Between Cooperation and Competition:

A Preliminary Essay in the Philosophy of International Law

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I. A Contradiction

The United Nations is founded on a contradiction.[1] In the General Assembly, which mimics a parliament, every country is entitled to one delegate and one vote. As in a parliament, collective decisions are taken by majority rule. The basis for this model is an analogy between the individual bearer of inviolable and equal rights and the sovereign state – an analogy usually captured in the phrase "sovereign equality."[2] Within the terms set by this analogy, a principle of democratic equality applies, even if it is not one that treats population size as a relevant factor in specifying the relative voice of states.

But layered on top of the General Assembly is the Security Council, which has the capacity to issue decisions having the force of law in matters of war and peace. Membership in the Security Council is specified by the Charter of the United Nations.[3] Five nations are permanent members. No principle for their identity is stated, but the permanent five (P5) began with the major victors in World War II -- the United States, the Soviet Union, and Britain -- supplemented by France (for reasons worth

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[1] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge: Cambridge University Press, 2005), 59-61 notes the "the common experience that international legal argument is somehow contradictory." Koskenniemi locates the contradiction in two approaches, one of which begins with a normative code purporting to govern state behavior and reasons downward to international law, the other of which begins with the existence of states and claims to reason upward to a normative order "on the basis of 'factual' state behavior." For him, these approaches are necessarily mutually exclusive. Although there may be some overlap between the two views sketched by Koskenniemi and the two families of views I sketch below, their essences differ; for me, the key difference lies in substance, not different methods for reasoning to normative conclusions. Koskenniemi also notes the difference between "community" driven and "autonomy" driven theories of international law, id. at 482. This is closer to the divide that I shall suggest. Koskenniemi thinks the contradiction is irreconcilable; I am not at all sure this is the case.

[2] "The fundamental premise on which all international relations rest." Koskenniemi, 93 & n.80 (quoting Cassese)

[3] U.N. Charter Chapter V, Article 23.

contemplating) and China, the sole non-European power.[4] Ten more members are elected by the General Assembly for two-year terms. Although the Security Council decides questions by a majority-style vote,[5] each of the P5 has a veto power over any Security Council resolution. The other ten members' votes count, but they do not have veto power.

This structure, decidedly undemocratic, in effect elevates the Security Council over the General Assembly, and the P5 over other countries. Its principle of organization is more difficult to identify than that of the General Assembly. The Security Council has, of course, some similarity to an unelected upper chamber. And the United Nations Charter, which created the structure, is a treaty ratified by all the member states, who have therefore formally agreed to the Security Council's design and membership. But unlike most upper chambers, which have tended to become more democratic in the municipal sphere[6] (the British House of Lords is a good example), the Security Council has remained largely unchallenged. India's bid to join the permanent members of the Security Council, recently endorsed by Barack Obama, reinforces rather than undercuts the idea that the P5 do and should maintain a dominant, even controlling role in the most important decisions of international affairs. The recognition of power is certainly part of the justification for this design. So, presumably, is some theory of a special responsibility that devolves on powerful states.

[4] Over time, this membership has evolved slightly. The Soviet Union no longer exists, and Russia inherited its seat. China was originally represented by the Republic of China, based in Taiwan, but in 1971, the People's Republic of China was acknowledged as a member instead.
[5] Actually a small super-majority: nine of the fifteen members.
[6] In this essay I will follow the international lawyers' convention of calling the domestic sphere "municipal," despite the occasional infelicity of the term.

What is going on here? A cynic (I am one) would say that the contradiction between democratic structure of the General Assembly and the undemocratic structure of the Security Council is no accident. The dual, contradictory structure was designed so that powerful countries, mostly the United States and the Soviet Union in the post-World War II period, could make some claim of democratic legitimacy while simultaneously preserving control over the most important functions of the United Nations. On this view, it should not be surprising that, according to the orthodox contemporary interpretation, Security Council resolutions may have the force of international law, while General Assembly resolutions ordinarily do not.[7] Those states with the greatest power aim to keep that power for themselves, and do not want allow the United Nations to redistribute it to other states in the form of a power to bind them by legislation.

