

## CONSTRUCTING AN INTERNATIONAL COMMUNITY

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### ABSTRACT

*What unites states and other global actors around a shared governance project? How does the group—what I will call an “international community”—coalesce and stay engaged in the enterprise? A frequent assumption is that an international community is cemented by its members’ commonalities and depleted by their intractable disagreements. This article critiques that assumption and presents, as an alternative, a theory that accounts for the combined integration and discord that actually characterize most global governance associations. I argue that conflict, especially conflict that manifests in law, is not necessarily corrosive to an international community. To the contrary, it often is a unifying force that helps constitute and fortify the community and support the governance project. As such, international legal conflict can have systemic value for the global order, even when it lacks substantive resolution. The implications for the design and practice of international law are far-reaching.*

### I. INTRODUCTION

What unites states and other global actors around a governance project? How does the group—what I will call an “international community”—coalesce and stay engaged in the joint enterprise?<sup>1</sup> A frequent assumption is that an international community is cemented by its members’ commonalities and depleted by their intractable disagreements. I argue in this article that that assumption is incorrect. And I present, as an alternative, a theory that accounts for the combined integration and discord that actually characterize most global

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<sup>1</sup> The phrase “international community” is often used casually, as rhetorical shorthand for the set of actors who mingle across national borders. See Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. INT’L L. 961, 964 (2002) (describing the use of the phrase as a “rhetorical device” or “convenient descriptive harness” for “the expanding set of ‘persons’ identified in orthodox accounts of the subjects of international law”). Beyond that usage, the phrase is abstract and lacks much accepted content. See STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW* 59–60 (2015) (“For the most part, international lawyers *assume* the existence of an international community of states . . .” or have “at best a meager understanding [of it.]”); Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT’L L. & POL. 1049, 1065 (2012) (“The term community is vague and over-used; it seems deeply weighted with meaning yet utterly abstract.”). My goal is not to give the phrase more precise content but rather to address the conceptual question of how global governance associations—what I am calling international communities—are established and maintained.

governance associations. As I will explain, this theory is not just of academic interest. It has far-reaching implications for the design and practice of international law.

The assumption that I aim to refute is evident in much of the literature on international law. Take the prominent claim that a universal international community—the so-called international community as a whole—must “embody [the] common interest[s] of all States and, indirectly, of mankind.”<sup>2</sup> Here, the community’s existence and strength are contingent on certain shared precepts.<sup>3</sup> Thus, *jus cogens* norms and *erga omnes* obligations—the two principles in positive law that purport to define this community—are said to promise a “higher unity, . . . the representation and prioritization of common interests as against the egoistic interests of individuals.”<sup>4</sup> By the same token, the regular disregard for those interests and the diversity and discord in the world are thought to betray that any universal community is only nascent or aspirational.<sup>5</sup>

The flawed assumption also animates the principal interdisciplinary theories on international law. These theories focus not on any universal community but on discrete subcommunities that organize around specific governance issues. Various terms are used for such communities: regimes,<sup>6</sup> networks,<sup>7</sup> interpretive communities,<sup>8</sup> and so

<sup>2</sup> Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 197, 227 (1993).

<sup>3</sup> See also, e.g., HEDLEY BULL, *THE ANARCHICAL SOCIETY* 13 (2d ed. 1995) (“A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.” (emphasis omitted)); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 10 (1995) (arguing that the international community is grounded in a set of “shared moral imperatives and values”); LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 10 (Ronald F. Roxburgh ed., 3d ed. 2005) (“[T]hese common interests, and the necessary intercourse which serves these interests, have long since united the separate States into an indivisible community.”); THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 25 (2015) (“The idea of ‘community’ introduces the conceptualization of a collective with shared interests and values.”); Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529, 566 (1998) (“The international community thus is a community based on an agreement on rules.”).

<sup>4</sup> Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 219, 245 (1997); see also, e.g., Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 EUR. J. INT’L L. 387, 394 (2010) (arguing that these principles evince a “trend towards the protection of community interests”).

<sup>5</sup> E.g., Kritsiotis, *supra* note 1, at 990–91 (arguing that any international community is shallow if it repeatedly fails to realize values that it defines as foundational); Philip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 816 (1990) (book review) (arguing that, because “we have no common, generally accepted world ideology,” we have not one international community but “many international communities . . . with their own distinctive values, practices, and belief systems”); Andreas Paulus, *International Community*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L., para. 28 (last updated Mar. 2013) (“[I]t appears that in the view of the diversity of contemporary international law, ‘fragmentation’ rather than community has become the key term to describe contemporary international society.” (citation omitted)).

<sup>6</sup> Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1983) (defining “regimes” as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations” (emphasis added)).

<sup>7</sup> ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 3, 15 (2004) (defining “networks” as groups of governmental officials who share “specific aims and activities” and claiming that these networks portend a “new world order . . . that institutionalizes cooperation and sufficiently contains conflict”).

<sup>8</sup> IAN JOHNSTONE, *THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS* 42 (2011) (defining as a legal “interpretive community” those who “share a perspective and way of understanding the world”).

forth.<sup>9</sup> Despite meaningful differences among these theories, they all define global governance associations by that which the participants share—common values, goals, interests, or practices.<sup>10</sup> Again, the participants' commonalities are what bind them together. Internal divisions are treated as weaknesses that must be overcome, lest they detract from the association.<sup>11</sup>

The idea that an international community is rooted in common precepts and impeded by internal discord portends a particular role for international law. It suggests that, in order to establish and fortify global governance relationships, international law must reinforce the participants' shared tenets and deter or defuse their disputes. For example, this is why many analysts describe as uniquely robust the community that centers at the World Trade Organization (WTO): the participants share an elaborate set of rules and processes for promoting a common trade agenda and curbing the disputes that might otherwise get in the way.<sup>12</sup>

In this article, I draw on work in political philosophy, sociology, and U.S. constitutional legal theory to expose a problem with that conception of an international community and to present an alternative that better captures a world with so much heterogeneity and division. The alternative is a decidedly political community. Members are bound together in a joint governance project and have certain practices and policies in common. But they also disagree, at times intently and without substantive resolution, about core facets of their association. The key difference between the now dominant conception and my own is that, here, irresolvable disagreements and disputes are not necessarily corrosive to the association. To the contrary, conflict can be and often is a unifying force that binds an international community together.<sup>13</sup> Thus, international law might construct a community—and bolster its

<sup>9</sup> E.g., JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 80 (2010) (arguing that, as the participants in a “community of practice” “coalesce[] around the emergence of common histories, values or norms,” a “deeper sense of community” develops); Cohen, *supra* note 1, at 1069 (“[A]n international legal community is defined by the rules of legitimate lawmaking that it shares.”); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992) (defining as an “epistemic community” the actors who are unified by shared beliefs, notions of validity, and practices).

<sup>10</sup> This is evident even in the language that is used to describe these communities. See *supra* notes 6–9 and corresponding text; see also *infra* Part II.A.

<sup>11</sup> See *infra* notes 27, 31–37 and corresponding text.

<sup>12</sup> 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); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 125–26 (2009).

<sup>13</sup> A few scholars have hinted at a similar claim but have not explored it or its implications in any depth. Most notably, Martti Koskenniemi has said that “a universal community is not only presumed but constructed by an international law that precisely due to its indeterminacy” invites conflict about its meaning and objectives. Martti Koskenniemi, *Legal Universalism: Between Morality and Power in a World of States*, in *LAW, JUSTICE, AND POWER: BETWEEN REASON AND WILL* 46, 62 (Sinkwan Cheng ed., 2004). Koskenniemi’s claim is that international law gives political adversaries a shared foundation for arguing as equals and “in terms of an assumed universality.” Martti Koskenniemi, *What Is International Law For?*, in *INTERNATIONAL LAW* 57, 77 (Malcolm D. Evans ed., 2d ed. 2006). Yet Koskenniemi does not elaborate on his claim, except to say that it supports formalism in, and enables the emancipation through, international law. See *id.* Likewise, Amy Kapczynski uses the access to knowledge movement to show that “engagement with law can bring actors locked in a struggle over law into alignment with one another” and thus can “have an integrative effect on social actors.” Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 809–10 (2008). Kapczynski concludes her study by suggesting that legal struggles might help create global polities. *Id.* at 881. But she does not pursue that possibility or address it beyond the context of the access to knowledge movement. Finally, Samantha Besson suggests that “[i]t is time to go beyond ‘dispute-settlement’-type conceptions of the

governance project—not by consistently pressing for consensus or reconciliation but by at times doing almost the opposite: enabling the participants to disagree.

The article proceeds as follows. Part II elaborates on the prevailing conception of an international community and then presents the theoretical construct for my alternative. I argue that an international community is ultimately constituted through the participants' interactions about their joint enterprise.<sup>14</sup> These interactions can be harmonious but are often contentious. In groups that are, like many international communities, highly diverse or diffuse, conflict plays a particularly important integrative role. Such groups need conflict to bind themselves because their members otherwise have little in common or limited opportunities to interact. To be sure, not all conflicts are constructive for the group; some are extremely damaging. But conflicts that manifest in law have the unique potential to unify, even as they divide, a group. The nature of a legal argument is to purport to speak not just for oneself but on behalf of a group. The argument helps construct the group by presupposing that it exists and then purporting to define its attributes. Further, some legal conflicts are especially powerful in this respect. Building on Philip Bobbitt's work in U.S. constitutional law, we can call these conflicts "ethical" because they focus the participants on the ethos—the shape and character—of the mutual association.<sup>15</sup>

Parts III and IV show that ethical conflict is routine in international law. Part III assesses the two principles in positive law that expressly speak of an international community: *jus cogens* norms and *erga omnes* obligations. These principles do not establish operative rules of decision, so their relevance and role in the global order have long been uncertain. I argue that they serve to foster ethical conflict. They invite global actors to fight about what an all-encompassing community is and stands for. They thus help construct the community as a going concern that binds the participants together. To clarify, my claim is not that this community is robust or even that it is truly universal. My claim is that a community that purports to be universal is constituted, not diminished, through ethical legal conflict. Disputes about *jus cogens* norms and *erga omnes* obligations unify the participants around a shared governance project, even as the contours of that project remain contested. Part IV shows that ethical legal conflict is not limited to those two principles. It also serves a unifying function in highly integrated communities, like the one at the WTO. The WTO community

relations among independent albeit integrated legal orders and realise the integrating and community-shaping capacity of conflict." SAMANTHA BESSON, *THE MORALITY OF CONFLICT* 534 (2005). Besson's discussion of this point—particularly, of its relevance to modern international law—is brief.

<sup>14</sup> The basic insight that global interactions can shape the participants' identities and behavior finds support in constructivist theories on international relations and international law. See Alexander Wendt, *Constructing International Politics*, *INT'L SECURITY* 71–72 (1995) (“[T]he fundamental structures of international politics are social rather than strictly material . . . and . . . these structures shape actors' identities and interests. . . .”); see also PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 42 (Polity G. Raymond & J. Thompson trans., 1991) (describing legal language as “creative speech which brings into existence that which it utters”).

<sup>15</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE* 94 (1982). In *Constitutional Fate*, Bobbitt described ethical argument as resting on “a characterization of American institutions and the role within them of the American people.” *Id.* at 94–95. Bobbitt also advanced, as a particular vision of the U.S. constitutional ethos, the commitment to limited government. *Id.* at 230. He and others have since recognized that that vision is too narrow and not the only plausible way to characterize the American ethos. See Philip Bobbitt, *Reflections Inspired by My Critics*, 72 *TEX. L. REV.* 1869, 1937 (1994); see also Richard Primus, Response, *The Functions of Ethical Originalism*, 88 *TEX. L. REV.* SEE ALSO 79, 80–81 (2010).

is constituted both by the participants' shared precepts and by their protracted disagreements and divisions.

Together, Parts II through IV argue that international legal conflict can have systemic value either for particular regulatory arrangements or for the global order as a whole. This value does not turn on whether the conflict is ultimately resolved and is sometimes best achieved by leaving it *unresolved*. The article thus counters the common view that international law matters to the extent that it shapes behavior toward or otherwise advances specific policy objectives.<sup>16</sup> Even when international law does not do that work, it might do other important work. It might foster productive conflicts and thereby help preserve or fortify global governance relationships. Part V discusses some of the implications for the practice and theory of international law.

## II. TWO CONCEPTIONS OF COMMUNITY

To start, I present two conceptions of an international community—the now dominant one and my alternative. The two have important similarities. Each is a positive theory of how an international community is constituted and sustained. Neither assumes that community members will have a particular level or kind of attachment to the group. Connections to the group might be affective or cognitive, and are likely to be fluid and varied. Some members might be extremely influential or invested in the community, while others are more peripheral or disengaged. The community's boundaries might even be contested or difficult to ascertain. The inquiry is not about the defining criteria of an international community. It is about how a recognizable community—a governance association that exists as a social fact—comes to be and endure.

Because the theories are descriptive and analytic, they do not necessarily address related normative questions, like whether particular communities are fair, who ought to participate them, or what their governance projects ought to entail. My only normative assumption is that it is desirable to have some fairly resilient international communities. An international community shapes how the participants relate to and interact with one another in a given domain of human activity; it provides the relational infrastructure for international law. As such, having an international community makes any international legal project, if not possible, at least more easily realizable than it otherwise would be.<sup>17</sup>

Finally, both theories recognize that an international community is constituted at least in part by its members' commonalities. Shared interests, values, goals, or practices can bind the

<sup>16</sup> This view is perhaps most evident in discussions of the efficacy of international law. International law's efficacy is widely defined in terms of whether it advances a prescribed policy, as if that is the only plausible metric for assessing its impact. *See, e.g.*, MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 11 (2008) (“[S]anctions . . . help to ensure that international law compliance is occurring on a level sufficient to consider it effective law.”); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 13, 25, 29 (2008) (presenting as a theory of “how international law works” a theory about states' compliance and attainment of shared gains); JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 98, 101 (2015) (asserting that the “whole point of international law is to create a structure whereby the cost of shifting strategy away from compliance becomes higher than it would be without legal regulation in a particular area,” and that “[t]he status of international law *as law* is seriously called into doubt” if it does not do that work).

<sup>17</sup> On the point that an international legal practice is inherently interactional, see BRUNNÉE & TOOPE, *supra* note 9.

participants together and help construct their association. The flaw in the dominant theory—and the thing that distinguishes it from my own—is that it assumes that conflict detracts from or evinces weaknesses in the community. I argue that conflict is often a unifying force that binds and strengthens the community.

### A. *Community as Constituted by Shared Precepts*

International legal theorists often suggest that an international community can be constituted only by commonality. The more that community members share, the thicker or stronger their community is thought to be. Of course, community members inevitably also disagree. But in this conception, ineradicable diversity and discord detract from, rather than enhance, the community. The community exists despite, not because of, those qualities.

Scholars who address the generic or universal international community almost always ground it in shared interests or values.<sup>18</sup> They treat disagreements and discord as evidence that the community is weak. An approach that is especially prominent in Continental Europe draws on the work of German sociologist Ferdinand Tönnies. Tönnies famously distinguished between a community (*gemeinschaft*) and a society (*gesellschaft*) as two forms of social ordering.<sup>19</sup> He claimed that community bonds are stronger. Members of a society are atomized and pursue only their own interests, but community members also act to advance collective interests.<sup>20</sup> Extending that logic to the global sphere means that the defining feature of an international community is that it, too, advances collective interests—interests that belong not to specific states but to all of them or even to humanity itself. When community members are divided by self-interest, their community is thought to be weak or unrealized.<sup>21</sup>

Other accounts of the generic international community reflect similar themes. For example, James Brierly claimed that “the acid test of the reality of a community is that common standards of conduct should be held with a conviction strong enough to induce its members to take common action.”<sup>22</sup> For Brierly, “the main and obvious cause” of the “weakness of the

<sup>18</sup> See sources at *supra* notes 2–5. There is a notable exception. Myres McDougal, Michael Reisman, and Andrew Willard explain that a “world community” is created through interdependence: “‘Community’ designates interactions in which interdetermination or interdependence in the shaping and sharing of all values attain an intensity at which participants in pursuit of their own objectives must regularly take account of the activities and demands of others.” Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807, 809 (1988). These authors contend that, once people recognize that they are interdependent, they do not necessarily act in the common interest, but they make and assess claims in terms of a common interest. See *id.* at 810, 834, 846. That account of an international community is consistent with my own, though it does not specifically focus on conflict’s constitutive role.

