iran-nuclear-deal-with-standoffs-shouts-and-compromise.html?_r=0 ("There was no single event, no heart-to-heart conversation between adversaries or game-changing insight that made the Iran deal happen. Instead, over a period of years, each side came to gradually understand what mattered most to the other.").

169. See generally S.C. Res. 2231 (July 20, 2015).

170. See Julie Hirschfeld Davis, *It's Either Iran Nuclear Deal or 'Some Form of War,' Obama Warns*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/06/us/politics/obama-urges-critics-of-iran-deal-to-ignore-drumbeat-of-war.html>; Jodi Rudoren, *U.S. Envoy to Israel Says Nation is Ready on Iran*, N.Y. TIMES (May 17, 2012), <http://www.nytimes.com/2012/05/18/world/middleeast/united-states-ambassador-dan-shapiro-to-israel-speaks-of-military-option-for-iran.html>.

Jockeying through international law stalled and appears to have released much of the steam behind that alternative. To be clear, international law had this effect even before the United States and Iran reached a deal, and it will have had this effect even if the deal unravels. A dispute that lacks real substantive resolution can still release tensions that would otherwise express themselves in more destructive ways.

3. *Intractable Conflict Is Not Inherently Dysfunctional*

The conflicts that international law enables do not always lead to outcomes that are compatible with the cooperation thesis. One can certainly imagine the dispute over Iran's nuclear program playing out differently and becoming more, rather than less, intense over time. Readers might insist, then, that conflict is undesirable or even inimical to the legal order when it gets heated or is intractable. Of course, such conflict can be extremely damaging. But we should not assume that it is inherently problematic or antithetical to international law. At times, it might even be desirable, at least relative to the available alternatives, which are rarely consensus and an absence of conflict.

The claim that irresolvable conflict damages the entire legal enterprise—that it portends a slide toward anarchy or a wholesale disengagement from law—is speculative and overdrawn. Global actors use international law in part to disagree. Thus, areas of law that are extremely contentious remain active. For example, the *jus ad bellum*, which governs the use of armed force across national borders, has long been disharmonious. Still, global actors use it to assess, challenge, defend, and at times agree on specific operations.¹⁷¹

Indeed, some scholars have argued that intractable legal conflicts can enhance a legal tradition. Writing on U.S. constitutional law, Robert Post and Reva Siegel challenge a claim that sounds in the cooperation thesis: that “an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done” and thereby “to elicit ‘socially beneficial cooperative behavior.’”¹⁷² Post and Siegel claim that, on some issues, authoritative settlement is neither possible nor desirable.¹⁷³ Abortion is their paradigm. The U.S. Constitution cannot achieve Americans' shared objectives on abortion because Americans disagree on the objectives. For decades, Americans have used the Constitution to have that dispute.¹⁷⁴ Post and

171. See David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT'L L. 387, 390 (2007) (“Article 2(4) has displayed remarkable resilience; it not only stubbornly refuses to die, but sometimes emerges stronger than before.”). For an argument that conflict is embedded in the very structure of this regime, see Hakimi & Cogan, *supra* note 111.

172. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007) (citing Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377, 1371 (1997) (internal quotation marks deleted)).

173. *Id.*

174. See also Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 326 (2001) (“[A]ll manner of social conflicts are channeled into struggles over

Siegel contend that persistent battles about the Constitution's meaning keep diverse groups engaged with the constitutional project.¹⁷⁵ Such engagement might best be sustained in the face of deep normative divisions by keeping the law pliable.¹⁷⁶ Indeterminacy allows groups with diverse perspectives to continue tapping into and arguing through the law. By contrast, high levels of legal settlement risk estranging dissatisfied groups from the law.¹⁷⁷

Moreover, even when a conflict is heated and ineradicable, it can serve to ventilate grievances and stabilize a legal arrangement.¹⁷⁸ For example, an ongoing conflict might prevent the arrangement from swaying too far toward one group's preferences, boxing out other constituents, and breaking apart.¹⁷⁹ Alternatively, because the legal conflict itself rests on shared ground rules, it might remind the adversaries of their common ground, even as it focuses them on their differences.¹⁸⁰ The point is that enabling global actors to disagree in relatively productive ways is not necessarily harmful and might at times be beneficial.

B. Explaining the Legal Practice

Once we appreciate that conflict and cooperation are symbiotic, we can explain the practice that the cooperation thesis dismisses as dysfunctional. Below, I reexamine the features of international law that are widely perceived to be problematic. I show that each enables conflict for the same reason that it enables the kind of cooperation that the thesis envisions. It establishes shared ground rules that global actors use for both. I then show that international law's role in facilitating conflict is not particular to these supposed problem areas. It is pervasive. Conflict is interdependent with co-

the Constitution's meaning, and the Constitution comes to serve as a discursive medium through which individuals and groups engage in disputes about ideal forms of collective life.”).