The more broadly and deeply one looks at institutions and practices of international law, the more this contradiction in the structure of the United Nations begins to look exemplary rather than exceptional.[8] Many international institutions reveal features that resemble municipal liberal democratic practices, building apparently on the analogy between the sovereign equality of states and the inviolable rights of individual citizens. International courts and administrative-bureaucratic bodies speak and act and are designed so as to draw on the bases for legitimacy (multiple and conflicting though they might be) that we know from the municipal context. Alongside values of deliberation,

[7] Both of these statements can be made more nuanced. There are some dissenters to the so-called "legislative phase" in the life of the Security Council since the end of the Cold War, who argue that the Security Council was never intended to make law, even if its decrees are situationally binding. As for the General Assembly, it may act with the force of law in admitting new member states; and its resolutions may be construed as sources of evidence for the content of customary international law.

[8] In this essay, I focus on the interaction between states as the primary focus of international law. But in the last decade, especially, the question of the status of non-state actors has become a major topic in the field, from NGOs to terrorist organizations to private individuals. This would require further elabpration.

equal voice, and voting that we see in the case of the General Assembly, we also encounter practices redolent of due process and reason-giving and rights.

Yet a wide range of international institutions – including, prominently, many doctrines of substantive international humanitarian law – seem on close scrutiny to eschew the presumption that states are imbued with equal rights in the same way as citizens. Instead, these institutions and doctrines acknowledge, explicitly or implicitly, that states have different amounts of power, and that they may exercise that differential power in their interactions with other states. Often the Security Council is the institution that operates to enforce the disparity. Thus, for example, the Security Council has the authority to authorize the use of force by some member states against others, and to prohibit the use of such force in particular cases by declaring it unlawful. In the most basic sense, this means that members of the P5 can uniquely veto wars – but can also pursue them under the structure of international law, provided there is no veto and enough other Security Council members agree.

For another example, consider the International Criminal Court. On the surface it looks like some sort of municipal court, constituted by its consenting and equal member states, with broad powers to investigate and prosecute cases in which local legal systems have proven inadequate. But in actuality, its jurisdiction is limited by the Security Council, which can ask for a year's delay in prosecution and can refer cases for investigation on its own initiative.[9] This means that every investigation or prosecution has some relation to

[9] Whether the Security Council could shut down a pending investigation permanently is less clear, but it is at least arguable that it could.

the Security Council, subject either to its suspension or veto. In effect, the ICC is therefore largely a tool limited to the investigation and prosecution of international law crimes that the P5 (as powerful members of the Security Council) are willing to see prosecuted.[10]

The cynic, observing such apparently contradictory features of international law, would say that they are unsurprising. The higher the stakes, the greater the reason for states with power to hold that power closely and not distribute it to others. In situations that are less pressing, powerful states can share authority more easily and cheaply. They can take advantage of the superficial analogy to municipal liberal democracy to produce a veneer of democratic legitimacy for the structure of international law. That legitimacy would in turn be useful if it helped convince ordinary states and their citizens that the institutions of international law are indeed legitimate, because it would normalize those ways in which international law not only replicates but enhances the power of the P5.[11]

But this cynical account, descriptively accurate though it might be, does not consider either the question of what principled theory underlies the structure, or whether it is normatively legitimate. After all, it is normal (inevitable!), cynics believe, for our political and legal institutions to be structured so as to reflect some combination of the

[10] From the opposite perspective, the ICC could perhaps be seen as constraining the previously unlimited authority of the Security Council, as Ruth Wedgwood has argued. This explains at least in part why the United states has not ratified the Rome Statute

[11] An intellectual historian might offer the modified, less cynical view that contradictions in the logical structure of international law reflect very complex, interrelated streams of thought about international relations over the last five centuries. Cf. Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge: Cambridge University Press, 2001). The historian, though, is cousin to the cynic: he must explain why among the various available options the particular contradiction has been adopted; and he cannot always rely on contingent chance, but must recognize a major role for power, as indeed does Koskenniemi (quite correctly).

deployment of power and the appearance of legitimacy. Yet that observation does not end the conversation about what principled reasons we might have to explain and justify those institutions -- instead, it begins it.

What follows is a preliminary essay in the philosophy of international law. I want to ask what theories, defensible or otherwise, might underlie the basic design of international legal institutions. I shall propose two main families of such theories, one grounded in the pursuit of international cooperation, the other in the management of international competition. Although I am interested in constructing and defending each of these theories, I also want to explore two further the questions: whether one of these theories is preferable to the other, and whether it is justifiable to have institutions that simultaneously embody both of these theories.