<sup>19</sup> FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* 52 (Jose Harris ed., Margaret Hollis trans., 2001).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., TOMASZ WIDLAK, FROM INTERNATIONAL SOCIETY TO INTERNATIONAL COMMUNITY: THE CONSTITUTIONAL EVOLUTION OF INTERNATIONAL LAW 16 (2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2707814](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707814) (distinguishing a “weaker, more pluralistic” society from a community that has “a thicker and denser layer of common values, interests and norms” and that “reach[es] common goals in the interest of the whole”); Simma, *supra* note 4, at 245 (“[T]he element which distinguishes a ‘community’ from its components is . . . the representation and prioritization of common interests as against the egoistic interests of individuals. A mere society (*Gesellschaft*) on the contrary, does not presuppose more than factual contacts among a number of individuals.”).

<sup>22</sup> James Leslie Brierly, *The Rule of Law in International Society*, in *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY THE LATE JAMES LESLIE BRIERLY* 250, 252 (Hersch Lauterpacht ed., 1958).

community sense in international society” was the world’s division into strong subunits, in the form of sovereign states.<sup>23</sup> Likewise, Georges Abi-Saab has argued that an international community depends on two factors: (1) “a community of interests or of values,” and (2) the minimization of conflict “to manage the disintegration of the community.”<sup>24</sup> Abi-Saab claimed that “the end of the Cold War, far from pushing international society towards a more integrated global international community, has introduced new dangers with new bones of contention among the members of this society, which create the risk of making it evolve in the opposite direction.”<sup>25</sup> Abi-Saab’s worry was that disagreements and divisions would erode the international community.

Over the past fifteen or so years, international legal theory has become more interdisciplinary. The dominant interdisciplinary theories on international law focus not on any universal community but on discrete subcommunities with issue-specific governance projects. These theories still assume that a community is constituted by commonality and diminished by discord. Consider the rational choice approach in international relations. According to this approach, global actors create joint governance associations in order to realize mutual objectives or solve common problems.<sup>26</sup> That shared agenda is what binds the participants together. And while they might at times disagree about the agenda, their disputes are treated as obstacles to the governance project that ought to be overcome. Thus, most of the rational choice scholarship on international law asks either how to buttress shared norms—usually, norms that have been collectively prescribed in law—or how to deter or settle related disputes.<sup>27</sup>

A similar assumption is evident in constructivist theories on “communities of practice,” though as I will explain, some of these theories come closer to my own. Emanuel Adler has defined a community of practice as consisting of “people who are informally as well as contextually bound by a shared interest in learning and applying a common practice.”<sup>28</sup> Adler acknowledges that community members occasionally disagree.<sup>29</sup> Yet what defines and unites them as a community is their “like-mindedness” and shared practice—common “routines, words, tools, ways of doing things, stories, symbols, and discourse.”<sup>30</sup> Legal

<sup>23</sup> *Id.* at 254.

<sup>24</sup> Georges Abi-Saab, *Whither the International Community?*, 9 EUR. J. INT’L L. 248, 251 (1998).

<sup>25</sup> *Id.* at 265.

<sup>26</sup> See, e.g., Robert O. Keohane, *The Demand for International Regimes*, 36 INT’L ORG. 325, 334 (1982) (“Regimes are developed in part because actors in world politics believe that with such arrangements they will be able to make mutually beneficial agreements that would otherwise be difficult or impossible to attain.”).

<sup>27</sup> E.g., GUZMAN, *supra* note 16, at 13, 25, 29 (presenting a theory of how international law fosters compliance with shared norms and thereby facilitates the attainment of mutual gains); BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW* 4–10 (2016) (arguing that different institutions have unique design features to overcome specific obstacles to the shared agendas); OHLIN, *supra* note 16, at 97, 103 (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 AJIL 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.”).

<sup>28</sup> EMANUEL ADLER, *COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS* 15 (2005).

<sup>29</sup> *Id.* at 22 (“The joint enterprise of members of a community of practice does not necessarily mean a common goal or vision, although in most cases it does.”).

<sup>30</sup> *Id.* at 15.

scholars who build on Adler's work to describe the communities that engage with international law likewise define these communities by that which the participants share. More telling, they cite ineradicable divisions as evidence either that the participants do not belong to the same community or that their community is thin.<sup>31</sup>

Ian Johnstone's account of what he calls "interpretive communities" is illustrative.<sup>32</sup> According to Johnstone, an interpretive community consists of actors who participate in the same field of legal practice.<sup>33</sup> What makes them a community seems to be that they "share a perspective and way of understanding the world acquired through their immersion in the law and interaction with one another."<sup>34</sup> Like Adler, Johnstone recognizes that these participants "may not share all the same values."<sup>35</sup> Further, he underscores that conflict can be constructive for a community because it can help the participants find more common ground.<sup>36</sup> But Johnstone ultimately insists that "[i]f after extensive deliberation on an issue international legal opinion is sharply divided"—in other words, if consensus is unattainable and the dispute persists—"then almost by definition no interpretive 'community' exists, or perhaps there are multiple communities."<sup>37</sup> Here again, protracted disputes detract from or betray weaknesses in the community.

### *B. Community as Constituted Partly by Conflict*

A conception of community that is grounded in shared precepts and impeded by internal division is oddly disconnected from the real world. Many global governance associations are, at once, highly integrated and replete with diversity and discord. Below, I offer an alternative conception that captures that reality. In this account, global actors engage together on a governance project, even as they disagree about its contours. The community is constituted through their interactions about the joint project. These interactions have the potential to

<sup>31</sup> *E.g.*, BRUNNÉE & TOOPE, *supra* note 9, at 80 (arguing that a "thin" community of international legal practice" might exist on the basis of "very limited shared understandings" but that "a deeper sense of community" develops as the participants "coalesce[] around the emergence of common histories, values or norms"); Cohen, *supra* note 1, at 1066, 1067, 1069 (asserting that a "legal community . . . is constituted by its members shared acceptance of certain ground rules and their shared expectations about good and bad argument," so while members might disagree on substance, their "disagreements over the legitimacy of particular sources may mean that international law is no longer defined by a single legal community"); *see also* Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377, 377, 380 (1989) (arguing that if an epistemic community "with a common perspective is able to acquire and sustain control over a substantive policy domain," it will "produce convergent state policies" and "the associated regime will become stronger").

<sup>32</sup> JOHNSTONE, *supra* note 8, at 33–54.

<sup>33</sup> *Id.* at 41–44.

<sup>34</sup> *See id.* at 42.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 32 ("Legal argumentation . . . does help to solidify agreement."). Other scholars also underscore that conflict is often part of the process of building a consensus or developing new norms. *E.g.*, Thomas Risse, "Let's Argue!": *Communicative Action in World Politics*, 54 INT'L ORG. 1, 7 (2000) ("Arguing implies that actors try 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, Jutta Brunnée & Ellen Hey eds., 2007) ("[T]he process of normative evolution is oftentimes conflictual."). These scholars suggest that conflict is constructive for a community to the extent that it reinforces or generates some common ground. However, they have not questioned and at times seem to endorse the view that conflict itself betrays a deficiency and must be resolved in order to realize any gains.

<sup>37</sup> JOHNSTONE, *supra* note 8, at 44.



construct and fortify the group no matter whether they are harmonious or persistently conflictual.

1. *Conflict's Constitutive Role.* The idea that conflict can constitute a community might seem counterintuitive but is not new.<sup>38</sup> Bernard Yack has attributed the idea to Aristotle himself. An Aristotelian community is, according to Yack, comprised of “individuals who differ from each other in some significant way.”<sup>39</sup> Of course, that kind of diversity creates the grounds for conflict. People with real differences invariably disagree about aspects of their social organization. But as Yack explains, Aristotle understood diversity as “a necessary element of community rather than the obstacle to social harmony that community seeks to overcome.”<sup>40</sup> People coalesce into a community not necessarily by overcoming their differences but by engaging together in what Aristotle called a practice of justice—a practice of trying to establish and hold one another accountable to standards that are generalizable for the group.<sup>41</sup>

The practice of justice helps unify a community both by solidifying areas of agreement and by structuring persistent conflict. First, community members who engage in the practice might eventually converge on a common substantive policy. If they do, the policy can be a communal glue that binds them.<sup>42</sup> Second, even when—as is more often the case—a practice of justice “structures *nothing more than the way we engage in conflict* with each other, it still reinforces the sense that we participate with others in a community.”<sup>43</sup> It does so because the people who partake in the practice presuppose that they are in a governance project together. They might disagree about which substantive standards are appropriate for the group, or about who may define or apply those standards. But in arguing about those issues, they take for granted that the group has generalizable standards. They assume that the group *is* a group.

The blend of commonality and conflict that binds a given community depends on its specific makeup. Yet highly heterogeneous and loosely structured communities are especially dependent on conflict to unify and sustain themselves. Members of these communities have little in common or few opportunities or reasons to interact. For them, the most plausible alternative to coalescing through conflict is not to coalesce through a drastic uptick in social unity. It is to have a weaker community—one in which members are less connected to the group or to its governance project.

<sup>38</sup> See, e.g., LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 137 (1956) (“[C]onflict, rather than being disruptive and dissociating, may indeed be a means of balancing and hence maintaining a society as a going concern.”); BERNARD CRICK, *IN DEFENCE OF POLITICS* 24 (1962) (“Diverse groups hold together . . . because they practice politics—not because they agree about ‘fundamentals’ . . . .”); MAX GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* 23 (1955) (“[C]ustom unites where it divides . . . .”); DON HERZOG, *HOUSEHOLD POLITICS* 128 (2013) (“Conflict, I’ll argue, isn’t the opposite of social order. It’s what social order usually is.”); Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, 22 *POL. THEORY* 203, 206 (1994) (reviewing literature on how “social conflict produce[s] . . . valuable ties that hold modern democratic societies together and provide them with the strength and cohesion they need”).

<sup>39</sup> BERNARD YACK, *THE PROBLEMS OF A POLITICAL ANIMAL* 29 (1993).

<sup>40</sup> *Id.* at 29–30; see also *id.* at 15 (“Aristotle argues against Plato that the elimination of social heterogeneity threatens to eliminate political community itself; *community* signifies for Aristotle a combination of sharing and differentiation rather than social unity.” (citation omitted)).

<sup>41</sup> *Id.* at 40–42.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 43 (emphasis added).

To appreciate how conflict can constitute a group, imagine that dozens of loners live on a deserted island. The islanders do not have much in common or much reason to fight. They have almost nothing to do with one another. We would hardly call their bunch a community. Now imagine that they get together once a week to fight over island resources. At each meeting, they disagree—fiercely and intently—over the use and distribution of the available resources. Depending on the week, some islanders get what they want, while others bitterly lose out. Here, they at least have a recognizable association. Their resource disputes help constitute, rather than diminish, their association because they congregate as a group in order to have those disputes. Without the resources to fight over, they would not interact or have a common enterprise.<sup>44</sup>

It bears underscoring that a community that is constituted largely through conflict is not necessarily weaker or more immature than one that displays high levels of social unity. Return to the fantasy island. Assume now that the islanders terminate their weekly meetings and anoint a king to make all resource decisions on their behalf. The king acts arbitrarily, but the islanders follow his rule because they see themselves as his subjects and would rather spend their time leading their loner lives than arguing over resources. In this scenario, the islanders share a governance project and have minimal levels of conflict. If their earlier conflicts were corrosive to or did not help constitute their community, then anointing the king would have strengthened their community. But surely, the group has become less cohesive and integrated. The islanders are completely checked out of their governance project, no longer engaging together on it.

Some of the constructivist work on communities of practice gestures in a similar direction. It highlights that international communities are constituted through social interaction.<sup>45</sup> And it acknowledges that the relevant interactions can be discordant.<sup>46</sup> But because this work ultimately defines a community by that which the members share—by their common practice—it misses, or at least does not press, the key conceptual claim that I am advancing here: a community is constituted not just by commonality but also by disharmony and discord. In order to interact as a group, the islanders needed a shared practice on when, where, and why they would meet. But that base of commonality was insufficient to generate their interactions. They also needed conflict. Without the resource disputes, the islanders would not have created or used a shared practice—or, therefore, engaged together on their governance project.

Readers might intuit that the community would be stronger still if its members interacted regularly *and* had minimal conflict. However, that vision of a community is completely unrealizable, and efforts to achieve it are often repressive.<sup>47</sup> Even very homogenous and tight-knit groups are replete with conflict. The commonalities that tie together the members of such groups and cause their lives to be so intertwined also give them many reasons and occasions

<sup>44</sup> To be clear, my point is not that the islanders have nothing in common. My point is that their community is constituted both by their commonality—here, their shared project to allocate resources—and by the associated conflicts. I amplify this point in the next few paragraphs.

<sup>45</sup> ADLER, *supra* note 28, at 15, 23; BRUNNÉE & TOOPE, *supra* note 9, at 70, 72.

<sup>46</sup> ADLER, *supra* note 28, at 21; BRUNNÉE & TOOPE, *supra* note 9, at 63.

<sup>47</sup> HERZOG, *supra* note 38, at 146.

to disagree.<sup>48</sup> In other words, conflict can bring people together, but coming together also brings conflict.<sup>49</sup> It is a part of, not inherently corrosive to, a social order.

Because conflict is inevitable in social life, creating space for it to occur routinely and in relatively productive ways serves an important systemic function; it helps stabilize and fortify a community in the face of inevitable divisions. If nothing else, a conflict exposes individual priorities and positions of relative strength or weakness within the group. When conflict is routinized, a community has ample opportunity to adjust its social structure so that internal strains do not become too intense to withstand.<sup>50</sup> To be clear, this “rebalancing” does not necessarily entail resolving or addressing the underlying dispute. The balance that is struck at any particular moment might be transitory or contentious. The social structure’s contestability is itself what strengthens the association. It reduces the risk that tensions will build, antagonistic alliances will harden, and conflicts will express themselves in more virulent ways. Thus, even when a dispute does not lead to substantive change or resolution, it might serve to clear the air and release pent up hostilities that would otherwise fester and become corrosive.<sup>51</sup> The point is that conflict is not only inevitable in human groups; it can also be productive for them.

It is not always. Some conflicts clearly diminish or threaten to tear apart a community. If the weekly meetings on the island become too combative, attendance might drop. Some islanders might prefer to do without the allocated resources than to engage with the group. Alternatively, a dissatisfied bunch might revolt and form a splinter group that competes with the original one for island resources. In either event, the community could dissipate. As several theorists have explained, however, the best way to avoid such destructive conflicts—and to maintain the community as a going concern—is not to try to ignore, suppress, or resolve intractable divisions. It is to enable community members to have their disputes routinely and on terms that reinforce, rather than undercut, their mutual association.<sup>52</sup> The trick, then, is to foster the “right” kinds of conflict.

2. *Law’s Constitutive Role.* I argue in the remainder of the article that international law can be an “eminently efficient producer of integration and socialization” when it facilitates and structures—but does not necessarily defuse—conflict.<sup>53</sup> Some readers might object to the

<sup>48</sup> For evidence, see Max Gluckman’s anthropological work, *supra* note 38.

<sup>49</sup> See generally HERZOG, *supra* note 38, at 123–47.

<sup>50</sup> COSER, *supra* note 38, at 79, 151–52.

<sup>51</sup> CHANTAL MOUFFE, *AGONISTICS* 8 (2013) (“[When] passions cannot be given a democratic outlet . . . [t]he ground is . . . [laid] for the multiplication of confrontations over non-negotiable moral values, with all the manifestations of violence that such confrontations entail.”); COSER, *supra* note 38, at 41 (“Conflict serves as an outlet for the release of hostilities which, were no such outlet provided, would sunder the relation between antagonists.”); GEORG SIMMEL, *CONFLICT: THE WEB OF GROUP AFFILIATIONS* 27 (1955) (“The sharpening of contrasts may be provoked directly for the sake of its own diminution . . . in the expectation that the antagonism, once it reaches a certain limit, will end because of exhaustion or the realization of its futility.”).