175. Post & Siegel, *supra* note 172, at 427.

176. Siegel, *Constitutional Culture*, *supra* note 153, at 1328, 1418–19 (2006); Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1004 (1994) (“[A] legal system is healthiest when there is conflict and dissent among its claims, because even irresolvable conflict is a sign of energy and attention.”); Michelman, *supra* note 64, at 1529 (“Legal indeterminacy in that sense is the precondition of the dialogic, critical-transformative dimension of our legal practice.”).

177. Siegel, *Constitutional Culture*, *supra* note 153, at 1328.

178. LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 85 (1956) (explaining that conflict in a relationship can be “an index of [] stability” and a “balancing mechanism” that keeps the relationship going).

179. *Id.* at 151–52 (explaining that institutionalizing conflict can be a “safeguard against conflict disrupting the consensual basis of the relationship” because it can “make possible the readjustment of norms and power relations within groups in accordance with the felt needs of its individuals”).

180. KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 276–78 (1941) (describing the unifying effects of legal conflicts); Ralf Poscher, *Why We Argue About the Law: An Agonistic Account of Legal Disagreement*, in *METAPHILOSOPHY OF LAW*, manuscript at 23 (forthcoming October 2016), <http://ssrn.com/abstract=2734689> (“Even in a hard case in which there is no legitimate hope of coming to terms, our discussions and debates will help us to explore not only the extend [sic] of our disagreement, but also our remaining common ground for agreement.”).

operation and integral to international law's mission—which makes the cooperation thesis, in both its strong and its weak variant, untenable.

1. *Conflict in the Perceived Problem Areas*

a. *Indeterminate Legal Texts*

Indeterminate legal texts enable conflict because they are open to multiple interpretations. Actors with diverse perspectives can easily use the same text to advance competing positions on the law.¹⁸¹ Again, these actors might disagree even without a common text. But the text provides them with a framework for and incentives to have their fight; prevailing on the law brings the promise of material or normative support.

While indeterminate texts generally invite conflict, some are especially suited for this purpose. They present questions that are very likely to arise and to be divisive.¹⁸² The 2011 UN Security Council resolution that authorized the use of force in Libya is a good example. The Council adopted Resolution 1973 on the understanding that Libya's longstanding leader, Muammar Gaddafi, was on the verge of committing atrocities. Resolution 1973 authorized states "to take all necessary measures . . . to protect civilians and civilian populated areas [in Libya] under threat of attack."¹⁸³ Shortly thereafter, Western states acknowledged that they intended to depose Gaddafi.¹⁸⁴ The legal question was whether a regime change fell within the scope of 1973—specifically, whether removing Gaddafi was necessary to protect civilians.

Security Council resolutions are usually interpreted by reference to the Council's contemporaneous intentions.¹⁸⁵ But with 1973, the Council did not offer a coherent position on the scope of its authorization. When the resolution was adopted, China and Russia emphasized "that many questions had not been answered in regard to provisions of the resolution, including . . . what the limits of the engagement would be."¹⁸⁶ Almost immediately thereafter, states used 1973 both to defend and to challenge the regime

181. Cf. FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 139, 149–55 (1991) (explaining that legal impression allows biases to seep into legal decisions).

182. Cf. Samantha Besson, *State Consent and Disagreement in International Law-Making: Dissolving the Paradox*, 29 *LEIDEN J. INT'L L.* 289, 292 (2016) (arguing that consent in international lawmaking "does not amount to strict agreement only, but rather to an agreement to disagree further").

183. S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

184. See Steven Lee Myers, *Allies Renew Demand for Qaddafi to Give Up Power*, *N.Y. TIMES* (Mar. 29, 2011), <http://www.nytimes.com/2011/03/30/world/africa/30london.html>.

185. See Alexander Orakhelashvili, *The Acts of the Security Council: Meaning and Standards of Review*, 11 *MAX PLANCK Y.B. U.N. L.* 143, 151 (2007); Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 *MAX PLANCK Y.B. U.N. L.* 73, 92 (1998).

186. Press Release, Security Council, Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

change. The dispute was never meaningfully resolved.¹⁸⁷ Resolution 1973 thus created a legal question that was sure to arise and, given the broader dynamics on humanitarian interventions, to be contested.¹⁸⁸

Other indeterminate texts essentially require global actors to disagree. For example, the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”) obligates states to “pursue negotiations in good faith on . . . a treaty on general and complete disarmament under strict and effective international control.”¹⁸⁹ Duties to negotiate are usually defined and analyzed in terms of the cooperation thesis: negotiating in good faith can help the disputants reconcile their differences and reach a new deal.¹⁹⁰ But in many contexts, like the NPT, the prospects of an agreement are slim. Nuclear weapon states are unwilling to eliminate their nuclear arsenals. The NPT obligates them to keep meeting and bartering with one another, instead of just accepting a deadlock and moving on.¹⁹¹

Significantly, these states cannot avoid disarmament-related confrontations by agreeing amongst themselves not to disarm. The NPT gives other actors grounds for continuing to condemn the failure to disarm. Recently, the Marshall Islands petitioned the ICJ to enforce the NPT duty against nuclear weapon states.¹⁹² In addition, the UN General Assembly regularly presses nuclear weapon states to make progress on disarmament.¹⁹³ For decades, then, the NPT duty to negotiate has facilitated not reconciliation or

187. See, e.g., Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 378–383 (2012); Dapo Akande, *What Does UN Security Council Resolution 1973 Permit?*, EJIL: TALK! (Mar. 23, 2011), <http://www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit/>; Simon Tisdall, *The Consensus on Intervention in Libya Has Shattered*, THE GUARDIAN (Mar. 23, 2011), <http://www.theguardian.com/commentisfree/2011/mar/23/libya-ceasefire-consensus-russia-china-india>.