I have, in other words, bitten off much more than I can chew. To make matters worse, I suspect, though I do not claim here, that this exploration of the theoretical foundations of international law can shed light on the ends of municipal law. I want to acknowledge in advance that I have not yet incorporated all of the voluminous literature on these topics into my references (or, for that matter, my base of knowledge). But that has not stopped me from starting to frame an argument.

II. Genealogy, Anthropology, Nature

The great classic theories of international relations and law – of Grotius, Pufendorf, and Hobbes – begin from claims about the nature of the human. Grotius, relying on the Stoic observation of human sociability, emphasized the fact that humans uniquely desire to organize themselves into cooperative societies, and identified that feature as natural.[12] From here he could, as a natural law theorist, proceed to normative claims about how people ought to treat each other; and from there to claims about how groups organized into states ought to act in their encounters. Speaking at a very great level of generality, one can say that Grotius considered cooperation important to his account of international law.[13] Pufendorf adopted an even more robust account of human sociability, and demanded much greater duties of cooperation among states, condemning wars that arose from competition between states.[14]

Hobbes, of course, emphasized different features of human nature, namely those of inevitable competition. For him, too, what he took to be natural facts provided a basis for arguments about how people ought to act towards each other. Specifically, the state of nature as a state of war of all against all clarified for him both the law of nature (every

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[12] Hugo Grotius, Prolegomena to the Second Edition of De Jure Belli Ac Pacis. For a contemporary interpretation of Grotius emphasizing the fact of human sociability (and its Stoic origins), see Martha Nussbaum, Frontiers of Justice: Disability, Nationality, Species, Justice (Cambridge; Harvard University Press, 2006), 36-9. A different emphasis can be seen in Richard Tuck, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant (Oxford: Oxford University Press, 1999), 99.Extending Grotius's argument and that of Pufendorf, both of whom used the faculty of speech as a proof of the naturalness of human cooperation, Emmerich de Vattel pointed out that the faculty of speech could only be perfected through linguistic contact in childhood -- as nice a disruption of the demarcation between the natural and social as can be imagined. Vattel, The Law of Nations, lix.

[13] Again, Tuck disputes this interpretation of Grotius, and believes Grotius and Hobbes are actually quite close, each accepting only “minimum” sociability, see Tuck at 102; but it is enough for my purposes here that the opposition between Grotius and Hobbes was often seen as standard. For Tuck, Pufendorf is the true anti-Hobbesian theorist of cooperation.

[14] See, e.g., Samuel Pufendorf, The Law of Nature and Nations (II.3.16) (“although another Person hath done me neither Good nor Hurt . . . yet Nature obliges me to esteem even such a one as my Kinsman and my Equal.”). See tuck, 164-65.

man ought to endeavor peace) and the right of nature (the right to defend ourselves by all means we can).[15] From here he could reason most famously to the necessity of the state; but also to the conclusion that, as among states, the right of nature remained.[16]

States were in a state of war with each other, like men in the state of nature. To explain why states, unlike individuals, did not join together to form a common sovereign, Hobbes turned to the benefits of competition. Competition among sovereign states served the interests of the subjects of those sovereigns. "Because they uphold thereby, there Industry of their subjects; there does not follow from it, that misery, which accompanies the Liberty of particular men.

In a basic sense, then, Grotius and Pufendorf built their accounts of international law on the basis of a theory about cooperation, while Hobbes relied for his views on a theory of inevitable competition. As a genealogical matter, these two approaches, the Grotian/Pufendorfian and the Hobbesian, stand behind the two families of international law theory that I intend to explore. It is possible, indeed probable, that many adherents of the views I am about to sketch come to their perspectives via anthropological commitments comparable to (or at least genealogically connected with) those of Grotius and Hobbes respectively.[17]

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[15] Thomas Hobbes, Leviathan, Richard Tuck ed. (Cambridge, Cambridge University Press, 1996), Chapter 14, 138-45.

[16] Leviathan, Chapter 30, 244 ("[T]he Law of Nations, and the Law of Nature, is the same thing. And every Soveraign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring his own safety.") Strictly speaking, then, Hobbes denied that international law was anything more than the law of nature; he therefore would have denied that international law could be understood as law in the ordinary sense of the term.

[17] The trajectory of the genealogy is extremely complex and involuted, far more than this schematic formulation just introduced would suggest. See Koskenniemi, Gentle Civilizer of Nations, passim.