<sup>52</sup> *E.g.*, *supra* notes 41–43 and corresponding text (discussing the Aristotelian practice of justice); CHANTAL MOUFFE, *ON THE POLITICAL* 20 (2005) (explaining that adversaries “must see themselves as belonging to the same political association . . . [and] sharing a common symbolic space,” even as they continue to disagree); COSER, *supra* note 38, at 157 (“Conflict tends to be dysfunctional for a social structure in which there is no or insufficient toleration and institutionalization of conflict.”); *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” (emphasis omitted)).

<sup>53</sup> Hirschman, *supra* note 38, at 206.

very idea that this is what international law does. I start by addressing that objection. Next, I look to U.S. constitutional legal theory for insights on how legal conflict can construct a political community. In Parts III and IV of the article, I apply these insights to international law.

*a. Law as the ground rules for conflict*

Many international lawyers define international law as a tool not for conflict but for consensus and reconciliation.<sup>54</sup> They treat conflict as if it either operates outside of international law, in the domain of politics,<sup>55</sup> or is a problem for international law to mitigate.<sup>56</sup> For these lawyers, the claim that international law affirmatively enables conflict might seem apocryphal. However, a prominent school of thought already defines international law as an argumentative practice. International law establishes a set of ground rules—texts, processes, methods, sources of authority, and so on—that structure cross-border interactions. The interactions can be congenial. Participants can use the ground rules to identify and work toward common aims. But the interactions can also be contentious. Adversaries use the same ground rules to compete and disagree with one another.<sup>57</sup>

I have built on that idea in other work to make three claims that set the stage for my argument here.<sup>58</sup> First, international law does not merely channel the conflicts that would occur in its absence. International law affirmatively enables conflict. Having shared ground rules helps the participants crystallize and focus on their disagreements. It gives them normative ammunition to condemn particular situations as problematic. It establishes mechanisms through which they can communicate their discontent and demand change. And it creates incentives to fight by

<sup>54</sup> The doctrine on sources itself defines international law in consensual terms. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 ICJ REP. 14, para. 269 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the State concerned. . . .”).

<sup>55</sup> 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.”).

<sup>56</sup> E.g., RATNER, *supra* note 1, at 1 (“International law represents a system of norms and processes for resolving competing claims. . . .”); Anthony D’Amato, *Groundwork for International Law*, 108 AJIL 650, 653 (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.”); Rosalyn Higgins, *Peaceful Settlement of Disputes*, Address at the American Society of International Law Annual Dinner (Apr. 6, 1995), in 89 ASIL 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)).

<sup>57</sup> MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 565, 567–68 (2d ed. 2006) (describing international law as a shared grammar that does not necessarily reflect the participants’ shared substantive commitments but instead structures an argumentative practice); Cohen, *supra* note 1, at 1067 (“Law provides a medium for debate and agreement, requiring actors to engage with each other in very specific fora using very specific language and procedures.”); Ingo Venzke, *Semantic Authority, Legal Change and the Dynamics of International Law*, 12 NO FOUNDATIONS 1, 2, 12 (2015) (arguing that “[t]he law provides the battleground for competing claims,” such that “different actors with varying degrees of semantic authority struggle” over its meaning).

<sup>58</sup> Monica Hakimi, *The Work of International Law*, 58 HARV. INT’L L.J. (forthcoming 2017) (manuscript on file with author).

promising material or normative support if they prevail. In all of these ways, international law gives global actors the tools and sometimes the reasons to disagree; it facilitates and even fuels their conflicts.<sup>59</sup> In Parts III and IV of the article, I offer specific examples of international law doing this work. For now, I emphasize that, as a positive matter, it is part of what international law does.

Second, although international law is an argumentative practice, the conflicts that it enables are not only discursive or confined to legal arenas. Law is a social phenomenon that interacts with and shapes how people experience the material world.<sup>60</sup> Just as global actors use international law to foster real-world collaborations, so too do they use it to foster real-world conflicts. In other words, international law enables conflicts that manifest in operationally relevant ways—through economic restrictions, deteriorated diplomatic relationships, and the like. The fact that it does is not necessarily problematic because, again, conflict is part of any social order.<sup>61</sup>

Third, the effect of using international law to disagree is not always to defuse the dispute or achieve some kind of reconciliation. The key insight of global legal pluralism is that the actors who engage with international law have diverse, sometimes incompatible views on how best to organize themselves.<sup>62</sup> These actors at times find ways to compromise. But other times, reconciliation seems too costly, and separation is infeasible. In these latter cases, they still use international law. They use it to disagree.<sup>63</sup>

#### *b. The unifying effects of legal conflict*

Though a protracted legal conflict is divisive in some sense, it can also be unifying. Legal arguments are structured like the Aristotelian practice of justice. Adversaries purport to speak not just in their own interests but on behalf of a group. Whatever the law requires, it is presumed to establish generalizable standards for the group.<sup>64</sup> Thus, even as a legal conflict pits community members against one another, it can reinforce the association.

The idea that legal conflict can help constitute a political community has been developed in U.S. constitutional theory. To be clear, the idea is that conflict itself does this work. A conflict

<sup>59</sup> *Id.* On the more general point that having shared ground rules helps people disagree, see HERZOG, *supra* note 38, at 134–41.

<sup>60</sup> See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* 133–34, 210–11 (2d ed. 2004); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: 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.”).

<sup>61</sup> Hakimi, *supra* note 58.

<sup>62</sup> PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 145 (2012) (“[N]ormative conflict is unavoidable. . . .”); 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.”); see also Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1507 (1988) (explaining that pluralism “doubts or denies our ability to communicate [diverse normative experiences] in ways that move each other’s views on disputed normative issues towards felt (not merely strategic) agreement without deception, coercion, or other manipulation”).

<sup>63</sup> Hakimi, *supra* note 58.

<sup>64</sup> See K.N. LEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 277 (1941) (explaining that, in law, “claims get made and urged in terms of the Order” and “tend powerfully to be set up as serving the welfare of the relevant Entirety”); YACK, *supra* note 39, at 57 (“In political communities the standards that define this sense of mutual obligation are expressed in laws, that is, in public rules open to discussion and revision.”).

need not be resolved, and might best be left unresolved, to nurture a community. For example, Robert Post and Reva Siegel argue that, on some issues in constitutional law, “authoritative settlement is neither possible nor desirable.”<sup>65</sup> The right to an abortion is their example. Because Americans disagree about this right, it has been pliable and contentious for decades. Post and Siegel contend that, “[s]o long as groups continue to argue about the meaning of our common Constitution, so long do they remain committed to a common constitutional enterprise.”<sup>66</sup> By this account, the Constitution is “a discursive medium through which individuals and groups engage in disputes about ideal forms of collective life.”<sup>67</sup> Such disputes can “strengthen social cohesion and constitutional legitimacy in a normatively heterogeneous nation like our own” precisely because the Constitution is a “powerful symbol of common American commitments”—a key referent that defines Americans as a community.<sup>68</sup> An intense and protracted constitutional conflict can bring Americans together to fight about their joint enterprise.

Further, several scholars have underscored that, in the face of deep normative divisions, such engagement with the enterprise is best sustained by keeping the law pliable.<sup>69</sup> The Constitution’s contestability allows people with competing perspectives to continue tapping into and arguing through it—using constitutional law to partake in the governance project. By contrast, high levels of legal settlement risk estranging dissatisfied groups from the law.<sup>70</sup> That risk might be especially pronounced for an international community. Whereas Americans who are boxed out of constitutional law have other opportunities to participate in communal life, such opportunities are more attenuated at the global level.

### c. Ethical legal conflict

The analogy between constitutional law and international law is imperfect because the U.S. Constitution has symbolic and normative power that is unparalleled at the international level. Although the United Nations Charter is sometimes described as the constitution of the international community,<sup>71</sup> it does not invoke the same sense of belonging and collective project.

<sup>65</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007).

<sup>66</sup> *Id.* at 427.

<sup>67</sup> Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 326 (2001).

<sup>68</sup> Post & Siegel, *supra* note 65, at 405; see also Michelman, *supra* note 62, at 1513 (noting the “conscious reference by those involved to their mutual and reciprocal awareness of being co-participants not just in this one debate, but in a more encompassing common life . . .”).

<sup>69</sup> See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1328, 1418–19 (2006) [hereinafter Siegel, *Constitutional Culture*]; Kapczynski, *supra* note 13, at 882 (arguing that “[r]estricted terms” might “be less attractive for groups seeking to mobilize than elaborated terms, which are more flexible and universalistic”); 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 62, at 1529 (“Legal indeterminacy in that sense is the precondition of the dialogic, critical-transformative dimension of our legal practice . . .”).

<sup>70</sup> Siegel, *Constitutional Culture*, *supra* note 69, at 1328.

<sup>71</sup> E.g., Fassbender, *supra* note 3; Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1997 MAX PLANCK Y.B. UNITED NATIONS L. 1, 33.

However, there is a particular kind of constitutional argument—ethical argument—that has analogs in international law and is especially suitable for constructing a community.

As Philip Bobbitt described it, ethical argument calls attention to the ethos—the shape and character—of a governance association. Such argument invokes the community’s ethos, either expressly or by implication, as a justification or source of authority for concrete legal positions. Bobbitt underscored that ethical argument is not the same as moral argument. It does not “claim that a particular solution is right or wrong in any sense larger than that the solution comports with the sort of people we are and the norms we have chosen to solve political and customary constitutional problems.”<sup>72</sup> Ethical argument helps construct a community by purporting to define it: Who belongs to the community, what does it stand for, and how has it chosen to address core facets of social or political life?

Part of Bobbitt’s claim is that ethical argument permeates U.S. constitutional law, even though it is not always presented as such. Take the U.S. Supreme Court’s decision in *District of Columbia v. Heller*.<sup>73</sup> The decision rests on an account of U.S. founding history to justify an expansive interpretation of the Second Amendment right to bear firearms. The dominant mode of reasoning in *Heller* is, on its face, originalist. As some constitutional lawyers have explained, however, originalism is itself a form of ethical argument.<sup>74</sup> It is about how Americans imagine themselves as a polity. Richard Primus argues that, although *Heller*’s discursive form is originalist, “[i]ts substance and its persuasive power are matters of ethos.”<sup>75</sup> He characterizes originalist arguments as ethical because their normative force “depends less on the accuracy of their historical accounts—or the plausibility of their theories of intertemporal authority—than on whether their audiences recognize themselves, or perhaps their idealized selves, in the portrait of American origins that is on offer.”<sup>76</sup> *Heller* put at issue the question of “whether twenty-first-century Americans (and in particular twenty-first-century American officials) are disposed to see the keeping and use of firearms as near the core of what makes them Americans and what connects them to the American past.”<sup>77</sup> As such, *Heller* was not just about the particular gun regulation in the District of Columbia. It was also about whether gun culture is part of who Americans are.

Of course, Americans disagree on that question, as they do on many other ethical questions. Even when ethical argument is used to reinforce a norm that is deeply held and uncontroversial, like the First Amendment right to freedom of expression, Americans contest its content or implementation in particular settings. This means that the ethos is unstable and contestable. The “true” ethos might not be discernable, and arguments about it might not be reliable indicators of what it really is.<sup>78</sup> To say that lawyers use ethical argument is to say that they put the ethos at issue and make it part of what is at stake in concrete legal battles or decisions.<sup>79</sup> Here, law can be the mechanism through which community members fight

<sup>72</sup> BOBBITT, *supra* note 15, at 94–95.

<sup>73</sup> 554 U.S. 570 (2008). I take this example and analysis from Primus, *supra* note 15, at 80.

<sup>74</sup> Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 73 (2009); Primus, *supra* note 15, at 79.

<sup>75</sup> Primus, *supra* note 15, at 80.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1133–35 (2013); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 678 (2013).

<sup>79</sup> See Primus, *supra* note 15, at 82, 89.

about the contours of their governance association—and in the process, construct it as a going concern that binds them.

### III. INTERNATIONAL LEGAL PARADIGMS

In international law, ethical argument is most evident in two principles that expressly invoke the international community as a whole: (1) *jus cogens* norms, and (2) *erga omnes* obligations. As these principles are articulated in positive law, they portray a community that is unified by shared precepts. The principles are said to embody and protect values that are foundational to all of humanity. That idea has had enormous symbolic force over the past several decades. But its descriptive and analytic purchase are limited. Although *jus cogens* norms and *erga omnes* obligations are regularly cited as positive law, their content is so nebulous, and their operational effect is so negligible, that they have an almost illusory quality.<sup>80</sup> They do not meaningfully foster the kind of community that they depict on their face—one unified by core values.

I contend that *jus cogens* norms and *erga omnes* obligations help constitute an international community not by defining commitments that are universally shared but by inviting loosely connected actors to battle over what those commitments are or might be. In other words, the principles enable ethical conflicts. They establish ground rules for disparate actors to argue about the tenets of this community on terms that presuppose that it *is* a community. This community might not be robust or even truly universal. While some global actors are clearly very invested in it, many others—not to mention the people whom it claims to represent—are not. The point is that it is constituted, not corroded, by the conflicts that *jus cogens* norms and *erga omnes* obligations invite. Its shallowness as a community results less from the participants' heterogeneity and divisions than from their overall disconnection and scarce opportunities for serious, broad-based engagement with the group.

I present this account of *jus cogens* norms and *erga omnes* obligations in order to advance my broader claim about the constitutive effects of international legal conflict. I also make a more discrete contribution. I explain what the principles on *jus cogens* norms and *erga omnes* obligations actually do in the global order. These principles have received enormous scholarly attention, but we still lack a compelling theory that accounts for the combination of persistence, rhetorical power, and opacity that they display in practice. As I show, that combination makes them particularly apt for fostering ethical conflicts.

<sup>80</sup> Others have recognized as much. *E.g.*, CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 4 (2d ed. 2010) (“[T]here is no agreement about the scope of the *erga omnes* concept, and the legal consequences flowing from that status remain unclear.”); Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 505 (2008) (“Uncertainty remains about the operational mode of this normative category.”); Ian Brownlie, *To What Extent Are the Traditional Categories of Lex Lata and Lex Ferenda Still Viable?*, in CHANGE AND STABILITY IN INTERNATIONAL LAWMAKING 66, 71 (Joseph Weiler & Antonio Cassese eds., 1988) (describing *erga omnes* obligations as “very mysterious indeed”); Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?*, 18 EUR. J. INT’L L. 853, 854–55 (2007) (“If we search the international law literature for information on the possible normative content and effects of *jus cogens* norms, it will provide but a very diffused picture.”).



### A. *The Doctrinal Muddle*

To appreciate how *jus cogens* norms and *erga omnes* obligations constitute a community, we first must understand their instantiation in positive law. The principles are regularly invoked and endorsed with language that puts them at the heart of the global order. However, they do not establish operative rules of decision or otherwise seem to promote specific substantive interests.

1. *Jus Cogens Norms.* *Jus cogens* norms are defined in positive law as peremptory and foundational to the international community as a whole.<sup>81</sup> States first collectively endorsed the principle in the 1969 Vienna Convention on the Law of Treaties (VCLT).<sup>82</sup> Since then, authoritative bodies have consistently invoked it.<sup>83</sup>

Still, we lack criteria for identifying the norms that qualify as *jus cogens*.<sup>84</sup> The set is usually said to include the prohibitions of armed aggression, genocide, war crimes, crimes against humanity, slavery, torture, racial discrimination, and denials of the right to self-determination.<sup>85</sup> That set is not necessarily exhaustive, but efforts to expand it or to articulate a workable standard for inclusion have been unavailing.<sup>86</sup> Take the common refrain that *jus cogens* norms protect fundamental community values.<sup>87</sup> This standard is too blunt to guide decisions or capture current expectations. For example, most *jus cogens* lists include the prohibition of race-based discrimination but not the prohibition of sex-based discrimination. Are we to understand that one is more highly or widely valued? If so, what is the basis for that posi-

<sup>81</sup> In early usage, the relevant community was described as a community of states. Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT]. Now, the community is widely understood to include other kinds of actors. Thus, authoritative references no longer define the community as comprised exclusively of states. See, e.g., *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 ICJ REP. 3, para. 33 (Feb. 5) [hereinafter *Belgium v. Spain*]; Int'l Law Comm'n, The Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Art. 25, cmt. 18, in Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, UN Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001) [hereinafter DARSIIWA].