188. On these dynamics, see, for example, Jutta Brunnée & Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 2 GLOBAL RESP. PROTECT 191, 192 (2010).

189. Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, 21 U.S.T. 483.

190. See *supra* note 12.

191. This is especially so because, while most duties to negotiate are interpreted to require states only to try to agree, the ICJ has interpreted the NPT duty to require states actually to reach a deal. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 99 (Jul. 8) (“[T]he obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”) (emphasis added).

192. In October 2016, the ICJ dismissed these petitions for lack of jurisdiction. Obligations Concerning Negotiations and Relating to Cessation of the Nuclear Arms Race (Marsh. Is. v. India), Judgment on Preliminary Objections (Oct. 5, 2016), <http://www.icj-cij.org/docket/files/158/19134.pdf>; Obligations Concerning Negotiations and Relating to Cessation of the Nuclear Arms Race (Marsh. Is. v. Pak.), Judgment on Preliminary Objections (Oct. 5, 2016), <http://www.icj-cij.org/docket/files/159/19166.pdf>; Obligations Concerning Negotiations and Relating to Cessation of the Nuclear Arms Race (Marsh. Is. v. UK), Judgment on Preliminary Objections, (Oct. 5, 2016), <http://www.icj-cij.org/docket/files/160/19228.pdf>.

193. E.g., G.A. Res. 70/33, ¶ 1 (Dec. 7, 2015); G.A. Res. 69/37, ¶ 5 (Dec. 2, 2014).

settlement but ongoing contestation and debate. If anything, the tenor of this contest has intensified, not diminished, in recent years.¹⁹⁴

Commentators interpret this dynamic to mean that the NPT has a “key defect”¹⁹⁵ or is “under great strain.”¹⁹⁶ But given the alternatives, the incessant bickering under the duty to negotiate might help stabilize this legal arrangement. Disarmament is not a real option. If confronted with an irrefutable duty to disarm, key nuclear weapon states would likely withdraw from the NPT or openly disregard its mandate. Meanwhile, without the duty to negotiate—without this focal point for disarmament-related confrontations—the NPT might be less tenable. Many developing states resent the NPT’s disparate treatment of nuclear and non-nuclear weapon states.¹⁹⁷ The dissatisfied states regularly and vociferously express their discontent through the duty to negotiate, rather than through more destabilizing moves, like retreating from the NPT’s substantive obligations. They also use the failure to disarm to justify resisting new non-proliferation obligations, which in their view fall disproportionately on them. Their clear message is that they will do more on non-proliferation if nuclear weapon states do more on disarmament.¹⁹⁸ In the end, then, the ongoing contest on disarmament might keep the NPT in check and help preserve the current, uneasy but long-standing balance.

b. Customary International Law

CIL also enables conflict. The process for making and applying CIL is completely unstructured. It plays out in manifold arenas, as disparate actors advance their own claims and try to disrupt competing claims.¹⁹⁹ These claims rest on accepted ground rules. They are couched in terms of state practice and *opinio juris*, and they usually invoke other common references, like treaties and decisions of international courts. The ground rules help global actors not only converge on shared positions but also disagree and challenge one another.

194. See, e.g., G.A. Res. 70/33 (Dec. 7, 2005); Jakob von Uexkull, *Is Trouble Brewing for the 2015 NPT Review Conference?*, THE HUFFINGTON POST (Apr. 22, 2014), http://www.huffingtonpost.com/jakob-von-uexkull/is-trouble-brewing-for-the-2015-npt-review-conference_b_7106216.html.

195. Alicia Godtsberg, *Nuclear Disarmament and the United Nations Disarmament Machinery*, 18 ILSA J. INT’L & COMP. L. 581, 585 (2012).

196. Tim Wright, *Negotiations for a Nuclear Weapons Convention: Distant Dream or Present Possibility?*, 10 MELB. J. INT’L L. 217, 218 (2009).

197. See Ogilvie-White, *supra* note 8, at 461–64.

198. For a discussion of the dynamics under the NPT, see Andrew Grotto, *Why Do States That Oppose Nuclear Proliferation Resist New Nonproliferation Obligations?: Three Logics of Nonproliferation Decision-Making*, 18 CARDOZO J. INT’L & COMP. L. 1, 13–16 (2010).

199. See DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 57 (2002) (describing the process as one of “struggle and resistance” and as a “marketplace” in which states affirmatively (and self-consciously) “bid” and “barter” and “trade” in new rules of conduct”); ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 266 (1971) (“[C]ustom represents a type of structured legal argument that has recurred in many claim-conflict situations.”).