But the theories of international law with which I want to deal in this essay differ from their genealogical ancestors in an important way: they are not theories of natural law. As I shall reconstruct them, they do not rely (I think) upon any claims about the inherent nature of human beings. They claim not to derive normative commitments directly from purported facts about the way the world is. They do make some observations about the way people behave towards each other when organized into societies and states. But, I shall argue, their disagreement is not based on fundamentally different beliefs about empirical facts. It is, rather, grounded in different ideas about what international law is for, defined in terms of its ability to improve human flourishing and to do so consistent with being morally justified.

It is worth noticing, of course, that biologists, primatologists, and social theorists (including psychologists and economists) have not given up on the schematic debate between cooperation and competition, which remains one of the most generative in modern Western thought.[18] Some moral philosophers, or would-be moral philosophers, remain intrigued by the possibility that important moral views could be derived from factual claims about how human beings or other primates are and how they interact. By extension, the behavior of organized political societies such as states might be expected to generate moral claims.

In what follows, I want to be careful to avoid arguments of this form, even while acknowledging that some sorts of naturalism may be sneaking into contemporary

[18] See, for example, the work of primatologist Frans De Waal.

normative views about international law. The genealogy to which I am pointing has a tremendously powerful influence. If, on one possible view, political theory can proceed as secularized theology,[19] it is also true that contemporary political-theoretical debate can sometimes proceed as de-naturalized natural law reasoning. That this intellectual risk exists provides even stronger reason for investigating the core philosophical commitments that might be said to underlie contemporary international law.

III. Cooperation

A. In Theory

What, then, are the possible theories that might underwrite the institutions of international law? The leading theories are, I think, structured by teleology: they offer an account of what international law is for, then use that purpose to explain and justify the practices of international law. There is a certain implicit functionalism at work here. Even when there is no easily available historical account of how the institutions of international law were self-consciously constructed to promote the purpose that is proposed, the theory reasons backwards from the existence of the practice to an account of what ends the practice serves.

One widely held view sees international law as designed to facilitate cooperation among different countries. There are, speaking generally, two main versions of this view. The first takes the existence of political groups such as modern states as a given fact, and holds that it is desirable for these groups to interact with each other cooperatively so as to

[19] Compare Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty, tr. Schwab (Chicago: University of Chicago Press, 2005), 36.

improve the well-being of the individuals who comprise these groups.[20] The second version, which is more cosmopolitan-utopian in its conception, considers the existence of political groups to be contingent and not especially desirable. It seeks cooperation among these groups for the same reason, namely to improve the well-being of individual members. But it also aims to use this cooperation so as to eliminate, over time, the political entities themselves. Its subsidiary goal is to allow individuals to interact with each other cooperatively without the mediation of political groups like states.

Why is cooperation among countries good, and why would we need international law to facilitate it? Unlike Grotius or Pufendorf, supporters of this vision of cooperation do not believe that cooperation is good because it is natural to us as human beings. They believe, rather, that cooperation among states is good because it improves well-being. Probably the most crucial benefit to well-being of cooperation is that, by facilitating common projects between nations and across their borders, cooperation creates incentives not to go to war. These incentives are both material and mental. On the material side, expanding cooperation reduces the risks of war by creating value that would be destroyed in case of war. It helps provide the self-interest that will give citizens of different states the motivation to pressure their governments not to fight each other. At the level of mental processes, this view suggests, cooperation increases the likelihood of common ways of thinking. Our ideas are important to avoiding war because they shape our beliefs about what our interests really are. On this view, cooperation among countries improves well-being in part because it encourages their citizens to see themselves as part of some

[20] I am leaving out here those organic nationalists who believe that the group itself has some moral interests apart from those of its members.

broader entity – a culture, say, or a moral community -- with a shared view of the best way to live.

Beyond peace, well-being is also usually understood to include the benefits of exchange among nations, usually according to some theory whereby exchange makes everybody better off in the long run.[21] The exchange that results from international cooperation is not purely material improvement through trade in goods. It includes the exchange of ideas, which travel more easily across borders when cooperation exists.