<sup>82</sup> VCLT, *supra* note 81, Art. 53.

<sup>83</sup> E.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 ICJ REP. 6, para. 64 (Feb. 3) [hereinafter *Dem. Rep. Congo v. Rwanda*]; Prosecutor v. Anto Furundžija, Case No. IT-95-17/I-T, Trial Judgment, 121 ILR 218, para. 153 (10 Dec. 1998); DARSIIWA, *supra* note 81, Arts. 26, 40.

<sup>84</sup> See DARSIIWA, *supra* note 81, Art. 26, cmt. 5; William E. Conklin, *The Peremptory Norms of the International Community*, 23 EUR. J. INT'L L. 837, 838 (2012) (“[D]espite their acknowledged universality, it remains unclear which norms are peremptory.”); Dinah Shelton, *International Law and ‘Relative Normativity,’* in INTERNATIONAL LAW 159, 164 (Malcom D. Evans ed., 2006) (“It is a concept without an agreed content and one that is not widely endorsed by State practice.”).

<sup>85</sup> DARSIIWA, *supra* note 81, Art. 26, cmt. 5.

<sup>86</sup> I focus in the main text on one such effort, but there are others. E.g., DARSIIWA, *supra* note 81, Art. 40, cmt. 3 (asserting that *jus cogens* norms proscribe conduct that is “intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values”); ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW—*JUS COGENS* 3 (2015) (arguing that *jus cogens* norms are defined not by their substantive content but by their non-derogable effect); Conklin, *supra* note 84, at 856 (arguing that *jus cogens* norms are norms that are “conditions for the very existence of the international legal order”). Despite these efforts, the definitional question remains.

<sup>87</sup> E.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Judgment, 2006 ICJ REP. 86, para. 10 (separate opinion by Dugard, J.); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 47 (2008); Simma, *supra* note 4, at 285–88.

tion? Both forms of discrimination are proscribed in treaties that are almost universally ratified.<sup>88</sup> And alas, both are pervasive in this world.

Moreover, no matter which norms qualify as *jus cogens*, the operational relevance of the designation appears to be negligible. The VCLT suggests otherwise because it articulates a strict rule of preemption. Under the VCLT, *jus cogens* norms invalidate contrary treaty obligations.<sup>89</sup> As a matter of practice, however, that rule is rarely, if ever, implemented.<sup>90</sup> States generally do not claim the right to contract out of recognized *jus cogens* norms, just as they do not claim that right for many other international legal norms. When they commit the proscribed conduct, they claim that they do not. The legal question then becomes what a particular *jus cogens* norm requires or whether a state has violated it in the case at hand, not whether it or a contrary norm applies.

Further, the International Court of Justice (ICJ) has consistently declined to treat a norm's *jus cogens* status as relevant to its judicial enforceability. The *jus cogens* status does not override the usual requirement that states consent to ICJ jurisdiction.<sup>91</sup> Neither does it override the customary law on foreign state immunity. As the ICJ explained in its 2012 judgment in *Jurisdictional Immunities of the State*, one state may not exercise jurisdiction over another simply by asserting a *jus cogens* violation.<sup>92</sup> The ICJ's jurisprudence thus limits the authority of international or national courts to enforce *jus cogens* norms. Although these norms might at times be judicially enforceable, their enforceability does not turn on their *jus cogens* status, at least not under international law.<sup>93</sup>

Admittedly, the International Law Commission (ILC) has claimed that the *jus cogens* designation matters in other ways—specifically, under the law on state responsibility.<sup>94</sup> The claim is that, when one state grossly or systematically violates a *jus cogens* norm, all other states have duties: (1) not to contribute to the violation, (2) not to recognize as lawful a situation

<sup>88</sup> Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, 1249 UNTS 13; International Covenant on Civil and Political Rights, Art. 2(1), opened for signature Dec. 19, 1966, 999 UNTS 171; International Covenant on Economic, Social, and Cultural Rights, Art. 2(2), opened for signature Dec. 16, 1966, 993 UNTS 3; The International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 UNTS 195.

<sup>89</sup> VCLT, *supra* note 81, Arts. 53, 64, 71.

<sup>90</sup> Egon Schwelb's 1967 statement still resonates: "There appears to be no case on record in which an international court or arbitral tribunal decided that an international treaty was void because of repugnancy to a peremptory rule, in which an international political organ made a decision or recommendation to this effect, or where, in settling a dispute, governments have agreed on such a proposition." Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AJIL 946, 949–50 (1967). For a more recent review of the practice, see Dinah Shelton, *Normative Hierarchy in International Law*, 100 AJIL 291, 304–17 (2006).

<sup>91</sup> See *Dem. Rep. Congo v. Rwanda*, *supra* note 83, para. 64 ("The fact that a dispute relates to compliance with a [*jus cogens*] norm . . . cannot of itself provide a basis for [] jurisdiction. . .").

<sup>92</sup> *Jurisdictional Immunities of the State* (Ger. v. It.; Greece Intervening), Judgment, 2012 ICJ REP. 99, Feb. 2, 2012, paras. 93–95 [hereinafter *Germany v. Italy*].

<sup>93</sup> Some have asserted that a norm's *jus cogens* status provides a basis for a state's national courts to exercise universal jurisdiction—that is, to adjudicate claims that lack any nexus to that state. As others have explained, however, the support for this assertion in the operational practice is weak. To the extent that states exercise jurisdiction in cases involving *jus cogens* norms, they very rarely rely or need to rely on the *jus cogens* principle. See Markus Petsche, *Jus Cogens as a Vision of the International Legal Order*, 29 PENN. ST. INT'L L. REV. 233, 250–52 (2010).

<sup>94</sup> DARSIVA, *supra* note 81, Arts. 26, 40, 41.

resulting from the violation, and (3) to cooperate to end the violation.<sup>95</sup> The ILC's claim is weak. Despite what the ILC says, its first two duties do not turn on the *jus cogens* designation. The first applies more broadly. States must refrain from contributing to international legal violations generally, not just when a *jus cogens* norm is at stake.<sup>96</sup> The ILC's second duty at best applies more narrowly—only to the prohibitions on aggression and self-determination. In other words, states might have to refrain from recognizing as lawful situations resulting from a violation of one of those two prohibitions. But comparable duties have not been established for other *jus cogens* norms.<sup>97</sup>

As for a duty to cooperate to end *jus cogens* violations, the ILC itself acknowledged in 2001 that the duty might not be positive law.<sup>98</sup> The ICJ has since endorsed something like this duty in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>99</sup> Without using the phrase “*jus cogens*,” the *Wall* opinion asserts that, “[g]iven the character and importance” of the relevant norms, all states must work to end Israel's violations of humanitarian law and of the Palestinian right to self-determination.<sup>100</sup> The opinion thus might indicate that a duty to cooperate is gaining legal traction. But for now, this duty remains almost entirely aspirational—both in the case of the Palestinian situation and more generally.<sup>101</sup> Any effect of the *jus cogens* designation is still, at best, marginal.

2. *Erga Omnes Obligations*. The law on *erga omnes* obligations follows a similar script. These obligations entered mainstream legal thinking with the ICJ's 1970 judgment in *Barcelona Traction, Light & Power*.<sup>102</sup> The judgment declared in dicta that *erga omnes* obligations are owed to “the international community as a whole” such that “all States . . . have a legal interest in their protection.”<sup>103</sup> The ICJ has since attached the *erga omnes* label to norms that are widely accepted as *jus cogens*.<sup>104</sup> One might reasonably infer, then, that obligations to comply with *jus cogens* norms are *erga omnes*—owed to everyone at once. Beyond that basic inference, the law in this area remains opaque.

<sup>95</sup> *Id.* Art. 41.

<sup>96</sup> *Id.* Art. 16.

<sup>97</sup> All of the practice that the ILC cites to support its second duty concerns these two prohibitions. *Id.* Art. 41, cmts. 4–10. In the 2004 advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 131, para. 159 (July 9) [hereinafter *Construction of a Wall*], the ICJ picked up on the ILC's claim to assert that “all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory . . . .” This language is best interpreted to mean that states may not recognize as lawful any forcible annexation of Palestinian territory. As Judge Kooijmans has explained, any other interpretation suggests a meaningless “duty not to recognize an illegal fact.” *Id.* (separate opinion by Kooijmans, J., para. 44).

<sup>98</sup> DARSİWA, *supra* note 81, Art. 41, cmt. 3.

<sup>99</sup> *Construction of a Wall*, *supra* note 97.

<sup>100</sup> *Id.*, para. 159.

<sup>101</sup> See Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 254–56 (2014) (reviewing practice); see also Andreas L. Paulus, *Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal*, 74 NORDIC J. INT'L L. 297, 315 (2005) (asserting that “there is not much” to the ILC's enforcement duties and that the ICJ's failure to speak in *jus cogens* terms “has weakened the concept, not strengthened it”).

<sup>102</sup> *Belgium v. Spain*, *supra* note 81.

<sup>103</sup> *Id.*, para. 33.

<sup>104</sup> *Id.*, para. 34; *Construction of a Wall*, *supra* note 97, para. 157.

Nearly five decades since *Barcelona Traction*, we have little guidance on how an obligation becomes *erga omnes* or whether the category extends beyond *jus cogens* norms.<sup>105</sup> We also know little about its practical effect. The famous dicta in *Barcelona Traction* arguably suggest that the defining feature of an *erga omnes* obligation is that any state may enforce it, no matter whether the state is uniquely injured by a breach.<sup>106</sup> In other words, *erga omnes* obligations might ground a universal enforcement right. But that just begs the question of what such a right would entail or how it would turn on the *erga omnes* designation.

The three most plausible answers are all unsatisfying. First, the designation might entitle states to initiate judicial proceedings against a scofflaw.<sup>107</sup> If states have this right, it remains untested. An international court has never admitted a claim solely on the basis of an *erga omnes* designation. The ICJ would conceivably do so only in exceedingly rare cases—where it already has jurisdiction and cannot ground the claim in treaty law.<sup>108</sup> Second, the *erga omnes* designation might entitle states to protest a violation through diplomatic or other informal channels. States may engage in such protest no matter whether an *erga omnes* obligation is at issue.<sup>109</sup>

The third possibility is more complicated. The *erga omnes* designation might entitle states to target the scofflaw with unfriendly measures, like economic restrictions. Some of these measures are permissible no matter whether an *erga omnes* obligation is violated.<sup>110</sup> The most that can be said about the others is that the law is unsettled. The question is whether all states may respond to an *erga omnes* violation with countermeasures—measures that would

<sup>105</sup> The two main theories for answering this question point in different directions. One justifies *erga omnes* obligations in terms of the “importance of the rights involved.” *Belgium v. Spain*, *supra* note 81, para. 33; TAMS, *supra* note 80, at 128–57. Under this theory, obligations to comply with *jus cogens* norms are *erga omnes* because they protect interests that are universal and foundational to the community. This theory implies that *erga omnes* obligations are limited to the *jus cogens* set; other norms are not as important. According to the second theory, *erga omnes* obligations arise from the structure of the rights involved. Violations affect all states at once, rather than specific states at a time. See Claudia Annacker, *The Legal Regime of Erga Omnes Obligations in International Law*, 46 AUSTRIAN J. PUB. INT’L L. 131, 136 (1994). This second theory is potentially more expansive than the first because a broader range of obligations might reasonably be characterized as affecting all states at once. *E.g.*, Gabcikovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 ICJ REP. 7, paras. 114–19 (Sept. 25) (separate opinion by Vice-President Weeramantry) (environmental obligations).

<sup>106</sup> See Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, 151, 156 (Joseph H. Weiler, Antonio Cassese & Marina Spinedi eds., 1989) [hereinafter INTERNATIONAL CRIMES OF STATE]. I say “arguably” because *Barcelona Traction* elsewhere suggests that any enforcement right must be grounded either in a treaty or in another rule of customary law. *Belgium v. Spain*, *supra* note 81, para. 91; see also, *e.g.*, Special Rapporteur on State Responsibility, Fourth Report on the Content, Forms and Degrees of International Responsibility, Int’l Law Comm’n, para. 100, UN Doc. A/CN.4/366 (Apr. 14–15, 1983) (by Willem Riphagen) (“[T]he presence of a collective interest . . . should imply a collective decision-making machinery as regards reprisals. . .”).

<sup>107</sup> DARSIIWA, *supra* note 81, Art. 48; *cf.* Questions Relating to the Obligation to Prosecute and Extradite (Belg. v. Sen.), 2012 ICJ REP. 422, paras. 68–69 (July 20) (finding that the treaty at issue establishes “obligations *erga omnes partes*,” meaning that “[a]ll the States parties ‘have a legal interest’ in the protection of the rights involved” and each state party has standing “to make a claim concerning the cessation of an alleged breach by another State party”) (quoting *Belgium v. Spain*, *supra* note 81, para. 33).

<sup>108</sup> See TAMS, *supra* note 80, at 159–62, 324.

<sup>109</sup> DARSIIWA, *supra* note 81, Art. 42, cmt. 2 (“There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so.”).

<sup>110</sup> A state that is not uniquely injured may take unfriendly measures if the measures are: (1) not otherwise prescribed by international law (so-called “retorsions”), or (2) authorized by an international organ, like the UN Security Council, that may override an acting state’s contrary obligations.

ordinarily be unlawful but are excused as self-help enforcement.<sup>111</sup> The ILC Draft Articles on State Responsibility are widely thought to reflect the customary international law in this area and suggest that the answer is no. According to the ILC, countermeasures may be taken only by a state that is uniquely injured by the violation.<sup>112</sup> The ILC specifically declined to recognize an exception for violations of *erga omnes* obligations, but it indicated that such an exception might develop in the future.<sup>113</sup> Scholars have since looked to state practice to argue that the exception has become or is becoming positive law.<sup>114</sup> So, *erga omnes* obligations might ground a universal right to take countermeasures, but any such right is tenuous and has not been widely endorsed.<sup>115</sup>

### B. *The Analytic Gap*

Commentators appreciate that the principles on *jus cogens* norms and *erga omnes* obligations do not do what they purport to do—that despite their powerful rhetoric, they do not meaningfully advance universal interests on behalf of the whole world.<sup>116</sup> Most analysts interpret this to mean either that the principles are not fully realized or that they betray the limits of any international community or of international law itself.<sup>117</sup> Analysts rarely entertain the possibility that the principles do something other than they say.

To be sure, some scholars claim that the principles serve an expressive or symbolic function by signaling that certain norms are uniquely important and not negotiable.<sup>118</sup> However, expressive

<sup>111</sup> DARSIWA, *supra* note 81, Arts. 22, 49–53.

<sup>112</sup> *Id.* Art. 54, cmt. 6.

<sup>113</sup> *Id.*

<sup>114</sup> See ELENA KATSELLI PROUKAKI, *THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY* 206 (2010); TAMS, *supra* note 80, at 208–51; Martin Dawidowicz, *Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship in the UN Security Council*, 77 BRIT. Y.B. INT'L L. 333, 350–417 (2006).

<sup>115</sup> See PROUKAKI, *supra* note 114, at 93 (recognizing that “state practice is often inconclusive, conflicting, and ambiguous,” as “states often avoid clearly identifying the legal basis of their action” and in many cases “uncertainty remains as to whether certain conduct amounts to retorsion or third-state countermeasures”); Martin Dawidowicz, *Third-Party Countermeasures: A Progressive Development of International Law?*, 29 QUESTIONS INT'L L. ZOOM-IN 3, 14, (2016) [hereinafter Dawidowicz, *Third-Party Countermeasures*] (“[S]tatements expressing *opinio juris* in the field of third-party countermeasures are rare”).