The nature of the process itself invites conflict. First, the process does not have formal controls to inhibit the participants from pressing hard for their positions—making tendentious claims that the cooperation thesis depicts as problematic. Instead, the process incentivizes such claims. It offers the possibility of prevailing on the law, without tedious negotiations and with a mere acquiescence of most states.²⁰⁰ Second, the lack of structure means that the process does not have a defined end point. An emerging consensus is susceptible to disruption or revision through the same moves that brought it about.²⁰¹ Thus, actors who are dissatisfied with a position have reason to act antagonistically. Such action can upend the apparent consensus and prevent the law from developing in an unfavorable direction.

To appreciate how CIL facilitates conflict, consider the persistent battles over the precautionary principle in international environmental law. Depending on the specific context in which this principle is invoked, it either requires or permits states to account for environmental risks when making regulatory decisions.²⁰² The principle appears in several treaties,²⁰³ but its status and content as CIL—which would apply more generally—have long been contested.²⁰⁴ The fact that the CIL in this context is unsettled shows that states have not gravitated toward a consensus position. But states still use CIL to have their disputes.²⁰⁵ They argue about whether the precautionary principle is CIL as they challenge or defend particular regulatory decisions.²⁰⁶ Significantly, international courts and tribunals have repeatedly

200. See, e.g., SHAW, *supra* note 5, at 89 (“Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate.”).

201. See D’AMATO, *supra* note 199, at 97–98; Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 175 (1998).

202. See United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex I, Principle 15 (Aug. 12, 1992); see also David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 Nw. U.L. REV. 1315, 1315 (2003) (“As a general matter, the precautionary principle counsels serious contemplation of regulatory action in the face of evidence of health and environmental risk, even before the magnitude of risk is necessarily known or any harm manifested.”).

203. E.g., Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1551; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312, 1316; Convention on Biological Diversity June 5, 1992, 1760 U.N.T.S. 143.

204. See, e.g., Appellate Body Report, European Communities—Measures Concerning Meat and Meat Products, ¶ 123, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998) (“The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges.”); David L. VanderZwaag, *The ICJ, ITLOS and Precautionary Approach: Paltry Progressions, Jurisprudential Jousting*, 35 U. HAW. L. REV. 617, 617 (2013) (“The precautionary principle . . . has become well-known for the confusion surrounding its interpretation and practical implications.”).

205. See DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 198–203* (2010) (explaining that the principle “establish[es] the context within which bargaining takes place,” “frame[s] the debate,” and provides “a basis to criticize other states’ proposals”).

206. E.g., Case Concerning Pulp Mills on the River Uruguay (Arg. v. Urug.), I.C.J., Memorial of Argentina, ¶ 5.4 (Jan. 15, 2007); Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), I.C.J., Memorial of the Republic of Hungary, ¶¶ 6.63–6.69 (May 2, 1994); Appellate Body Report,

declined to try to settle this area of CIL. They have instead left the competing CIL claims on the table for states to fight over in concrete cases.²⁰⁷

Here, CIL helps states disagree about how to balance environmental protection against other regulatory goals. The alternative to using CIL for this purpose is not consensus. The most plausible alternative is for one state to strike whatever balance it prefers, while others lose a vehicle through which to voice their discontent and justify pressing their opposing views.

c. Fragmented Normative Structure

International law's fragmented structure likewise facilitates conflict. Multiple studies now show that global actors exploit fragmentation to challenge and undercut regulatory arrangements with which they disagree.²⁰⁸ Julia Morse and Robert Keohane recently coined the term "contested multilateralism" to describe the phenomenon.²⁰⁹ Actors that are dissatisfied with one multilateral arrangement try to weaken it by pursuing a competing agenda through an alternative arrangement. The effect is that "[t]he rules and institutionalized practices of the challenging institution conflict with or significantly modify the rules and institutionalized practices of the *status quo*

European Communities—Measures Concerning Meat and Meat Products, ¶¶16,123, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998) (discussing the EU's position).

207. *E.g.*, Appellate Body Report, European Communities—Measures Concerning Meat and Meat Products, ¶ 123, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998) ("[I]t is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on [the] important, but abstract question" of whether the precautionary principle is CIL); Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.89, WTO Docs. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Sept. 26, 2006) ("Since the legal status of the precautionary principle remains unsettled . . . we consider that prudence suggests that we not attempt to resolve this complex issue. . . ."); *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶¶ 113, 141 (Sept. 25) (recognizing that "both [p]arties agree on the need . . . to take precautionary measures" but leaving to the parties the task of negotiating what that means in the case at hand); *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 164 (Apr. 20) (recognizing that "a precautionary approach may be relevant" without providing further analysis); *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, ¶ 135 (describing "a trend towards making [the principle] part of customary international law").