Adding to greater peace, more goods, and a richer range of ideas still does not exhaust the appealing features of cooperation, however. Even without embracing the view that cooperation is good because it is human, we can still construct the argument that our well-being as humans is inherently enhanced by being in relations of cooperation with one another. A mutually cooperative relation is likely to be one of mutual respect and commonality. If this is so, then cooperation itself improves the quality of our well-being, not just the amount of it. To cooperate, on this view, is partly constitutive of what it means to live well.[22]

To undergird the purposes of international law, this normative view of cooperation – that it is a great contributor to well-being – must be transferred from the level of relations among individual to relations between states. The move may seem intuitively obvious,

[21] Even if in the short run the transfer of goods and ideas can have destructive effects.
[22] Of course cooperation can be used to achieve bad ends. But on this argument, the cooperation itself might enhance the well-being of the participants, even if what they do while cooperating turns out to be evil.

but as we shall have occasion to see later, many people do not find it so, and for plausible reasons. It can be accomplished in two ways. First, one could argue that cooperation among states makes cooperation among individuals more likely. Or one could argue, more ambitiously, that since states are composed of individuals, the very acts of cooperation among them – acts performed ultimately by individuals (albeit acting on behalf of states) – are themselves acts that contribute to well-being. The idea is not that states themselves have the features of, say, dignity that make relations of commonality and respect inherently valuable, but rather that the people who make uo the sattes and act on their behalf have these features.

Cooperation among states could in principle occur without international law. Yet supporters of the cooperation view see law as particularly well suited to facilitating international cooperation. The reason for this perspective must begin with the claim that cooperation requires express agreement. Parties can sometimes cooperate without express agreement; but cooperation is more difficult for large, complex entities like states than it would be for ordinary individuals.

The next step of the argument must be that agreement is more likely to be durable and reliable if it occurs pursuant to legal norms. This is a subtle matter for international law theory, and for familiar reasons. In the case of ordinary municipal law contracts, a legal order provides the possibility of enforcement that makes contracts more durable than agreements backed only by moral sanction. In the international context, the absence (as a general matter, though not invariably) of a third-party enforcement mechanism makes it

slightly harder to see why legal agreements are more durable than ordinary moral agreements. Indeed, the classic theorists of international law often elided the distinction between legal and moral obligations, describing the law of nations as a moral law of nature that bound, at least in part, only in conscience.

Without attempting to generate a full-blown account of how enforcement works in international law, one can at least assert uncontroversially that, in this realm, legal agreements are today, by convention, entitled to a different sort of enforcement than non-binding agreements. Sometimes treaty regimes provide mechanisms for the parties to enforce their violation. Some treaties carry no overt international sanctions for their violation, but rely on municipal enforcement (the Geneva Conventions are a prominent example). Many courts around the world, including some in the United States, have long treated international law as enforceable in municipal courts. So in the case of some international agreements, enforcement for legal as opposed to moral promises may be greater only municipally. Nevertheless, this still counts as a significant, meaningful difference.

Furthermore, it could be argued that law is uniquely well-suited to facilitating international cooperation because law itself is in some sense an archetypally cooperative social practice.[23] Law, on this view, arises precisely when parties agree to create institutions that will monitor their future behavior under some set of rules or norms. If law comes into being when parties are cooperating in the creation of durable institutions, then whenever we observe the creation of new legal-institutional forms, we can be sure

[23] Compare Scott Shapiro, building on Michael Bratman, characterizing law as a joint cooperative activity.

that greater cooperation between the relevant parties is being facilitated. This is not quite a circular relationship. Rather, the argument is that an aspiration to cooperation can explain the growth of legal and quasi-legal institutions, because such institutions are both the product of cooperation and also are designed to make future cooperation possible.

B. In Practice

To make this entire somewhat abstract account concrete, apply the pro-cooperation view to the example of the European Union. Many of those who today support the EU think of cooperation as providing substantial benefits to the citizens of member states. The free exchange of goods and ideas is of course a central part of the story -- indeed, the union began as an economic community for evolving in the direction of greater and closer cooperation. But the main motivating force from the beginning seems to have been the desire to use cooperation to avoid another European war. A Germany that is materially invested in the well-being of France might be less inclined to conquer it. And cooperation was also meant to facilitate the emergence of common European values -- captured in declarations of rights as well as other international instruments -- that might lead Germans not to define their self-interest in terms of regional conflict or *lebensraum*.