<sup>116</sup> See sources at *supra* note 80.

<sup>117</sup> This interpretation is variously expressed. Some commentators propose reforms to give the rhetoric operational bite. *E.g.*, TAMS, *supra* note 80, at 5 (“The present study attempts to demystify aspects of the [*erga omnes*] concept and thereby to facilitate its implementation.”). Others suggest that the “problem” is that states are motivated by self-interest or that the legal system itself is too primitive. *E.g.*, Hélène Ruiz Fabri, *Enhancing the Rhetoric of Jus Cogens*, 23 EUR. J. INT'L L. 1049, 1050 (2012) (explaining that the *jus cogens* principle is a source of “hope that international law . . . can be driven by values other than the mere satisfaction of selfish (albeit collective) interests, supported and promoted by pure power relationships”); Villalpando, *supra* note 4, at 417 (explaining that the “core problem” is that the legal system still lacks rules or mechanisms for balancing the interests of the entire community against the interests of particular states).

<sup>118</sup> *E.g.*, Bianchi, *supra* note 80, at 507–08 (claiming that *jus cogens* has magical symbolic power); Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 66 (1993) (“Much of the importance of the *jus cogens* doctrine lies not in its practical application but in its symbolic significance in the international legal process.”); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 590 (1988) (asserting that “*jus cogens* is a normative myth” that “symbolizes a hope for a humane public order” and “carries a potential vision of integrating norms basic to a cosmopolitan world order . . .”); Petsche, *supra* note 93, at 237 (“[T]he true import of the recognition of the concept of *jus cogens* lies more in its ‘symbolic’ value and its ‘vision’ of international law and the international legal system.”).

accounts of these two principles remain underdeveloped and have not grappled with even the most basic questions.<sup>119</sup> For example, what message do the principles send, given that their substantive content is so nebulous? What function is served by prioritizing a small handful of norms and thereby degrading the relative worth of so many others? How powerful of a message do the principles convey through the discourse alone? A legal system ordinarily expresses its values not only discursively but also—perhaps primarily—through action. If the rhetoric is unaccompanied by action, do the claims about core universal values seem empty?

The possibility remains that the principles do not do anything at all and are just “cheap talk.”<sup>120</sup> Realist scholars have leveled this attack against international law generally: that global actors use it as a discursive medium because doing so is nearly costless, not because it actually affects or is intended to affect the material world.<sup>121</sup> The usual response to that attack is to argue that, even if engaging with international law is cheap,<sup>122</sup> it must do *something*.<sup>123</sup> After all, it permeates global interactions, and as constructivist theorists have underscored, these interactions shape perceptions and behaviors. Yet the something that international law is said to do is almost always described in regulatory terms. International law helps global actors identify, implement, and enforce their shared norms.<sup>124</sup> That explanation is inapt for *jus cogens* norms and *erga omnes* obligations.<sup>125</sup> The question is whether the principles do something else.

<sup>119</sup> To date, Markus Petsche has offered the most thorough expressive account of *jus cogens* norms. He argues that the principle shapes, in diffuse ways, expectations about international law. Petsche’s argument rests on a claim about the substantive content of these norms—that “*jus cogens* essentially aims to protect individual rights.” Pesche, *supra* note 93, at 269. The argument thus does not account for the principle’s amorphous quality. Further, it operates at a very high level of abstraction. Petsche does not explain what the *jus cogens* principle offers that the substantive law—here, human rights law—does not. He also does not explain the practice of regularly invoking the principle but not making it operational.

<sup>120</sup> *E.g.*, Anthony D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens!*, 6 CONN. J. INT’L L. 1, 6 (1990) (describing the principles as useless); Hugh W.A. Thirlway, *The Law and Procedure of the International Court of Justice—Part One*, 60 BRIT. Y.B. INT’L L. 1, 100 (1989) (describing them as “empty gesture[s]”).

<sup>121</sup> *E.g.*, JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 170–84 (2006); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 200 (1979).

<sup>122</sup> *But cf.* Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 561 (2006) (arguing that using international law can actually be quite costly).

<sup>123</sup> See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 479 (2005) (asserting that the critics “give no explanation as to why [cheap talk] is valuable—as to why, that is, the great powers feel the need to justify the pursuit of their interests”).

<sup>124</sup> *E.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 118 (1995); JOHNSTONE, *supra* note 8, at 7–8, 41–50; Risse, *supra* note 36, at 7 (“Argumentative and deliberative behavior is as goal oriented as strategic interaction, but the goal is . . . to seek a reasoned consensus.”).

<sup>125</sup> Other explanations for the international legal discourse are similarly unhelpful in this context. For example, some scholars argue that the legal discourse helps legitimize decisions. A lawful decision might be perceived as more legitimate and thus be easier to make than an unlawful one. *E.g.*, Ian Hurd, *The Permissive Power of the Ban on War*, EUR. J. INT’L SEC. (Aug. 9, 2016), available at <http://dx.doi.org.ezp-prod1.hul.harvard.edu/10.1017/eis.2016.13>. This explanation presumably requires some nexus between the discourse and the decisions that it is supposed to legitimize. No such nexus is evident here because the discourse on *jus cogens* norms and *erga omnes* obligations is disconnected from the operational practice. Other scholars claim that the discourse helps structure international politics. These scholars do not explain what they mean by this, if not that engaging with international law regulates behavior or is just cheap talk for politicking and debate. They also do not explore the effects of arguing in one “language,” rather than another. See, e.g., Christian Reus-Smit, *Introduction, in THE POLITICS OF INTERNATIONAL LAW* 11 (Christian Reus-Smit ed., 2004); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205, 221 (1993).

### C. Contestations About Community

What they do, I argue, is help construct an international community. To do this work, the principles need not establish meaningful rules of decision. And their substantive content need not be settled. Indeed, it is probably best left unsettled. The principles must simply help global actors disagree on terms that call attention to and presuppose their mutual association. That is precisely what they do.

Consider a protracted dispute that occupied the ILC as it worked on the law on state responsibility. In 1976, after an already extensive internal debate, the ILC proposed distinguishing between ordinary violations that states commit and so-called crimes of states.<sup>126</sup> The proposal was motivated by then-recent developments on *jus cogens* norms and *erga omnes* obligations.<sup>127</sup> The ILC defined state crimes as violations of obligations that are “essential for the protection of fundamental interests of the international community.”<sup>128</sup> It reasoned that, if an obligation protects core community values (*jus cogens*), and a violation affects everyone (*erga omnes*), then unique consequences ought to follow under the law on state responsibility.<sup>129</sup> The ILC’s distinction between state crimes and other international legal violations was “[t]he single most controversial element in the Articles on State Responsibility.”<sup>130</sup> After twenty-five more years of debate, the ILC finally dropped the language on state crimes but continued to claim that *jus cogens* norms and *erga omnes* obligations have unique implications for state responsibility.<sup>131</sup>

The episode is illuminating for two reasons. First, the positive law on *jus cogens* norms and *erga omnes* obligations provoked the entire debate. When the principles were authoritatively endorsed—in the VCLT and *Barcelona Traction*, respectively—they were sure to raise the state responsibility question; by then, the ILC’s project on state responsibility had already begun.<sup>132</sup> Moreover, although the concept of state crimes might have been introduced even if the principles had not yet been established in law, it is inconceivable that the fight would have been as contentious or prolonged as it was. Having that positive law gave the proponents of state crimes the normative ammunition that they needed to press hard for their position. The ILC’s reports and the contemporaneous secondary literature thus are replete with references to *jus cogens* norms and *erga omnes* obligations as justifications for state crimes.<sup>133</sup>

<sup>126</sup> See Robert Ago (Special Rapporteur), Fifth Rep. on State Responsibility, UN Doc. CN.4/291 and Add.1 & 2, paras. 89–99 (1976).

<sup>127</sup> See Marina Spinedi, *International Crimes of State: The Legislative History*, in INTERNATIONAL CRIMES OF STATE, 21–22 & 135.

<sup>128</sup> Int’l L. Comm’n, Report on the Work of Its Twenty-Eighth Session, May 3–July 23, 1976, UN Doc. A/31/10, at para. 61.

<sup>129</sup> See Int’l L. Comm’n, Draft Articles on State Responsibility with Commentaries Adopted on First Reading, Art. 19, cmts. 10, 16–17, UN Doc. A/CN.4/L.528/Add.3 [hereinafter DARSWA Adopted on First Reading], at [http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9\\_6\\_1996.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9_6_1996.pdf&lang=EF).

<sup>130</sup> James Crawford (Special Rapporteur), First Rep. on State Responsibility, UN Doc. A/CN.4/490, at para. 43 (1998).

<sup>131</sup> *Supra* notes 94–95 and corresponding text.

<sup>132</sup> G.A. Res. 799 (VIII), at 52 (Dec. 7, 1953); see also Bruno Simma, *International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility*, in INTERNATIONAL CRIMES OF STATE, *supra* note 106, at 283, 290 (explaining that, once the positive law existed, the state responsibility question was “almost on the tip of the tongue”).

<sup>133</sup> See generally DARSWA Adopted on First Reading, *supra* note 129, Art. 19, cmts.; INTERNATIONAL CRIMES OF STATE, *supra* note 106.

Second, the principles focused the debate on the community's ethos:<sup>134</sup> Who belongs to this community?<sup>135</sup> Who may act on its behalf to sanction specific conduct?<sup>136</sup> Which norms are central to its identity?<sup>137</sup> And what is the most suitable organizing principle for protecting those norms?<sup>138</sup> These questions presuppose the existence of an international community and focus the participants on defining its shape and character. For decades, the questions were at the center of an intense and prominent debate.

The answers that were batted around in this debate might have been inaccurate. Ethical argument constructs a community not necessarily by capturing the community's true ethos but by putting the ethos at issue and inviting claims about its content. One might reasonably ask about that content—for example, whether the community actually stands for universal norms or whether all states are really members. But however we answer those questions, the debate on state crimes clearly gave actors who otherwise have only tenuous connections to one another regular opportunities to engage with and see themselves as

<sup>134</sup> Commentators recognized at the time that the debate on state crimes was ultimately about the international community's shape and character. *E.g.*, R. Ago, *Obligations Erga Omnes and the International Community*, in *INTERNATIONAL CRIMES OF STATE*, *supra* note 106, at 237, 238 (arguing that state crimes were key to the community's "advanced institutionalization"); Eric Wyler, *From 'State Crime' to Responsibility for 'Serious Breaches of Obligations Under Peremptory Norms of General International Law'*, 13 *EUR. J. INT'L L.* 1147, 1153 (2002) (claiming that state crimes were part of a transformation in the "protection of 'international *ordre public*' as a collective interest transcending that of the victim state").

<sup>135</sup> *E.g.*, Int'l L. Comm'n, *State Responsibility: Comments and Observations Received from Governments*, 50th Sess., May 20–June 12, July 27–Aug. 14, 1998, UN Doc. A/CN.4/488, at 121–22 [hereinafter *Government Comments*] (statement of France) ("What is meant by the 'international community'?"); Int'l L. Comm'n, *State Responsibility: Comments and Observations Received from Governments*, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, UN Doc. A/CN.4/515, at 33, 45 (statements of United Kingdom, Slovakia) (suggesting that "international community as a whole" be replaced by "international community of states as a whole" to avoid confusion about the community's composition); *id.* at 50 (statement of Netherlands) (supporting the use of the phrase "international community as a whole," as opposed to "international community of states," in order to avoid "a restrictive interpretation of the term 'international community'").

<sup>136</sup> *E.g.*, *Government Comments*, *supra* note 135, at 122 (statement of France) ("[W]ho will determine that an interest is 'fundamental' and that it is of concern to the 'international community' . . .?"); *id.* at 114 (statement of Austria) ("[I]nter-State relations lack the kind of central authority necessary to decide on subjective aspects of wrongful State behavior."); *id.* at 119 (statement of Mongolia) ("[T]he determination of the commission of an international crime [must] not be left to the decision of one State, but be attributed to the competence of international judicial bodies.") (alteration in original); *id.* at 121 (U.S. statement) ("Existing international institutions and regimes already contain a system of law for responding to violations of international obligations which the Commission might term 'crimes.'").

<sup>137</sup> *E.g.*, DARSIVA Adopted on First Reading, *supra* note 129, Art. 19(3) & Art. 19, cmt. 62 (providing a non-exhaustive list of possible crimes and explaining that the category of crimes overlaps considerably but not entirely with that of *ius cogens* norms); Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 *EUR. J. INT'L L.* 425, 428–29 (1999) (arguing that international crimes should include all breaches of *ius cogens* norms but not all breaches of *erga omnes* obligations).

<sup>138</sup> See James Crawford (Special Rapporteur), First Rep. on State Responsibility, UN Doc. A/CN.4/490, at 13–14 (1998) ("Many [government] comments accept that a distinction should be drawn . . . between the most serious wrongful acts, of interest to the international community as a whole, and wrongful acts which are of concern only to the directly affected States. But the distinction need not and perhaps should not be expressed in the language of 'crime' and 'delict.'"); *Government Comments*, *supra* note 135, at 120 (U.K. statement) ("[I]t is entirely possible that the concept [of state crimes] would impede, rather than facilitate, the condemnation of egregious breaches of the law . . . [and] make it more difficult for the international community to frame the terms of the condemnation so as to match precisely the particular circumstances of each case of wrongdoing."); B. Graefrath, *On the Reaction of the "International Community as a Whole": A Perspective of Survival*, in *INTERNATIONAL CRIMES OF STATES*, *supra* note 106, at 254 ("[T]here is a common understanding that there are violations of international obligations that are so dangerous that the community as such, as a whole, should react; the international community should have the possibility, the means to react because this is necessary for the survival of mankind. . . .").



part of a common enterprise. The reason that the debate became so heated is that many of these participants care deeply about the enterprise. They want the international community to stand for some things (e.g., peace and human rights) and not others (e.g., aggression or state impunity). The principles allowed them to battle over the core tenets of their association without calling into question—indeed while reinforcing—that they are an association.

The debate on state crimes was not aberrational. Because *jus cogens* norms and *erga omnes* obligations expressly invoke an international community, they regularly fuel ethical argument. The ICJ's recent *Jurisdictional Immunities* case is another high-profile example.<sup>139</sup> The case arose out of a suit against Germany in Italian court for claims of forced deportation and labor during World War II. In *Ferrini v. Germany*, Italy's highest court relied heavily on the *jus cogens* concept to override Germany's immunity and allow the case to proceed.<sup>140</sup> *Ferrini* explained that the claims against Germany rested on norms that "lie at the heart of the international order and prevail over all other conventional and customary norms . . ." <sup>141</sup> *Ferrini* then echoed the debate on state crimes, asserting that immunity would be inappropriate for "such grave violations" because these violations require "a response which, in qualitative terms, is different and more severe than that reserved for other illegal acts."<sup>142</sup>

Here again, the *jus cogens* principle enabled a set of conflicts. If *Ferrini* had upheld Germany's immunity, the dispute probably would have dissipated; the Italian claimant lacked a good alternative outlet. By stripping Germany of immunity, *Ferrini* instead allowed the dispute to proceed. *Ferrini* also catalyzed several other lawsuits or enforcement proceedings against Germany in Italian court for conduct relating to World War II.<sup>143</sup> Eventually, Germany's discontent with these developments led it to initiate a case against Italy at the ICJ.<sup>144</sup> Greece then intervened in that case.<sup>145</sup> (A group of Greek nationals had separately been seeking redress against Germany for similar conduct.) The sparring did not end with the ICJ's 2012 judgment. In 2014, Italy's Constitutional Court declined to follow the ICJ and held that Italian courts have jurisdiction over foreign states for claims relating to gross violations of fundamental rights on Italian territory.<sup>146</sup> Since then, lower Italian courts have issued a number of rulings against Germany for World War II-era conduct.<sup>147</sup>

These disputes are plainly about more than the rules on immunity or the relief that is due to particular claimants. They are about the central contest in international law over the past several decades: the extent to which states' traditional prerogatives trump the interests of

<sup>139</sup> *Germany v. Italy*, *supra* note 92.