208. *E.g.*, PULKOWSKI, *supra* note 69, at 191 ("The simultaneous coverage of one and the same situation by the rules of various regimes—and thus the potential for their conflict—is the intentional product of political bargaining."); SURABHI RANGANATHAN, *STRATEGICALLY CREATED TREATY CONFLICTS AND THE POLITICS OF INTERNATIONAL LAW* 3 (2014) (describing as common the practice of creating new treaties to undercut or challenge existing treaties); Helfer, *supra* note 135, at 58 (arguing that developing countries use "regime shifting" to, among other things, try to "revise or supplement existing intellectual property rules"); Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 301–02 (2004) (using the experience on plant genetic resources to show "that states may also attempt to create what we term *strategic inconsistency*"); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 744 (2010) ("[I]ndividual states (or other actors) may deliberately use soft-law instruments to undermine hard-law rules to which they object, or vice-versa, creating an antagonistic relationship between these legal instruments.").

209. Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT'L ORG. 385, 387–88 (2014).

institution.”²¹⁰ Morse and Keohane do not explain the phenomenon, but they show that it occurs frequently and across substantive areas of international law.²¹¹

A well-known example is the extended conflict over the regulation of genetically modified organisms (“GMOs”). Under the agreements of the World Trade Organization (“WTO”), health or environmental restrictions on food imports must satisfy a “sound science” requirement: any restriction that exceeds international standards must be based on a scientific risk assessment and “not maintained without sufficient scientific evidence.”²¹² In the late 1990s, some states began resisting that requirement in favor of a more precautionary approach. When these states failed to change the law within the WTO, they looked elsewhere—to an arrangement that was more amenable to their position. They used the Convention on Biological Diversity to establish the Cartagena Protocol, which implicitly undercuts the sound science requirement by endorsing a precautionary approach and preserving some state discretion in this area.²¹³

The conflict about the proper scope of an importing state’s regulatory discretion has never really been resolved. In the *EC-Biotech* case, a WTO panel examined the European Union’s GMO regulations but ducked the broader question of how strictly to interpret the sound science requirement.²¹⁴ Thus, although that particular GMO dispute no longer occupies center stage, a normative settlement has not been reached. Either side could easily reignite the conflict by reasserting its position in a new context. Fragmentation enables and perpetuates that kind of dispute. Again, the most likely alternative is not the realization of a shared agenda or the reduction of conflict. It is for one position to formally stamp out a politically salient, competing position—and for that competing position potentially to express itself in less palatable ways.

2. *Conflict in the Anointed Citadel*

International law’s role in enabling conflict is not limited to areas that the cooperation thesis depicts as problematic. Because cooperation and conflict are interdependent, international law enables conflict even when it promotes a shared agenda, as it does in the WTO. WTO law is, by most accounts, the

210. *Id.* at 388.

211. *Id.* at 386.

212. Agreement on the Application of Sanitary and Phytosanitary Measures art. 2.2, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493; see also *id.* Art. 5.1 (requiring risk assessment).

213. Cartagena Protocol on Biosafety to the Convention on Biological Diversity arts. 1, 2.4, 10–11, Jan. 29, 2000, 2226 U.N.T.S. 208.

214. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.75, 7.92–7.95, 8.3–8.10, WTO Docs. WT/DS291/R, WT/DS292/2, WT/DS293/R (adopted Sept. 29, 2006); see also MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS 187–97, 222 (2009) (analyzing the decision).

closest that international law comes to satisfying the strong variant of the cooperation thesis.²¹⁵ This body of law consists of detailed substantive agreements and a robust adjudicative process.²¹⁶ For many, that combination reveals states' "deep cooperation" on trade liberalization.²¹⁷ The adjudicative process, in particular, is thought to strengthen WTO law for reasons that sound in the cooperation thesis: adjudications help clarify the terms of cooperation,²¹⁸ resolve trade disputes by limiting the space for power politics,²¹⁹ and increase the chances that states will "follow through on their cooperative agreements rather than defecting."²²⁰

But even as WTO law achieves the ends that the cooperation thesis envisions, it also does the opposite; it generates and amplifies trade conflicts. It does so because cooperation and conflict are synergistic. Consider three data points. First, although the WTO's adjudicative process is usually described as a mechanism for settling disputes, it also functions to inflame disputes. Giving adversaries the opportunity to obtain an authoritative decision in their favor creates an incentive to fight, rather than to let the dispute fizzle or negotiate a compromise. The adjudicative process then sharpens the dispute by spurring each side to defend its position as forcefully as possible and to try to defeat its opponent.²²¹ If a WTO body finds a breach, it helps the winning side increase the pressure on the scofflaw, including in some cases with economic restrictions. After all of this, WTO law might induce a noncompliant state to advance a shared agenda on trade liberalization. But no matter whether it does—and it sometimes will not—it first serves to aggravate the dispute.

215. *E.g.*, Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 13 (2006) ("The most effective and important international institution today is the World Trade Organization . . ."); Mark Wu, *Rethinking the Temporary Breach Puzzle: A Window on the Future of International Trade Conflicts*, 40 YALE J. INT'L L. 95, 95–6 (2015) ("The World Trade Organization (WTO) is often held to be an exemplar of a legitimate, effectively functioning institution of international law.")