It is also worth noticing that both of the two versions of the cooperative account of international law can be identified in the beliefs of different EU supporters. Many, probably most, think that the continued existence of the European states as states is inevitable and probably desirable. For them, cooperation among the member states is most beneficial for EU citizens precisely when the participants in the cooperation are

separate states. Some benefits, associated especially with national culture, might be lost if cooperation were to break down the distinctions between nation-states. Other EU supporters, however, see the increasingly cooperative EU process as moving along a continuum toward a true federal state, one that would be cosmopolitan at least vis-à-vis its citizens. For them, international cooperation is a step towards the gradual removal of arbitrary boundaries.

Applying the model of international law as cooperation to the United Nations, one can see that it underwrites the democratic model of the General Assembly, conceived as a cooperative association of free and equal states. The sovereign equality of the member states is conceived here as a basic condition for cooperation.[24] Trade in goods is not within the direct ambit of the GA, although by extension one could see the network of international trade treaties as an extension of the GA's reach and ideology. Cooperation to facilitate the trade in ideas, however, is within the ideological model of the UN in so far as the Universal Declaration of Rights calls for free speech.

More to the point, the iterated cooperation among the member states of the United Nations is intended to reduce the risk of war by creating common material interests as well as common beliefs and values. The ideal over the long term is to institutionalize cooperation through the UN and its many member and affiliate organizations. The world Health Organization and the Millenium Development Project are two high-profile examples of institutions aimed to improve the quality of life of the citizens of member

[24] Consider by analogy the "circumstances of justice" that famously obtain among individuals according to Hume.

states through cooperation. But the UN has many arms devoted to economic and social cooperation, including the Economic and Social Council (ECOSOC). By participating in in these institutions – as voting members, donors, recipients, or each by turns – member states are supposed to develop the incentive to keep participating. Making war on other member states would curtail that participation (at least in theory). Cooperation should therefore in principle reduce the likelihood of warmaking.

Institutionalized cooperation in the GA and other UN institutions is also supposed to affect the beliefs and values of member states and their citizens. Cooperating in institutions that treat states as sovereign actors is, according to this theory, a way to reinforce the belief in member states' right of sovereign inviolability. The panoply of human rights institutions connected to the UN, for its part, is supposed to generate or reinforce the belief that the citizens of member states are rights-bearing individuals. Both beliefs are connected to an ideal of increasingly shared values across states. Those values, in turn, are imagined to have the effect of reducing the likelihood of states going to war with each other.

It is worth noting that the quasi-parliamentary structure of the GA is not *necessarily* tied to the ideal of cooperation. As I shall suggest later, one could imagine the view that an assembly is just for talking – that its purpose is to mitigate the effects of competition, rather than to facilitate cooperation. (Consider Churchill's famous quip that "it is always better to jaw, jaw, than to war, war.")

Nevertheless, the structure of a modern parliament ordinarily is precisely about cooperating to achieve common ends. The reason is that our theory of democracy depends on the idealized claim that governance takes place through the mechanism of the parliament. For a multi-member body to govern it must coordinate; and to coordinate effectively, its members must cooperate. A parliamentary government does not just sit around defusing conflict – it processes information, makes policies, and votes to implement those policies. The process of debate, then, in a modern parliament, is not simply talk for the sake of defusing tension. It is, rather, talk for the sake of cooperative undertakings like planning. Even an opposition party is, in this sense, engaged in a cooperative venture with the government, because its criticisms are assumed to be helpful to refining the government's policies.

The structure of the GA follows this model of debate to facilitate cooperation, rather than simply to defuse conflict. Its member states make normative arguments about the best policies for the body to adopt, and participate in shaping the other cooperative institutions that arise from the GA. Of course the GA does not do the thing that is most central to modern parliaments: it does not legislate. And lawmaking is a crucial feature of cooperative endeavor. Yet although the GA is not a lawmaking body, it partakes of features of lawmaking bodies that are themselves dedicated to cooperation. Its structure, in other words, connects it to the ideology of modern parliamentarism. Even when the GA is disparaged as a "debating society," it is a debating society devoted to ideals of policymaking and cooperation.

Beyond the General Assembly with its legislative structure, there have developed a wide range of international law practices that correspond in form less to legislation than to bureaucratic administration. Dubbed "global administrative law" by the scholars who have followed them most closely,[25] this complex of practices and institutions represents, in my view, an updated version of the cooperation model. It springs in part from the recognition that the GA does not in fact legislate (so that there is no global "legislative" law emanating from it) and yet a wide variety of legally binding decisions issue from a wide range of international institutions. I take it that the philosophical aspiration of describing these practices as global administrative law is to rationalize and justify them as instances of legitimate international lawmaking, and to criticize them when they fall short of legal-administrative legitimacy, however that might be conceived.