<sup>140</sup> *Ferrini v. Fed. Repub. Germany*, 128 ILR 659 (Ital. Corte di Cassazione 2004).

<sup>141</sup> *Id.*, para. 9.

<sup>142</sup> *Id.*

<sup>143</sup> See *Jurisdictional Immunities of the State* (Ger. v. It.; Greece intervening), Germany, Memorial, paras. 23–45 (June 12, 2009) (discussing subsequent cases) [hereinafter *Germany v. Italy*, Germany Memorial].

<sup>144</sup> *Application of Jurisdictional Immunities of the State* (Ger. v. Italy), (Dec. 23, 2008).

<sup>145</sup> *Application by Greece to Intervene in Case Concerning Jurisdictional Immunities of the State* (Ger. v. It.), (Jan. 13, 2011).

<sup>146</sup> Judgment 238, Corte Cost., 22 Oct. 2014, Foro it. 2015, I, 1152 (It.), available at <https://drive.google.com/file/d/0BwJjW6kOLfgiX1BWRlpQVTZxb28/view?usp=sharing>.

<sup>147</sup> See Paolo de Stefani, *On Human Dignity and State Sovereignty: The Italian Constitutional Court's 238/2014 Judgment on State Immunity*, at 5 (Feb. 19, 2016) (working paper), available at <https://www.researchgate.net/publication/295103806>.

individuals.<sup>148</sup> The ICJ proceedings thus are dripping with ethical argument.<sup>149</sup> Greece's intervening statement is particularly colorful; it proclaims that granting Germany immunity in the case would "jeopardize all of the progress made within the international community."<sup>150</sup> Skeptics might dismiss this talk as cheap or pretextual. Greece surely spoke in ethical terms to advance what it believed to be its self-interest. But that does not render its argument meaningless or irrelevant. Even if Greece used ethical argument cynically, it did so in order to engage with the international legal project and because it believed—correctly—that ethical argument would resonate with key players on the international stage.

The alternative to having these disputes is not a more unified community. Global actors disagree sharply on the proper balance between state and individual interests. The alternative is to have a lesser community, one in which fewer actors have reason to interact on, or to see or treat themselves as part of, a common project. In the context of *jus cogens* norms and *erga omnes* obligations, that project concerns the basic foundations of the legal order.

#### IV. ETHICAL ARGUMENT IN THE MAINSTREAM

The ethical arguments about *jus cogens* norms and *erga omnes* obligations are easy to spot because they expressly speak of community. But ethical argument in international law is not limited to those two principles. Usually, it appears without explicit reference to community, and it works to construct not an all-inclusive community but communities that organize around specific issues. Such communities are known to exist. International law consists of a patchwork of regulatory arrangements. Participants in any given arrangement comprise an international community to the extent that they engage together on and act like they are part of a shared governance project.

To show that ethical legal conflict helps constitute these communities, I use as an example the community that centers at the WTO. I focus on this community for two reasons. First, scholars widely recognize that it is, at least at its core, a tight-knit group. The WTO "club" or "insider network" consists of actors who regularly interact on the trade project—national trade officials, international civil servants, academics, and private sector attorneys and consultants.<sup>151</sup> WTO adjudicators are also key players in this community. Other actors participate more indirectly, episodically, or at the margins.

Second, I use the WTO community because it is, in many respects, the poster child for the view that I resist. The WTO's success is usually attributed to the members' shared precepts—their common policy objectives, rules, and practices—and to their mechanisms for curbing

<sup>148</sup> On this contest's centrality, see RUTI G. TEITEL, *HUMANITY'S LAW* 9, 37 (2011); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AJIL* 866, 872 (1990).

<sup>149</sup> *E.g.*, *Germany v. Italy*, *supra* note 92, paras. 288–99 (separate opinion by Trinidad, J.); Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Counter-Memorial of Italy, paras. 4.56–77 (Dec. 22, 2009); *Germany v. Italy*, Germany Memorial, *supra* note 143, paras. 83–90.

<sup>150</sup> Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Written Statement of Hellenic Republic, para. 56 (Aug. 3, 2011), at <http://www.icj-cij.org/docket/files/143/16658.pdf#view=FitH&pagemode=none&search=%22diplomatic%22>.

<sup>151</sup> *E.g.*, Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 *AJIL* 94, 98 (2002); Richard B. Stewart & Michelle Rattón Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 *INT'L J. CONST. L.* 556, 560 (2011).

disputes.<sup>152</sup> I show that that view is incomplete. Although the participants in the WTO have plenty in common, they also have profound and intractable differences. In the face of this internal division, WTO law constitutes and fortifies the group in part by enabling ethical conflict—establishing the ground rules for the participants to disagree about the tenets of their association while reinforcing that they are in it together. I examine below two kinds of ethical conflict that are routine at the WTO: (1) conflicts about the trade agenda, and (2) conflicts about the terms of membership in this community.

### A. Agenda Conflicts

The Uruguay Round of trade negotiations that culminated with the WTO agreements in 1994 significantly expanded the trade project.<sup>153</sup> The effect was to magnify what Robert Howse has called the “core dilemma” in trade governance—the fact that trade liberalization is in tension with “a rather huge number of possible nontrade or not explicitly trade-based policies” that individual states might legitimately pursue.<sup>154</sup> This dilemma goes to heart of the WTO. It raises the question of what the trade agenda is all about: To what extent and when should the policy on liberalization bend to accommodate other social or economic interests? Disagreements about that question are a persistent and largely intractable feature of the WTO.<sup>155</sup>

The WTO Appellate Body has responded not by trying to resolve the contest but by enabling states continually to have it. In WTO law, the question presented is usually whether a trade-restrictive measure falls within one of the recognized “public interest” exceptions to liberalization.<sup>156</sup> A series of decisions predating the WTO interpreted those exceptions narrowly, prioritizing liberalization over states’ autonomy to pursue other regulatory goals, like protecting human health or the environment.<sup>157</sup> As discontent with that approach grew, the WTO Appellate Body shifted gears. It started affording states more discretion to restrict trade

<sup>152</sup> See, e.g., Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT’L L. 575, 604 (2009) (asserting that the WTO has helped create “a relatively close-knit community of trade negotiators and governmental officials with a defined ‘ethos,’ a sense of common purpose, broadly shared normative commitments, and common ways of defining and analysing problems,” and suggesting that “this community is sustained[as] its shared ideas are created and disseminated”); Posner & Sykes, *supra* note 12, at 1033–34 (“The WTO dispute settlement system helps to orchestrate cooperation. . . . [It] has the capacity to resolve disputes over the meaning of the rules, so that disagreements over ambiguous legal obligations do not degenerate into trade wars.”).

<sup>153</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 UNTS 14.

<sup>154</sup> Howse, *supra* note 151, at 95; see also, e.g., ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM* 57–58 (2011) (arguing that trade law’s ideological foundations are contested).

<sup>155</sup> For an excellent overview of this contest within the WTO, see Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9 (2016) [hereinafter Howse, *The WTO 20 Years On*].

<sup>156</sup> General Agreement on Tariffs and Trade, Art. XX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187; General Agreement on Trade in Services, Art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183.

<sup>157</sup> E.g., Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT BISD (39th Supp.), at 50–51 (1991) (environment); Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R, paras. 5.27, 5.39, 6.1 (Jun. 16, 1994) (same); Report of the Panel, *Thailand—Restrictions on Importation of and International Taxes on Cigarettes*, paras. 72–76, DS10/R (Nov. 7, 1990), GATT BISD (37th Supp.), at 200 (1990) (health); Report of the Panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 (Mar. 22, 1988), GATT BISD (35th Supp.), at 114 (1989) (environment).

for other interests.<sup>158</sup> However, the Appellate Body has not in any meaningful sense resettled or established new rules of decision in this area. Its test for assessing measures that are justified in the public interest is opaque, shifty, and fact-specific.<sup>159</sup> What the Appellate Body has done is create space for states to use WTO law to fight about the proper balance between liberalization and other interests in concrete settings. This balance is unstable and consistently at issue in WTO legal disputes.

The 2014 decision in *EC-Seal Products* is illustrative.<sup>160</sup> Canada and Norway contested a European Union regulation that prohibited the importation and sale of products containing seal, with exceptions for seals hunted by indigenous communities or for marine management. The case was widely understood to be about more than the particular regulation at issue; it was about the kind of community that the WTO would be—the extent to which this community would permit states to restrict trade in order to advance their idiosyncratic policy preferences.<sup>161</sup> The Appellate Body decided that trade restrictions for animal welfare can fall within the public morals exception to liberalization.<sup>162</sup> It then found that the particular regulation at issue was noncompliant because the exception for indigenous hunts was arbitrary.<sup>163</sup> Trade scholars have criticized the decision for its muddy reasoning, departures from precedent, and failure to guide states on the larger ethical contest that the case presented.<sup>164</sup>

<sup>158</sup> See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp & Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, paras. 153–54, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp & Shrimp Products*, para. 121, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998); Diane A. Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 FLA. J. INT'L L. 51, 70–71 (2014) (“Despite some well-known victories . . . full acceptance of States’ regulatory freedom to enact policies that vindicate public interest or human rights concerns remains very much a work-in-progress throughout the WTO system.” (footnotes omitted)).

<sup>159</sup> See, e.g., Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 AJIL 95, 96 (2015) (explaining that trade measures have repeatedly been deemed noncompliant for failing to satisfy the chapeau of the provision with the public interest exceptions but that “it is still not clear what [the chapeau] requires”); Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of “Necessity” in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93, 155 (2013) (reviewing cases and concluding that “[t]he test has been expressed in a number of different ways and indeed seems to change each time it is articulated . . .”).

<sup>160</sup> Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *Seal Products*].

<sup>161</sup> See, e.g., Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367, 430 (2012) (suggesting that the case is about whether, “by permitting pluralism, the WTO fulfills its own institutional mandate more effectively and does not unnecessarily encroach on the regulatory autonomy of member states”); Julia Y. Qin, *Accommodating Divergent Policy Objectives Under WTO Law: Reflections on EC—Seal Products*, AJIL UNBOUND (June 25, 2015, 11:42 AM), at <http://www.asil.org/blogs/accommodating-divergent-policy-objectives-under-wto-law-reflections-ec%E2%80%94seal-products> (claiming that the case is about how WTO law would “accommodate divergent legitimate purposes of domestic regulation”).

<sup>162</sup> *Seal Products*, *supra* note 160, paras. 5.194–5.201.

<sup>163</sup> *Id.*, paras. 5.338–339.

<sup>164</sup> E.g., Gregory Shaffer & David Pabian, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, 109 AJIL 154, 158–59 (2015); Donald H. Regan, *Measures with Multiple Purposes: Puzzles from EC—Seal Products*, AJIL UNBOUND (June 25, 2015, 11:41 AM), at <https://www.asil.org/blogs/measures-multiple-purposes-puzzles-ec%E2%80%94seal-products>; Joel Trachtman, *The WTO Seal Products Case: Doctrinal and Normative Confusion*, AJIL UNBOUND (June 25, 2015, 11:38 AM), at <https://www.asil.org/blogs/wto-seal-products-case-doctrinal-and-normative-confusion>; Qin, *supra* note 161. *But cf.*

But leaving this area of law pliable allows states to continue arguing through it. Here, WTO law brings states together to fight about their trade agenda on terms that reinforce that *this* is where trade governance happens. Again, the alternative to having these conflicts is not more unity on trade policy. WTO members invariably disagree on precisely when and how the policy on liberalization intersects with other interests. The most plausible alternative is for the community to be less integrated—for members that disagree with one another or with particular WTO policies to disengage from the enterprise. For example, some members might just accept the policies that others prescribe, without themselves expending the energy to crystallize or fight for their preferences. Others might try to undercut the WTO by shifting decisionmaking to arenas that they find more favorable. Still others might just disregard WTO rules with which they disagree or refuse to participate in WTO processes when they are unlikely to prevail. Playing out their conflicts through WTO law keeps them engaged in the governance project and has the effect of strengthening, not weakening, the association.

### B. Membership Conflicts

The WTO community is also beset by disagreements about its composition and terms of membership. I use “membership” here in a functional, rather than a technical, sense—to mean not just states, which the WTO agreements formally recognize as members, but the full set of actors who engage with the WTO. Questions about the participation or role of specific actors regularly arise and are contested at the WTO.<sup>165</sup> The disputes are ethical because they go to the community’s constitutional makeup.

For example, the participation of nongovernmental organizations (NGOs) received considerable attention in the 1990s and early 2000s.<sup>166</sup> NGOs were becoming more aware of the WTO and interested in shaping trade policy. The initial response from within the WTO was meager. The General Council, which consists of all WTO member states, decided to give NGOs new opportunities to interact with and learn about the WTO, while keeping them at the periphery of WTO decisionmaking.<sup>167</sup> The council proclaimed that “there is currently

Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 GEO. WASH. INT’L L. REV. 81, 149 (2015) (arguing that, though the Appellate Body ideally would not have “sacrifice[d] clarity,” its decision “was ultimately not as problematic” as others say because it “was generally rooted in an appropriate and subtle understanding of the WTO’s institutional role”).

<sup>165</sup> I focus in the main text on the participation of nongovernmental organizations. Other membership conflicts in the WTO have concerned: (1) the participation of particular states, (2) the dominance of an insider group in decisionmaking, (3) the limited opportunities for direct stakeholder involvement, (4) the apparent disenfranchisement of developing countries, and (5) the role or influence of other intergovernmental bodies. For tastes of these other conflicts, see YVES BONZON, PUBLIC PARTICIPATION AND LEGITIMACY IN THE WTO (2014); SARAH JOSEPH, BLAME IT ON THE WTO? 56–90 (2011); Raj Bhala, *Enter the Dragon: An Essay on China’s WTO Accession Saga*, 15 AM. U. INT’L L. REV. 1469 (2000); Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT’L L. 103, 127–35 (2011); Stewart & Badin, *supra* note 151.

<sup>166</sup> See, e.g., Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT’L L.J. 173 (2000); Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT’L ECON. L. 851 (1996); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 61–68 (2001).

<sup>167</sup> See WTO General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WTO Doc. WT/L/162 (July 23, 1996) [hereinafter *NGO Guidelines*]; see also Robert Howse, *Membership and Its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, 9 EUR. L.J. 496, 497 (2003) [hereinafter Howse, *Membership and Its Privileges*] (explaining that these opportunities were marginal and intentionally disconnected from the hub of WTO decisionmaking).

a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.”<sup>168</sup> Shortly thereafter, the WTO Appellate Body decided, with highly legalistic interpretations of the relevant treaty, that WTO adjudicative bodies may consider amicus curiae briefs that NGOs submit.<sup>169</sup>

The Appellate Body’s legal decisions on amicus briefs provoked an intense ethical conflict.<sup>170</sup> The dispute came to a head in November 2000, when the Appellate Body took the initiative to establish “working procedures” for the submission of amicus briefs in a case that was then pending before it.<sup>171</sup> States responded loudly and negatively. They convened a special General Council meeting, and almost every state that spoke criticized the Appellate Body’s working procedures.<sup>172</sup> Developing countries were especially vocal; their principal complaints went directly to the membership’s composition and terms of participation.

Uruguay’s comments are representative. It claimed that the Appellate Body’s working procedures improperly “affected the rights and obligations of WTO Members and altered the relationship between the bodies within the system.”<sup>173</sup> Uruguay’s worries were twofold. First, the Appellate Body arrogated for itself “decisions on relations with NGOs while such decisions statutorily belonged to the General Council.”<sup>174</sup> Second, the Appellate Body effectively “grant[ed] individuals and institutions outside of the WTO a right that Members themselves did not possess.”<sup>175</sup> Egypt, speaking on behalf of the Informal Group of Developing Countries, echoed those concerns, underscoring that “[t]he WTO was a Member-driven”—by which it meant state-driven—“organization and this basic fundamental nature of the organization had to, and would, remain as such.”<sup>176</sup> India proclaimed that “the effect of the Appellate Body’s approach to *amicus curiae* briefs was to strike at the intergovernmental nature of the WTO.”<sup>177</sup> As these comments reveal, the dispute was as contentious as it was not because amicus briefs are so important but because it put at issue a question that went to the core of the community’s ethos: Would this community remain insular

<sup>168</sup> *NGO Guidelines*, *supra* note 167, para. VI.