216. *See generally* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15 1994, 1867 U.N.T.S. 14; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

217. *See* Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355 (2004); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 585–86 (2005).

218. *E.g.*, Eric A. Posner & Alan O. Sykes, *International Law and the Limits of Macroeconomic Cooperation*, 86 S. CAL. L. REV. 1025, 1033–34 (2013).

219. *E.g.*, JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 97 (2d ed. 1997); MITSUO MATSUSHITA ET. AL., *THE WORLD TRADE ORGANIZATION: LAW PRACTICE, AND POLICY* 103–39 (2d ed. 2006); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PENN. J. INT'L ECON. L. 273, 359 (2006); *but cf.* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 248 (2004) (underscoring that the WTO "Appellate Body is constrained by international legal discourse and politics").

220. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 464 (2003).

221. *Cf.* J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement*, in EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 334, 339 (Roger B. Porter et. al., eds. 2001) ("[D]isputes that go to adjudication are not settled; they are won and lost.")

Second, to the extent that WTO law motivates states to work toward trade liberalization, it also creates incentives to undercut liberalization. This is why many scholars analyze WTO law as a prisoner's dilemma: all states might be better off by reducing than by maintaining their tariffs. But any particular state might be best off by imposing tariffs while its trading partners reduce theirs.²²² If WTO law motivates states to reduce their protectionism, then it simultaneously motivates their market competitors to exploit their reduced tariffs by cheating on or pushing the boundaries of the law—which is what triggers trade conflicts. By fostering the kind of cooperation that the cooperation thesis envisions, WTO law also creates grounds for conflict. Trade scholars sometimes assert that WTO law overcomes that dynamic and deters the associated conflicts through monitoring and enforcement.²²³ But the law does not fully counterbalance the incentives that it itself creates to cheat.²²⁴

Third, the extensive cooperation in WTO law means that many actors are committed to it. Because they are committed, they are willing to fight hard for results that they believe to be appropriate.²²⁵ Historically, the two most invested players in the WTO have been the United States and the European Union. These two players have also been the most frequent litigants in the WTO.²²⁶ And a number of the most protracted and heated WTO disputes have been between them. The United States and the European Union disagree so intently because they both have a lot at stake in the WTO. Both want WTO law to be properly implemented and applied; they just disagree about what that means in specific cases. WTO law gives the United States

222. *E.g.*, Anu Bradford, *When the WTO Works, and How it Fails*, 51 VA. J. INT'L L. 1, 38 (2010) ("It is possible to model many international trade issues as Prisoner's Dilemmas."); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 649 (2005) ("From the perspective of game theory, trade can be described as an iterated prisoner's dilemma.")

223. *E.g.*, Shaffer & Ginsburg, *supra* note 16, at 31 ("The predominant theory among economists is that states agree to international trade law in order to resolve the prisoner's dilemma—in particular, by providing mechanisms for monitoring and enforcement.")

224. This is so for at least two reasons. First, some dubious trade restrictions can be disguised as lawful. *See* Mark Wu, *Antidumping in Asia's Emerging Giants*, 53 HARV. INT'L L.J. 1, 14 (2012). Second, because the WTO remedies violations only prospectively, the benefits of breaching often outweigh the costs of being detected and condemned. *See* Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 19 (2016) (explaining that because "remedies are only prospective," there is in effect "a 'free ride' to violate WTO obligations for several years, given the length of time the dispute process takes. . . ."); *see also* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002) (arguing that the WTO is designed to permit efficient breaches—those for which the gains to the scofflaw outweigh the costs to the injured state); Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 259–61 (2013) (arguing "that dispute resolution can (but will not always) lower the reputational losses associated with breach" and may actually "facilitate breach, rather than deter it," by offering the scofflaw a face-saving way to avoid its obligations).

225. *Cf.* COSER, *supra* note 178, at 72 ("[T]he closer the relationship and the more the participants are involved in it, the more occasions there are for conflict.")

226. *See* Edward Lee, *Measuring TRIPS Compliance and Defiance: The WTO Compliance Scorecard*, 18 J. INTELL. PROP. L. 401, 411 (2011); Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995–2009: A Statistical Analysis*, 13 J. INT'L ECON. L. 205, 208 (2010).

and the European Union reasons to fight because it advances an agenda that they both so intensely value.

In sum, international law invites conflict even when it seems to satisfy the strong variant of the cooperation thesis. WTO law might help the participants advance a shared agenda on trade liberalization. And it might curb the overall frequency or severity of trade disputes. But even as it does, it gives global actors reasons to fight and helps them have and sharpen their disputes. Indeed, some of these disputes are intractable and built into the very structure of the WTO. The legal project works not by persistently curtailing conflict but by simultaneously curtailing and enabling it. Cooperation and conflict are not antithetical but synergistic.