For my purposes, what is significant about this model is that it frankly recognizes the cooperative, iterative nature of emerging international legal processes. As in municipal administrative law, repeat players interact under familiar rules. Interested parties express policy preferences and make legal claims; decision-making institutions engage in reason-giving so as to provide rational legitimacy for their decisions. These practices, familiar from the municipal context, are archetypes of cooperative undertaking -- more so, perhaps, than legislation produced by voting in the shadow of the conflict among interest groups, because they derive their legitimacy not from some initial act of voting but constructively from the very cooperative process of participatory administration.

[25] Kingsbury, Krisch, and Stewart, The Emergence of Global Administrative Law, IILJ; see also the Global Administrative Law Project.

In short, the cooperation-driven picture of international law is alive and flourishing. Although in this essay I began by using the GA as a simply sketched model of this cooperative ideal, cooperation is not restricted to the structure of parliamentary legislation. Any lawmaking -- and perhaps particularly lawmaking that is generated from non-parliamentary entities like administrative bodies -- embodies some sort of vision of cooperation.

As I suggested at the beginning of this section, it is not at all necessary that the vision of international law as cooperation embrace cosmopolitanism of the sort that aspires to a single world government. Relatively few people in the world today embrace such a vision. Instead, cooperation can be seen as systematically enhancing welfare by reducing incentives for conflict and increasing common beliefs and values, as well as encouraging cooperative relations of mutuality and respect. The picture of global administrative law corresponds perfectly. Repeated cooperative interaction in the administrative process creates common incentives to preserve value. Simultaneously, according to its theorists, global administrative law both reflects and constructs commonly held beliefs and values, which again reduce the likelihood of conflict and enhance well-being by affording legitimacy to binding decisions.

IV. Competition

But is international law really best interpreted as a practice devoted to facilitating cooperation? For many observers of the international scene, the answer is a definitive no.

These self-described foreign-policy realists observe that states frequently behave in non-cooperative ways; and they sometime also judge that this sort of non-cooperation is inevitable. But their argument derives from more than positive description. According to the family of views I want to describe, it is also desirable that states compete with each other. The worry that corresponds to the benefit of competition is that unmanaged competition can spin out of control and devolve into actual war, which is generally (though not always) acknowledged as undercutting the reasons that favor competition. Some mechanism is needed to manage it. That mechanism is international law.

Once again, there are two main sub-families of views that construe international law in terms of the goal of managing competition. One considers international competition desirable on grounds of citizens' welfare. Competition among states is, on this view, roughly analogous to competition among companies. It keeps each of the players alert and engaged, and if it does not always lead to the improvement of general well-being, at least as a general matter the invisible hand does its work and competition improves outcomes. The improvements generated by competition on this view are not only material, but may also relate to people's political circumstances. Countries can compete to give their citizens greater political freedom, or to find the balance between democracy and economic growth that will make people the best off that they can be given the existence of trade-offs.

The other subfamily favors international competition on grounds of democratic theory. This view proceeds from the plausible observation that citizens participate democratically

at the level of the state, where they share common political bonds with people who are (relatively speaking) proximate to them along a relevant political dimension. Democratic legitimacy, on this view, arises only at the level of state organization. By contrast, international cooperative organizations possess democratic legitimacy only (at best) derivatively. They typically ignore the differences in population size, a further problem from the standpoint of democratic theory. Decisions are made far from the citizens who might confer democratic legitimacy on them, and often by unelected bureaucrats.
Too much international cooperation, according to this view, will tend in the direction of making international bodies into legislative and regulatory entities – with a corresponding erosion of democratic, participatory practices and values.

The view that managing competition between states is the purpose of international law therefore does not commit its holder to any view about the inherent value of cooperation between human beings. Someone could believe with perfect logical consistency that cooperative relations are an important part of the good life for humans, but reject the idea that international affairs is the right arena for such relations to be accomplished. In fact, he might think that international cooperation would actually have the effect of undermining the kind of cooperation he considers valuable, because it tends to produce a kind of shell-cooperation in the realms of bureaucracy and power politics, unlike the more immediate cooperation that can arguably be achieved within the democratic state.[26]

[26] By contrast, the competition-management theorist of international law probably cannot hold that law (or at least international law) is archetypally cooperative. He believes that cooperation should not be encouraged in the international realm, but also believes that international law is an good tool for managing competition.