<sup>169</sup> See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp & Shrimp Products*, paras. 106–10, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) (deciding that WTO panels may consider unsolicited NGO amicus briefs); Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, paras. 39–42, WTO Doc. WT/DS138/AB/R (adopted June 7, 2000) (deciding that the Appellate Body has this authority).

<sup>170</sup> A similar conflict about amicus briefs has recently been playing out in international investment law. For an overview, see Katia Fach Gómez, LLM Perspective, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 *FORDHAM INT’L L.J.* 510 (2012).

<sup>171</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, paras. 50–52, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).

<sup>172</sup> See WTO Gen. Council, Minutes of Meeting of Nov. 22, 2000 (Jan. 23, 2001), at <https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3A%2Fwt%2Fgpc%2Fm60.doc&>.

<sup>173</sup> *Id.*, para. 5.

<sup>174</sup> *Id.*, para. 6; see also, e.g., *id.* at 50 (Mexican statement that the Appellate Body “arrogated to itself a right that belonged solely to WTO members acting collectively”); *id.*, para. 55 (Colombian statement on behalf of the ANDEAN members that “[t]he power to create a procedure such as the one proposed rested exclusively with Members”); *id.*, para. 57 (Zimbabwean statement that the Appellate Body “usurped Members’ authority”).

<sup>175</sup> *Id.*, para. 7.

<sup>176</sup> *Id.*, para. 16.

<sup>177</sup> *Id.*, para. 38.

and controlled mostly by states, or would it integrate other actors and allocate more authority to its adjudicative bodies?<sup>178</sup>

In the end, the brouhaha over amicus briefs fizzled without substantive resolution. The Appellate Body decided that none of the nonparty briefs in the case before it satisfied its working procedures.<sup>179</sup> Since then, WTO adjudicative bodies have continued to accept amicus briefs on a case-by-case basis but have generally treated these briefs as tangential to their decisions.<sup>180</sup> Meanwhile, NGOs have identified other ways to engage with the WTO,<sup>181</sup> though the terms of their participation remain fluid and contestable.<sup>182</sup> Perhaps for these reasons, commentators have said that the amicus dispute “produced little more than frustration”<sup>183</sup> or was “much ado about nothing.”<sup>184</sup>

Those assessments overlook the role of ethical conflict in constructing a community. The amicus dispute not only presupposed that the community existed but also treated it as worth fighting for—as if belonging and exercising authority in it mattered. The dispute was particularly significant because it gave developing countries, which historically have been marginalized at the WTO,<sup>185</sup> an opportunity to reaffirm their stake in it and claim it as their own. Again, the alternative was not more unity or consensus. It was for one WTO organ to try to settle the issue, with the effect of further alienating an important constituency—either developing countries or the NGOs and their supporters. The Appellate Body’s legal decisions on amicus briefs incited an ethical conflict that, though never really resolved, reinforced the community’s standing as the locus of trade governance.

## V. IMPLICATIONS FOR INTERNATIONAL LEGAL PRACTICE

I have argued that conflict—especially conflict that plays out in ethical legal terms—can be productive for an international community. It can help constitute and fortify the community. My argument so far has been descriptive and analytic, but its prescriptive message is clear. Insofar as we favor and want to support particular governance arrangements, we ought to

<sup>178</sup> On the point that this dispute was about much more than the amicus briefs, see 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, 344 (Roger B. Porter, Pierre Suavé, Arvind Subramanian & Americo Beviglia Zampetti eds., 2001); Howse, *Membership and Its Privileges*, *supra* note 167, at 509.

<sup>179</sup> See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, paras. 55–56, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).

<sup>180</sup> See Eric De Brabandere, *NGOs and the “Public Interest”: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12 CHI. J. INT’L L. 85, 87, 110 (2011).

<sup>181</sup> See Seema Sapra, *The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-state Actors*, 11 OR. REV. INT’L L. 71, 90–95 (2009). *But cf.* Peter Van den Bossche, *NGO Involvement in the WTO: A Comparative Perspective*, 11 J. INT’L ECON. L. 717, 747 (2008) (arguing that NGO participation is still low).

<sup>182</sup> See BONZON, *supra* note 165, at 1–7.

<sup>183</sup> Jeffrey L. Dunoff, *Public Participation in the Trade Regime: Of Litigation, Frustration, Agitation, and Legitimation*, 56 RUTGERS L. REV. 961, 965 (2004).

<sup>184</sup> Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION 317 (Armin von Bogdandy, Peter C. Mavroidis & Yves Mény eds., 2002).

<sup>185</sup> See World Trade Organization, Ministerial Declaration of 14 November 2001, para. 3, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) (pledging to “address[] the marginalization of least-developed countries in international trade and to improv[e] their effective participation in the multilateral trading system”).

preserve or create space for ethical conflict. We ought to ensure that the relevant participants (however defined) have opportunities to fight on terms that reinforce their association. That message runs counter to much of the current thinking on international law. Many analysts assume that an international community is constituted by commonality and corroded by internal divisions or discord. And they press for international law to solidify consensus and deter or curb disputes. My argument suggests that we need to alter that thinking. Below, I discuss what this might mean in specific contexts. To be clear, my goal here is not to offer concrete proposals for reform. It is to explain why and how we might reassess some common tropes in the design and practice of international law.

### A. Doctrinal Design

Several foundational rules of international law are justified on the ground that, by simply reducing interstate friction, they foster friendly relations and enhance global stability. That logic is flawed. Friction is not inherently an impediment to—and is often an ingredient for—friendly and stable relationships. So, we should stop treating this justification as if it is persuasive on its face. We should demand additional support for it in discrete contexts, defend the relevant rules on other grounds, or adopt different rules.

Take the rule on foreign state immunity that was at issue in the *Jurisdictional Immunities* case. The most prominent justifications for this rule are that it: (1) respects state sovereignty, and (2) enhances interstate relations by reducing friction.<sup>186</sup> The first justification has never been sufficient to explain why a foreign state's prerogatives trump the host state's, especially if the host is regulating conduct in its own territory.<sup>187</sup> The sovereignty justification has also become less tenable over time. In contemporary international law, sovereignty is no longer an adequate basis for shielding states from accountability. Thus, the second justification—about reducing interstate friction—is doing much of the heavy lifting. For example, Steven Ratner recently proclaimed that the rule on foreign state immunity “can easily be justified for its contribution to peace, for the complete absence of immunity would inflame interstate tensions.”<sup>188</sup> The assumption here is that friction necessarily impairs and destabilizes interstate relations.

It does not. What matters is not whether exercising jurisdiction produces friction but how that friction manifests and affects the frequency or nature of the interactions. Indeed, the idea that exercising jurisdiction necessarily corrodes global relationships is belied by a well-accepted exception to immunity. Under the so-called restrictive theory of immunity that most states now endorse, national courts may exercise jurisdiction over foreign states for claims relating to commercial conduct.<sup>189</sup> This exception invariably produces friction in the form of domestic litigation. But there is little evidence that it destabilizes—and good

<sup>186</sup> *E.g.*, *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (justifying immunity by the “perfect equality and absolute independence of sovereigns, and [the] common interest impelling them to mutual intercourse, and an interchange of good offices with each other”); Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AJIL 741, 748 (2003) (describing these justifications as the “two leading rationales . . . [for] the doctrine”).

<sup>187</sup> *See id.* at 748–55.

<sup>188</sup> RATNER, *supra* note 1, at 203.

<sup>189</sup> ANTONIO CASSESE, *INTERNATIONAL LAW* 100–01 (2d ed. 2005); MALCOLM N. SHAW, *INTERNATIONAL LAW* 512–16 (7th ed. 2014).



reason to believe that it instead enhances—global relations. Allowing courts to adjudicate commercial claims lessens the pressure on the host state’s political branches to get involved in these disputes.<sup>190</sup> The litigation helps keep the conflicts confined to the actual disputants. It probably also helps deepen commercial ties between countries. Private entities are more likely to do serious business with a foreign state if they are confident that they can hold it liable for its misconduct than if they are not.<sup>191</sup> In short, the rule on foreign state immunity needs a more rigorous justification.

So too does the rule that limits countermeasures to states that are uniquely injured by a breach. An oft-stated reason for this rule is that allowing “third” states to take countermeasures “would certainly cause a very disturbing increase in international tension”<sup>192</sup> or even devolve the global order into chaos.<sup>193</sup> Again, that reasoning is suspect. Expanding the right to take countermeasures might inflame interstate tensions and exacerbate disputes. But it would do so by enabling multiple states to engage seriously and simultaneously on an issue—which is part of how broad-based multilateral relationships are sustained.<sup>194</sup> For example, since 2011, more than a dozen countries have imposed countermeasures and other economic restrictions on the Syrian government for atrocities in the Syrian civil war.<sup>195</sup> The remedial or deterrent effect of third-state countermeasures tends to be negligible.<sup>196</sup> The measures are significant because they are an occasion for multiple states to rally behind the violated norms and to insist that these norms apply equally to all states. The rule that limits countermeasures to uniquely injured states should be relaxed or justified on other grounds. And if it is maintained, we ought to appreciate its potential costs. At times, it likely will deprive states of opportunities to engage together on their shared governance project and deepen their association.

<sup>190</sup> See H.R. Rep. No. 94-1487, at 45 (1976) (explaining that the “broad purposes” of the U.S. Foreign Sovereign Immunities Act were “to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation . . .”); H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 240 (1951) (“From the point of view of securing a friendly atmosphere in international relations judicial remedies against foreign states may be preferable to diplomatic action necessitated by the refusal of those states to submit to jurisdiction.”).

<sup>191</sup> Cf. Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary, 94th Cong. 80 (1976) (testimony of Cecil J. Olmstead, Chairman, Rule of Law Comm. and Vice President, Texaco Co., accompanied by Timothy Atkeson, Counsel) (“Enactment of this bill[] . . . should substantially reduce certain risks of doing business with foreign governmental entities, reduce costly litigation over immunity issues, and thus benefit the American business community as a whole.”).

<sup>192</sup> Michael Akehurst, *Reprisals by Third States*, 44 BRIT. Y.B. INT’L L. 1, 15–16 (1970).

<sup>193</sup> Stephen C. McCaffrey, *Lex Lata or the Continuum of State Responsibility*, in INTERNATIONAL CRIMES OF STATE, *supra* note 106, at 242, 244 (“It would seem that any situation allowing each member of the international community to take individual action would amount to a state of vigilantism, and thus simply be an invitation to chaos.”); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 433 (1983) (“[U]nder the banner of law, chaos and violence would come to reign. . . .”); see also, e.g., D.N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT’L L. 151, 202 (1988) (“To leave each State to determine its own right to respond to an international crime might, therefore, let loose ‘a sort of international vigilantism . . . .’ (footnote omitted).”)

<sup>194</sup> For examples of countermeasures or other unfriendly measures strengthening legal relationships, see Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT’L L.J. 105, 126–38 (2014).

<sup>195</sup> Dawidowicz, *Third-Party Countermeasures*, *supra* note 115, at 6–7.

<sup>196</sup> See TAMS, *supra* note 80, at 229 (reviewing the state practice on such countermeasures and concluding that “[t]heir actual effects were often rather trivial”).

## B. Institutional Design

1. *Adjudicative Institutions.* Recognizing that conflict can be productive for a community should also affect how we assess key international institutions. In recent decades, international courts, tribunals, and other adjudicative bodies have flourished. Adjudicative institutions are generally thought to enhance global governance arrangements by helping to resolve concrete disputes and clarify the law's normative content, either generally or as applied in specific cases.<sup>197</sup> My argument suggests that these institutions can also enhance global governance arrangements by enabling protracted conflicts.

The suggestion is not as radical as it might appear because it actually captures quite a bit of practice. Recall that the WTO Appellate Body created space in WTO law for states to fight about the proper balance between liberalization and other regulatory goals.<sup>198</sup> Here, an adjudicative institution unsettled, rather than clarified, the law's normative content. And while WTO adjudications can help resolve concrete disputes, they often also catalyze additional rounds of battle. Many WTO disputes last years after an initial finding of noncompliance, as losing states make only modest adjustments to or refuse to alter their offending regulations.<sup>199</sup> Such tactics are facilitated, not hampered, by the adjudicative process. The fact-specificity of WTO decisions and the availability of countermeasures to remedy only prospective harms give noncompliant states leeway to keep fighting for their positions, rather than accept the unfavorable rulings and work earnestly toward compliance.<sup>200</sup> Thus, even if WTO adjudication eventually leads to a dispute's resolution, it often first serves to structure an extended conflict.

Indeed, adjudicative bodies sometimes make explicit that they intend neither to settle a concrete dispute nor to clarify the law. The ICJ's judgment in *Gabčíkovo-Nagymaros* is an example.<sup>201</sup> The case arose out of a 1977 treaty between Hungary and Czechoslovakia about the joint construction of various installations along the Danube River. (When Czechoslovakia dissolved, Slovakia inherited the case.) The ICJ found that each party had acted unlawfully.<sup>202</sup> It then addressed the question of what the parties must do going forward. The Court acknowledged that the treaty's "literal application" was no longer feasible,<sup>203</sup> but rather than give the treaty new content, it directed the parties to define that content themselves.<sup>204</sup> The dispute still lacks a substantive resolution.<sup>205</sup>

<sup>197</sup> See, e.g., KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* 4 (2014); YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 48 (2014). The idea that adjudicative institutions exist to resolve disputes is evident even in the language that is most often used to describe them—as "dispute settlement" bodies.

<sup>198</sup> See *supra* Part IV.A.

<sup>199</sup> See Joost Pauwelyn, *The WTO 20 Years On: 'Global Governance by Judiciary' or, Rather, Member-Driven Settlement of (Some) Trade Disputes Between (Some) WTO Members?*, 27 EUR. J. INT'L L. (forthcoming) (manuscript at 4), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2864413](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864413).

<sup>200</sup> See Howse, *The WTO 20 Years On*, *supra* note 155, at 19 (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").

<sup>201</sup> *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 ICJ REP. 7 (Sept. 25).

<sup>202</sup> *Id.*, paras. 59, 77, 87–88.

<sup>203</sup> *Id.*, para. 142.

<sup>204</sup> *Id.*, para. 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. . . .").

<sup>205</sup> See Jana Liptáková, *State Takes Control of Gabčíkovo*, SLOVAK SPECTATOR (Mar. 23, 2015), at <http://spectator.sme.sk/c/20056626/state-takes-control-of-gabcikovo.html>.

Analysts of course know that international courts and tribunals do not always resolve the disputes before them or clarify the law's normative content. But most interpret this practice as evidence of dysfunction—that the institutions are weak, flawed, or ineffective.<sup>206</sup> My claim is that the practice can be productive. There is value to enabling global actors to fight about the tenets of their governance project, even when they cannot agree on its content. Adjudicative bodies are especially suited to teeing up and sharpening these disputes because adjudication spurs each side to defend its position as forcefully as possible, on terms that assume an existing relationship.<sup>207</sup>

2. *Institutional Redundancy.* For similar reasons, we might see upsides to international law's institutional redundancy. Recall that the various communities that use international law operate mostly independently from one another. Each has its own governance project and institutional structure. But these communities inevitably overlap and intersect. Multiple studies show that global actors exploit that institutional redundancy to undercut decisions with which they disagree. Those who dislike a decision by one community often work to obtain a competing and more favorable decision within another. In other words, they purposefully create conflicts between communities.<sup>208</sup>

The extended dispute over the regulation of genetically modified organisms (GMOs) is a well-known example.<sup>209</sup> Under the WTO agreements, 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

<sup>206</sup> See sources at *supra* note 164 (criticizing WTO Appellate Body decision in *Seal Products*); Laurence R. Helfer, *The Effectiveness of International Adjudicators*, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464–70 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014) (reviewing literature and explaining that the efficacy of these bodies is almost always assessed in terms of whether they actually resolve disputes or clarify the law); Phoebe N. Okowa, Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), 47 INT'L & COMP. L.Q. 688, 697 (1998) (characterizing the judgment as an abdication of judicial responsibility); Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS., 237, 269–70 (2016) (“Another, *even more troubling* tactic to avoid the WTO's impact is ‘uncompliance,’ in which a Member formally complies with a ruling but adopts other measures that have an equivalent protectionist effect that nullifies the ruling's impact.” (emphasis added)).