3. *Conflict in the Supposed Bedrock*

For similar reasons, international law enables even very destructive conflicts. Recall that the bedrock goal of modern international law is widely said to be to promote peace by limiting war. As such, the *jus ad bellum* is almost always described and assessed in terms of whether it satisfies the weak variant of the cooperation thesis.²²⁷ Yet while the *jus ad bellum* curbs some uses of force, it invariably invites and inflames others. Again, it does so not because it is dysfunctional but because that is part of the legal project.²²⁸

The *jus ad bellum* is generally thought to prohibit states from using cross-border force except: (1) pursuant to the UN Security Council's authorization, (2) in individual or collective self-defense, or (3) with the territorial state's consent.²²⁹ The parameters of each exception are regularly contested. But setting aside the areas of uncertainty, the *jus ad bellum* clearly licenses

227. *E.g.*, OLIVIER CORTEN, *THE LAW AGAINST WAR* 550 (2010) (asserting that the *jus ad bellum* "institute[s] a 'law against war' principle"); RATNER, *supra* note 2, at 70 ("[I]t is also clear that states bind themselves through international law rules in part in order to prevent war and solidify peace."); Karen Alter, *The Only Way to Counter Russia*, U.S. NEWS AND WORLD REPORT, Mar. 12, 2014 ("99 times out of 100, following international law is the prudent approach for avoiding provocation, and triggering retaliation, further violence and international instability."); *see also* Mónica García-Salmones, *Walther Schücking and the Pacifist Traditions of International Law*, 22 EUR. J. INT'L L. 755, 756 (2011) ("[I]nternational law has always been permeated with ideals of peace, . . . [so] war always constitutes a failure.").

228. Some constructivist and critical legal theorists have gestured in a similar direction. However, their work tends to focus on how law legitimizes war, rather than on whether or how law affects the conflict at an operational level. Moreover, these scholars have not challenged and at times seem to accept the cooperation thesis's core premise that international law's role in facilitating military conflicts is inherently problematic or evidence of its limits. *See* DAVID KENNEDY, *OF WAR AND LAW* (2006); CHARLOTTE PEEVERS, *THE POLITICS OF JUSTIFYING FORCE: THE SUEZ CRISIS, THE IRAQ WAR, AND INTERNATIONAL LAW* (2013); Ian Hurd, *The Permissive Power of the Ban on War*, EUROPEAN J. INT'L SECURITY (Aug. 9, 2016), http://faculty.wcas.northwestern.edu/~ihu355/Home_files/hurd%20ban%20on%20war.pdf.

229. UN Charter art. 2, ¶ 4, Ch. VII; *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 246 (June 27) (recognizing that intervention "is already allowable at the request of the government of a State"). Some international lawyers argue for a fourth exception in cases involving humanitarian crises. But the dominant view is still that unauthorized humanitarian interventions are unlawful. *See* Albrecht Rendlzhofer & Oliver Dörr, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 200, 223 n. 129 (Bruno Simma et. al., eds., 3d ed. 2012).

some uses of force. When it does, it does not just rubber stamp or channel the forcible operations that states would otherwise initiate. It sometimes creates pressure to engage in or magnify a military conflict.

The 2011 Libya operation is a good example because, in a single incident, the *ius ad bellum* served initially to curb and then to inflame a conflict. During the early stages of the Libya crisis, a forcible intervention was unlikely.²³⁰ France and the United Kingdom were prepared to use armed force but had difficulty mustering support for that position within the UN Security Council or the North Atlantic Treaty Organization (NATO). The United States, in particular, was leaning against a forcible operation, and Germany was strongly opposed. Thus, when NATO states met on March 11, 2011, they agreed not to intervene in Libya absent a demonstrable need, regional support, and a clear legal mandate, which as a practical matter meant UN Security Council authorization.²³¹ These conditions set a high bar for intervening. NATO states that were reluctant to intervene used the requirement of Security Council authorization to press their position. The requirement was a strong justification for not acting.

However, the situation on the ground changed rapidly, and within days, the very same legal requirement became a basis for acting. Because the *ius ad bellum* licenses force with the Council's authorization, it motivated states that favored an intervention to seek such authorization. On March 12, the Arab League formally asked the Council to authorize the use of force in Libya.²³² This call for Council action made doing nothing more difficult. By all accounts, it galvanized the United States to shift gears and press hard for the Council's authorization. Once the United States became invested in intervening, it decided for operational reasons to pursue a broader mandate and more aggressive military strategy than others had been contemplating. Meanwhile, Russia and China acquiesced in Resolution 1973 not because they supported the military action but because they felt some compulsion to defer to regional stakeholders that were agitating for it.²³³ In the end, the Council adopted 1973, and the United States played a critical role in the military conflict. Some states might have used force in Libya even without the Council's authorization. But that authorization unquestionably increased the likelihood and scale of the operation.

230. For descriptive accounts of this incident, see CHRISTOPHER S. CHIVVIS, TOPPLING QADDAFI: LIBYA AND THE LIMITS OF LIBERAL INTERVENTION 38–68 (2014); Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect*, 87 INT'L AFFAIRS 825, 838–46 (2011); Patrick Wintour et al., *Winning Over Obama Was Key Moment in Securing Libya No-Fly Zone*, GUARDIAN (U.K.), Mar. 18, 2011, <https://www.theguardian.com/world/2011/mar/18/obama-libya-no-fly-zone>.

