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Professor Hakimi's Reply on The Work of International Law

August 4, 2017

by *Monica Hakimi**

Thanks to the *Harvard International Law Journal* for hosting a symposium on my Article and to the four respondents for their thoughtful contributions. In the Article, I distill and then criticize a prominent view about the role of international law in the global order. The view—what I call the “cooperation thesis”—is that international law serves to foster a particular kind of cooperation, specifically to help the participants achieve their common aims and curb their disputes. Lawyers who subscribe to this view of course appreciate that international law is, like all law, often contentious in operation. But they posit that, unless such conflict is overcome, it detracts from cooperation and evinces the limits of international law. That view is wrong. It incorrectly assumes that cooperation and conflict are antithetical—that they pull in opposite directions, such that international law fosters one by curtailing the other. In fact, international law fosters both simultaneously. Even as it helps the participants achieve their shared goals and reconcile their differences, it also helps them have and sharpen their disputes. The two kinds of interactions are not antithetical but interdependent. I will not use this Reply to rehash that argument. I will simply address the main criticisms and questions that the respondents raised.

A. Does My Argument Go Too Far?

Of the four respondents, Professor Bodansky seems the most critical of my piece. He contends that the cooperation thesis is not specious, as I claim it to be; **“it is, at worst, incomplete.”** According to Bodansky, the thesis is partly true because global actors sometimes use international law to promote their shared objectives and resolve their disputes. He offers the example the Montreal Protocol on Substances that Deplete the Ozone Layer. Bodansky says that the Protocol **“establishes a cooperative regime to promote states’ common interest in preserving the stratospheric ozone layer.”** He acknowledges that this regime **“might be understood as enabling conflict, by using ambiguous terms that permit differing interpretations and by authorizing parties to use trade measures against non-participating states.”** But he argues that characterizing the Protocol as conflict-enabling would be “misleading” because the Protocol clearly fosters cooperation.

Bodansky’s criticisms are misdirected. I do not deny that global actors sometimes use international law for the ends that the cooperation thesis envisions—to advance their common agendas or move past their differences. The thesis is wrong because it presupposes that conflict is an obstacle to those ends and, therefore, a problem that international law must overcome. To the extent that Bodansky claims that international lawyers do not adhere to that view, I disagree. Statements like the following are routine:

- “[A] dispute itself implies disagreement and non-cooperation” and must be addressed to avoid “the *danger* of an impasse in dispute settlement.”^[1]
- “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.”^[2]

- “International law represents a system of norms and processes for resolving competing claims,” and, in turn, promotes peace and the respect for generally accepted, basic rights.[3]
- “The purpose of international law, conventionally viewed, is to reduce interstate conflict and facilitate interstate cooperation. . . .”[4]

These statements reflect the cooperation thesis. They suggest that international law does or must curtail conflict in order to foster cooperation.

The cooperation thesis is evident even in Bodansky’s own response to my Article. He begins by framing my inquiry in terms of whether “**the function of international law [is] to promote cooperation or conflict**” (emphasis added). Notice his use of the disjunctive. He then repeatedly depicts conflict as oppositional to cooperation. He says, for example, that “**litigation is associated with conflict. . . . But transactional law, in contrast, is interest-based and generally promotes cooperation**” (emphasis added). His invocation of the Montreal Protocol is illustrative. He claims that characterizing the Protocol as conflict-enabling is misleading because the Protocol promotes cooperation. What’s actually misleading is his insistence that the Protocol promotes cooperation but not conflict. It promotes both. The contract analogy simply drives home the point. Even when a contract helps the parties reach a mutually beneficial goal, it creates new grounds and reasons for them to disagree. It entitles them to fight over its application and to contest behavior that now constitutes a breach.

This brings me to Bodansky’s normative claim. He asserts that, although an instrument like the Montreal Protocol “**can sometimes lead to litigation, . . . that is not their object. Litigation is a sign of failure rather than success.**” I’m not sure exactly what he means by an instrument’s “object.” If he means that the parties to the Protocol intended not to foster conflict but to achieve a particular result—to preserve the stratospheric ozone layer—then he is probably correct. But the functions that a legal instrument serves are not always the ones that it was originally intended to serve. Though the Montreal Protocol helps the parties work together to preserve the stratospheric ozone layer, it also helps them disagree about various facets of that project.