<sup>207</sup> Cf. Weiler, *supra* note 178, at 339 (“[D]isputes that go to adjudication are not settled; they are won and lost.”).

<sup>208</sup> E.g., DIRK PULKOWSKI, THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT 191 (2014) (“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 6–7 (2014) (describing the practice of creating new treaties to undercut or challenge existing treaties); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 53–62 (2004) [hereinafter Helfer, *Regime Shifting*] (arguing that developing countries use “regime shifting” to, among other things, try to “revise or supplement existing intellectual property rules”); Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT'L ORG. 385, 387–88 (2014) (coining the term “contested multilateralism” for the phenomenon and showing that it occurs across substantive areas of international law); 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*”).

<sup>209</sup> For more detailed descriptions of this example, see MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS (2009); 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, 483–87 (2014).

maintained without sufficient scientific evidence.”<sup>210</sup> In the late 1990s, some states began to resist that requirement and to favor more of a precautionary approach. When these states failed to alter the law within the WTO, they pursued their agenda through a different community—the one that is grounded in the Convention on Biological Diversity. There, states established the Cartagena Protocol, which implicitly undercuts the WTO sound science requirement by endorsing a precautionary approach and preserving some state discretion in this area.<sup>211</sup>

The dispute about the proper scope of an importing state’s regulatory discretion has never really been resolved. A WTO panel in the *EC-Biotech* case examined the European Union’s GMO regulations but did not answer the broader question of how strictly to interpret the sound science requirement.<sup>212</sup> Thus, while that specific case has dissipated, either side could easily reignite the normative conflict by reasserting its position in a new context.

The majority view in the literature is that such conflicts damage international law, to the extent that they linger without substantive resolution.<sup>213</sup> That view is animated by principally two concerns. First, a normative conflict might undercut the efficacy of international law. A state with incompatible obligations can easily invoke one to evade the other.<sup>214</sup> Second, the conflict might destabilize or delegitimize international law.<sup>215</sup> Because distinct communities operate independently, conflicts between them tend to be resolved, if at all, through competition and the jockeying for power, not through the application of accepted legal principles.<sup>216</sup>

<sup>210</sup> 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 UNTS 493; *see also id.* Art. 5 (requiring risk assessment).

<sup>211</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Arts. 1, 2.4, Jan. 29, 2000, 2226 UNTS 208.

<sup>212</sup> *See* Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, paras. 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).

<sup>213</sup> Cohen, *supra* note 1, 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 of 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 (2012) (“There exists a widespread normative preference for coherence over fragmentation. . .”).

<sup>214</sup> *E.g.*, Gehring & Faude, *supra* note 209, at 472; Kal Raustiala, *Institutional Proliferation and the International Legal Order*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

<sup>215</sup> *E.g.*, G. Hafner, *Risks Ensuing from the Fragmentation of International Law*, [2000] 2 Y.B. INT’L L. COMM’N 143, 147, UN Doc. A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1 (asserting that such conflicts threaten the “credibility, reliability and consequently, authority of international law”); Joost Pauwelyn & Luiz Eduardo Sales, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions*, 42 CORNELL INT’L L.J. 77, 83 (2009) (asserting that “inconsistent rulings can” both “leave [a] dispute unresolved” and “threaten the stability and legitimacy of the broader ‘system’ within which the tribunals operate”). *But cf.* José E. Alvarez, *Beware: Boundary Crossings*, in BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS: HUMAN RIGHTS, PRIVATE ACTORS, AND POSITIVE OBLIGATIONS 92 (Tsvi Kahana & Anat Scolnicov eds., 2016) (“Some boundary crossings are desirable, and others are not. The legitimacy of the ‘international rule of law’ does not always require them.”).

<sup>216</sup> A common, related refrain is that powerful countries disproportionately benefit from institutional redundancy because they have the resources to exploit normative conflicts for their own ends. *E.g.*, 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). Some scholars have shown that weaker countries can also benefit, but these

Those two concerns ought to be directed toward specific substantive rules. For example, we might reasonably worry that the Cartagena Protocol undermines the efficacy, stability, or legitimacy of the WTO's strong science requirement. But the concerns are often expressed at a level of greater generality, as if the conflicts that stem from institutional redundancy cause systemic damage to entire regulatory arrangements or to the legal order itself.<sup>217</sup>

In fact, such conflicts might carry systemic benefits. Because distinct communities have overlapping memberships, a conflict between communities often also reflects divisions within a particular community. The GMO dispute was not only between the trade and biodiversity communities but also internal to the trade community. Like other WTO conflicts, this one might have strengthened that community. At the very least, it revealed the fortitude of the opposition to the sound science requirement and provided opportunities for modest but organic adjustment. The dispute was also a way for dissatisfied states to continue engaging with and pressing for their vision of the WTO. The principal backers of the Cartagena Protocol worked through the biodiversity community not because they had given up on the WTO or sought to shift the overall locus of trade governance but because they were invested in the WTO and wanted it to reflect their preferences. They provoked a normative conflict in order to continue participating in the trade project.

Conflicts between international communities might also benefit the legal order more generally. The sheer number of international communities means that conflicts persistently cut across different alliances, rather than cleave along one dividing line. For instance, Europe worked with many developing countries and against the United States on GMOs, but those alliances shift in other contexts. Quite a bit of research suggests that having continuous, crisscrossing conflicts helps stabilize loosely structured societies.<sup>218</sup> When conflicts cut across different associations, no single incident comes to embody all of a state's interests or grievances. A state that is disgruntled in one community can easily tap into and try to address its concerns in another. This reduces the state's incentives to fight to the hilt in any particular case. Thus, even if conflicts between communities undermine particular substantive rules, they might stabilize the broader legal order. Rather than persistently try to defuse or settle these conflicts, we might at times let them linger or even find ways to cultivate them.<sup>219</sup>

scholars have not contested the claim that the conflicts themselves undercut the legitimacy of international law. *E.g.*, Helfer, *supra* note 208, at 82.

<sup>217</sup> See, e.g., Gehring & Faude, *supra* note 209, at 472 (claiming that the conflicts "undermine institutional commitments"); Pauwelyn & Salles, *supra* note 215, at 83 (claiming that the conflicts "threaten the stability and legitimacy of the broader 'system' . . .").

<sup>218</sup> COSER, *supra* note 38, at 77 ("Stability within a loosely structured society . . . [is] partly as a product of the continuous incidents of various conflicts crisscrossing it."); GLUCKMAN, *supra* note 38, at 26 ("The more his ties require that his opponents in one set of relations are his allies in another, the greater is likely to be the peace of the feud."); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing A New Approach to Federalism in Congress and the Court*, 14 *YALE L. & POL'Y REV.*, 187, 217–18 (1996) ("It is possible that America has managed to maintain stability even in an era of robust individual rights precisely because the divisions that define our political structure (i.e., states) do not coincide with the divisions that define our social and cultural structure (e.g., racial and ethnic groups and economic and national interests).").

<sup>219</sup> Some scholars, especially those who work in critical legal theory or global legal pluralism, have likewise argued that we should create space for conflicts between communities. But these scholars either concede or do not address the claim that I am resisting—that when these conflicts are protracted, they undercut a governance association. *E.g.*, KRISCH, *supra* note 62, 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

### C. *Regulatory Legitimacy*

Finally, my argument offers new insights on the legitimacy of international law. Analysts often tie international law's legitimacy to the participants' consent or consensus.<sup>220</sup> That approach suggests that protracted ethical conflicts pose a legitimacy problem for global governance arrangements. Such conflicts show that an arrangement is still contentious to the core. But if, as I argue, ethical conflicts help constitute a political community, then they might instead be an ingredient for legitimacy. Establishing a meaningful political community might help legitimize legal arrangements in the absence of a thick substantive consensus.

Grounding international law in some kind of consensus is attractive because it has the potential to satisfy, simultaneously, three distinct but interdependent dimensions of legitimacy.<sup>221</sup> First, jurisprudential legitimacy, concerning the criteria for validating specific norms as law. Second, sociological legitimacy, on whether people perceive and treat the norms as authoritative. Third, normative legitimacy, about the circumstances in which global actors ought to comply with specific norms. For instance, a state's consent when it ratifies a treaty might show: (1) that decisions under the treaty are legally valid, (2) that the state accepts the decisions as authoritative, and (3) that the state is properly bound by them. However, as the state's actual or felt acceptance of a decision becomes more attenuated, its consent loses purchase along one or more of the above dimensions. As such, a claimed consensus can go only so far to legitimize particular arrangements. It is unlikely to be sufficient when an arrangement has extensive ramifications for constituents who do not participate in it or when it governs issues that remain divisive.

Absent a meaningful consensus, an arrangement's legitimacy—and particularly its sociological legitimacy—might be enhanced through ethical conflict. As discussed, ethical conflict can foster a political community, in which the participants engage together on a common enterprise. Having that kind of community can help legitimize governance decisions in the face of substantive disagreement. In other words, global actors might more readily accept as

NORMATIVE PLURALISM AND INTERNATIONAL LAW 94, 134 (Jan Klabbers & Touko Piiparinen eds., 2013) (claiming that a pluralist order lacks “the stability that is needed for deep international cooperation”); cf. KOSKENNIEMI, *supra* note 57, at 608–15 (arguing for more political contestation to *upend* the “structural bias” in existing legal arrangements) (emphasis added). In fact, most global legal pluralists argue that, though normative conflicts are inevitable, international law should still try to reconcile or overcome them, insofar as is possible. See BERMAN, *supra* note 62, at 10 (arguing for mechanisms that “help mediate conflicts by . . . seeking ways of reconciling competing norms, and by deferring to alternative approaches, if possible”); 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) (manuscript at 16), available at <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”).

<sup>220</sup> See, e.g., Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AJIL 596, 605 (1999) (explaining that the legitimacy of international environmental law is often assessed by reference to state consent); Jan Klabbers, *Law-making and Constitutionalism*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 81, 114 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009) (defending the consensual underpinnings of the sources doctrine on the ground that “anything else would be dictatorial”); Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733, 748–49 (2014) (arguing that the sources doctrine presents a legitimacy problem because it is satisfied by “thin state consent,” and that norms that do not formally satisfy the doctrine might be more legitimate because they might be made through more inclusive processes and “supported by a broader consensus”).

<sup>221</sup> On these dimensions, see Nicole Roughan, *Mind the Gaps: Authority and Legality in International Law*, 27 EUR. J. INT'L L. 329, 340–41 (2016).

legitimate community decisions with which they disagree if they are connected to and invested in the community than if they are not.<sup>222</sup> The implication is not that the arrangement should be entirely up for grabs at any given moment but that it should strike a balance between settlement and contestability.<sup>223</sup> Parts of it should be fixed, while other parts are pliable and open to debate.

To be sure, this path to legitimizing regulatory arrangements has certain limits. First, legal decisions in the zones of contestation are likely to be inconsistent with one another and motivated by considerations, like raw power, that would ideally be external to law. The decisions thus would not satisfy a prominent vision for the rule of law—one that prioritizes consistency in application and constraints on the exercise of power.<sup>224</sup> However, that vision for the rule of law is not the only plausible one. As Christopher Kutz has explained, inconsistency and external influence in legal decisionmaking are not necessarily incompatible with the rule of law. A decision that claims the mantle of law still must be defended on its own terms, with reasons that support it. “The force of such reasons is not cancelled by the presence of competing considerations.”<sup>225</sup> Meanwhile, the law’s pliability gives dissenters room to resist a decision and press their opposing views. Kutz contends that this dynamic advances, rather than weakens, the rule of law. “The ideal of the rule of law is far better served by lively debate than by wooden consensus because debate renders the law’s many values perspicuous in the actual exercise of authority.”<sup>226</sup> The point for now is that any rule of law concern with ethical legal conflict ought to be taken seriously but not overstated.

Second, if international law is too open-ended, it might not effectively regulate behavior.<sup>227</sup> This just means that international law would serve a different function in its open spaces.<sup>228</sup> It would facilitate conflict. Moreover, it might to some extent still serve a regulatory function if it establishes authoritative processes that can define codes of conduct for concrete

<sup>222</sup> See, e.g., Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 *TULSA L. REV.* 485 (2004); Seyla Benhabib, *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty*, 103 *AM. POL. SCI. REV.* 691, 698 (2009).

<sup>223</sup> RONALD DWORKIN, *LAW’S EMPIRE* 88–90 (1986).

<sup>224</sup> See, e.g., UN Secretary-General, Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004, 616, para. 6 (2004) (asserting that the rule of law “requires . . . measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency”); Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 *VA. J. INT’L L.* 19, 25 (2003) (“Not only does the international rule of law instill a habit of obedience, thereby civilizing the exercise of power; but the requirement of consistency would also provide greater predictability and a more stable international environment.”).

<sup>225</sup> Kutz, *supra* note 69, at 1028.

<sup>226</sup> *Id.* at 1029; see also 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 public power.”).

<sup>227</sup> This claim is central to many compliance theories. E.g., CHAYES & CHAYES, *supra* note 124, 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 *AJIL* 705, 714 (1988) (“A determinate rule is less elastic and thus less amenable to . . . 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.”).

<sup>228</sup> See BESSON, *supra* note 13, at 117 (“Knowing precisely where we stand is not always the point of a provision: instead, the point may be to ensure that certain reasonable debates take place in our society rather than to settle them entirely.”).

settings. For example, this is what the WTO Appellate Body does now that it has unsettled the law on the balance between trade liberalization and other public policies: it makes fact-specific determinations of how the disputing states ought to behave in specific contexts.

Third, ethical conflict will not solve all of the legitimacy concerns that surround international law. Conflict's legitimizing potential is starkest for actors who actively engage with and see themselves as part of the relevant community. These actors might come to accept as legitimate decisions with which they disagree. But conflict is unlikely to have a similar impact on actors who are marginalized within or completely outside of the community. Groups that are disenfranchised are likely to continue questioning the legitimacy of community decisions that affect them. As such, an arrangement's legitimacy for its core members might be out of step with its legitimacy for other constituencies. That kind of legitimacy gap has already been identified at the WTO<sup>229</sup> and has led to various proposals for altering the WTO's ethos—by broadening the set of actors or interests that fall within its ambit.<sup>230</sup> My argument suggests that, rather than pursue specific substantive reforms, we might create more opportunities for ethical engagement and contestation. We might, in other words, enhance the legal mechanisms, both at the international level and within national systems, for various constituencies to argue about specific global governance projects.

## VI. CONCLUSION

International law now touches almost every aspect of public governance, and in many areas it penetrates deeply into national legal systems. As international law's scope has expanded, the world has become more integrated. The number and range of actors who engage on global governance issues have grown, and their interactions have become more frequent. Inevitably, these actors have also found new reasons and occasions to disagree. It is wrong to assume that their conflicts detract from or impede their governance arrangements. Conflict is an integral—often critical—part of these arrangements. So, we should assess and treat it as such. Rather than persistently try to cabin, curtail, or defuse it, we should at times preserve or even cultivate it. And we should study how best to structure it so that it further enhances both specific regulatory arrangements and the global order more generally.

<sup>229</sup> See Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT'L L. 221 (2006); Weiler, *supra* note 178.

<sup>230</sup> See, e.g., Robert Howse & Kalypso Nicolaïdis, *Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large*, 79 L. & CONTEMP. PROBS., 259, 266–67 (2016); Stewart & Badin, *supra* note 151, at 579.