231. See NATO, *NATO Ready to Support International Efforts on Libya* (Mar. 10, 2011), http://www.nato.int/cps/en/natolive/news_71446.htm.

232. Arab League, Res. No. 7360, *The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position* (Mar. 12, 2011).

233. See U.N. SCOR, 66th Sess., 6498th mtg. at 8, 10, U.N. Doc. S/PV.6498 (Mar. 17, 2011).

The Libya case is not unique. The license to use force in collective self-defense also enables states to magnify military conflicts. A state that has been attacked may reasonably pressure its allies to fight on its behalf. Indeed, many states have entered into mutual defense pacts that effectively require them to step in if a party is attacked. For example, NATO states have agreed that, if one or more of them is attacked, “each of them, in the exercise of the right of individual or collective self-defense . . . will assist the Party or Parties so attacked,” including with the use of armed force.²³⁴ NATO states are obligated to insert themselves into a conflict that does not directly involve them—in other words, to expand or exacerbate the conflict.

All of this is to some extent hiding in plain sight. International lawyers know that the *jus ad bellum* licenses some military conflicts. Moreover, the habitual justifications for permitting these conflicts is consistent with my theory: some conflicts contribute to peace and to the realization of other shared goals. The UN Charter itself provides that the Security Council may authorize force in order to secure a peace.²³⁵ Here, conflict is an instrument for, not antithetical to, peace. Similarly, the *jus ad bellum* is sometimes said to permit defensive force to deter acts of aggression.²³⁶ Enabling conflict is again part of the project for suppressing it. And yet, when international lawyers describe or assess the *jus ad bellum*'s role in the global order, they almost uniformly do so through the lens of the cooperation thesis.²³⁷ They suggest—wrongly—that international law's role is to enable peace by consistently curbing war. The *jus ad bellum* enables peace in part by enabling war.

V. CONCLUSION

The cooperation thesis permeates current thinking on international law but is unfounded. The thesis posits that international law serves, at bottom, to curtail conflict, whether as an end in itself or as a means for achieving other common goals. That view does not capture or explain much of the actual practice of international law. Global actors use international law as the thesis envisions, but they also use it for the opposite: to challenge, compete, and disagree with one another. The thesis's conceptual flaw is in assuming that these two kinds of interactions are antithetical—that one detracts from and must be reduced in order to achieve the other. In fact,

234. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

235. U.N. Charter arts. 39, 42.

236. E.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 176 (4th ed. 2005) (“The evolution of the idea of self-defence in international law goes ‘hand in hand’ with the prohibition of aggression.”); W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION* 83, 88 (1992) (arguing that outlawing defensive force in response to low-intensity attacks would “allow the low-level and protracted belligerent to operate with impunity outside the target state” and thus would “probably lead to a net increase in violence in international politics.”).

237. See *supra* notes 3, 227, and accompanying text.

international law fosters both simultaneously. It helps the participants find and work toward areas of agreement, even as it helps them crystallize and sharpen their differences. Neither set of interactions is inherently problematic because the two are interdependent.

My argument that conflict is part of what international law is for—and not just a perversion or problem for international law to overcome—has far-reaching implications. First, it reduces the bite of the two most prominent attacks on international law, and the significance of the arguments in response. As discussed, international law is widely criticized as lacking—either illegitimate or ineffective—when it does not satisfy the cooperation thesis. These assessments are overstated and need to be refined. The conflicts that international law enables are often instruments for the kind of cooperation that the thesis envisions. This is true even of conflicts that get heated or lack substantive resolution. And when a conflict does not lead to that kind of cooperation, it might still do other important work in the global order. Rather than assume that it is pathological, we ought to analyze and assess it as part of the legal enterprise.

Second, my argument cautions against the frequent instinct to “fix” international law so that it better satisfies the cooperation thesis. Because cooperation and conflict are symbiotic, and global actors use international law for both, persistent efforts to reduce the conflict in international law will often fail and can be counterproductive. Rather than instinctively promote one set of interactions at the expense of the other, we ought to preserve or even create space for both—though, of course, the appropriate mix between them will vary. It will depend on what’s feasible, what’s at stake, and how the cooperation and conflict manifest in a particular context.

Finally, my argument sets the stage for a new research agenda on international law. Once we accept that ineradicable legal conflict is not just politics or evidence of international law’s dysfunction, we can study when, why, and with what effect global actors use international law in order to disagree. Which functions are served, and which are undercut, when specific legal conflicts continue without resolution? What are the benefits, drawbacks, and effects of structuring conflict in particular ways? When does conflict help stabilize the global order and reduce the risk of devastating war, and when might it be disruptive and increase that risk? These questions are central to the operation of international law. But to examine them, we first must put to rest the cooperation thesis’s misguided vision and accept that enabling conflict is itself part of the project of international law.