Two propositions follow. First, even if we assess the success of international law as Bodansky does—in terms of whether it advances a shared agenda—disputes about that agenda would not betray its failure. As I explain in the Article, and as Bodansky concedes, conflict is often an ingredient for, rather than an impediment to, achieving a common objective. This can be so even if the conflict is protracted or lacks real substantive resolution. It means that litigation is not necessarily “**a sign of failure.**” Second, Bodansky’s metric for assessing success is myopic. When international law does not help the participants reach a specific goal or reconcile their differences, it might (successfully) do other things. If nothing else, international law might help these actors disagree, which can itself be valuable.

B. Does My Argument Not Go Far Enough?

Whereas Professor Bodansky argues that I overstate international law’s role in enabling conflict, Professors d’Aspremont and Krisch suggest that I do not press that claim hard enough. D’Aspremont criticizes my Article on two grounds. First, he says that I did not adequately acknowledge that “**the relationship between international law and conflict is not one of facilitation but of mutual constitution.**” His point is that international law both constitutes and is constituted by the conflicts in which it is invoked. I made a similar point in my Article, though I used different language. I argued that cooperation and conflict are synergistic—by which I meant that each depends on and helps generate the other.

Second, d’Aspremont argues that, “**in positing a symbiosis between conflict and cooperation, [I] uphold[] the dichotomy between two idealized and objectivized situations, namely conflict and cooperation, and vindicate[] the possibility that the latter replace the former.**” That was not my intention. In arguing that conflict and cooperation are symbiotic, I aimed to show that the two go hand-in-hand; one does not evince or lead to the absence of the other. Indeed, I used the World Trade Organization and the *ius ad bellum* to make

precisely this point: although international law curbs some trade or forcible conflicts, it facilitates and even fuels others. In addition, I underscored that these conflicts themselves reflect a kind of cooperation, though not the kind that the cooperation thesis prizes. In order for adversaries to engage in an intelligible conflict, they need to be able to communicate their positions and make sense of each other's moves. Having a cooperative base—common ground rules with which to convey their discontent and structure their interactions—enables their dispute. Again, conflict and cooperation are not inherently dichotomous. They are intertwined.

Krisch's main criticism of my Article is more normative. He suggests that international law has been implicated in much deeper, more pernicious ways than I admit. In his view, my effort to portray international law **"in a positive light"** and to defend it from **"unwarranted normative charges . . . constrains [me] from developing the full potential of [my] conflictual account."** Krisch is correct that I do not examine the full range of conflicts that international law invites or all of their potentially destructive effects. But my normative agenda was not to portray international law as, on the whole, justifiable. It was to underscore that the two most common attacks on international law—that it is ineffective or illegitimate to the extent that it does not curb conflict—rest on the cooperation thesis and are conceptually flawed. These attacks must be refined to reflect the fact that conflict does not necessarily betray a failure of cooperation or a deficiency in international law. Conflict is instead part of the project of international law.

C. Next Steps

Professor Meyer seems the most sympathetic to my descriptive and normative claims. He focuses on an important follow-up question: **"how one can tell whether a particular conflict is consistent with international law's purposes."** Meyer rightly notes that **"some conflicts surely are challenges to the larger system of international law, rather than efforts to work within it. And some conflicts surely make us worse off than we were ex ante."** He hypothesizes that international law might be least adept at productively channeling value conflicts. In his view, **"an aversion to value-driven conflicts"** and the associated **"[a]ppeals to technocracy"** are **"built into much of international law"** and risk exacerbating inevitable conflicts. Meyer's descriptive account might or might not be accurate. But he and I agree that international law **"needs to become more comfortable with value conflicts."** I explore this theme in greater depth in a separate article, "Constructing an International Community," which is forthcoming in the *American Journal of International Law*.

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[1] Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 *Eur. J. Int'l L.* 1, 9–11 (2003) (emphasis added).

[2] Anthony D'Amato, *Groundwork for International Law*, 108 *Am. J. Int'l L.* 650, 652 (2014).

[3] Steven R. Ratner, *The Thin Justice of International Law: A Moral reckoning of the Law of Nations* 1 (2015); *see also id.* at 2, 73 – 76.

[4] Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 *B.C. L. Rev.* 1147, 1152 (2011).