Behind this democracy-driven view lies skepticism about political cosmopolitanism. Of course from the standpoint of democratic theory, a large polity – even a world-state – might potentially possess democratic legitimacy. Citizens of the cosmopolis could vote; and a federal structure could even give people the opportunity for democratic participation at a level more proximate than the global government. But proponents of this view are, presumably, worried that the sort of bonds that hold people together into polities cannot and indeed should not really be replicated at the global level. They might believe there are certain naturally occurring political bonds that underlie collective democratic legitimacy, or simply that it is a contingent fact of our existing politics that such bonds would be too weak to sustain cohesive political community committed to individual rights of citizens.

Why should a belief in the need to manage desirable international competition lead to the view that the right way to manage that competition is international law? One might imagine that the embrace of competition as a positive feature of the international order would actually lead away from the embrace of international law, rather than toward it. Certainly there are foreign-policy realists who sometimes sound as though they must believe that international law is a bad mechanism full stop -- especially when they are engaged in a polemical struggle with advocates of greater adherence to international law.

Part of my argument, however, is that in fact such figures -- like those in the Bush administration -- actually do embrace a version of international law; it is just that the version they favor is one with the minimalist aspiration of managing competition, while

their opponents typically favor more ambitious structure of facilitating cooperation. Here is the reason why: as even foreign-policy realists must admit, unmitigated competition between countries carries with it a very substantial risk. The risk is that competition between countries can escalate into outright hostility, and that hostility in turn can become total war. That risk needs to be managed; and on this view, international law is a technology devised to manage it.

There is no need to compromise on foreign policy realism to develop this view of international law. Realists believe that states act to maximize their own interests even if that comes at the expense of others. But they acknowledge the contingent possibility of circumstances where states' interests overlap -- sometimes for extended periods of time. The law of nations, on this view, evolved in situations where it was adoptively advantageous for states to create legal norms. Those norms can be followed and treated as law, being violated only when the benefits of lawbreaking outweigh its harms from the standpoint of the decision-maker.

Take, for example, a crucial principle of international law: *pacta sunt servanda*, agreements must be respected. According to the foreign-policy realist, this principle generally serves the interests of states. It includes, however, the proviso that states may withdraw from their agreements. And it also includes the legal principle that breaking an obligation need not generate sanction from a sovereign that exists over and above the state party. The contrary, a sanction would be implemented by other states, albeit authorized by the relevant principle of international law.

International humanitarian law is another instance of international law that fits a competition-management model. Parties at war with each other are certainly competing. The goal of humanitarian law is to control *jus in bello*, protecting non-combatants and also techniques of war so the conflict war does not become a total war in which everyone may be targeted and states' very existence comes into question. The understanding is that war will sometimes occur, and that regardless of its preventability, its actual manifestation needs to be managed. Humanitarian law also, of course, embodies some substantive theories of individual rights, including (underspecified) rights to safety and dignity, as well as (more surprisingly) the right to kill in combat, manifested through the privilege conferred on lawful belligerents so that they can kill without fear of subsequent criminal sanction. But these rights theories are subordinated to a conception of inevitable international conflict.

The most institutionally robust real world, practical manifestation of this competition-management view of international law may be seen in the design of the Security Council, which deals with *jus ad bellum*. To begin with, Security Council is not the kernel of a world government. Its binding resolutions do indeed purport to have the force of international law, but the Security Council itself has no dedicated judicial or prosecutorial apparatus dedicated to enforcing its pronouncements,[27] to say nothing of a police or military forces dedicated to carrying out the orders of such a governmental structure.

[27] The International Criminal Court does have a relationship with the Security Council, discussed above; yet the court does not have general jurisdiction to enforce the Security Council's dictates.

The membership of the P5 and their unique power both as permanent members and unique wielders of the veto tracks the structure of competitive power in the world in at least two ways. It sets up the Security Council as a venue in which comparably powerful states can manage competition amongst themselves and also allows them to manage competition among lesser states that lack P5 status. One particularly significant feature of the veto power as an institutional norm is that it prevents members of the Security Council from allying themselves with each other so as to overwhelm one particular member of the P5. Such a model would make no sense in a legislature, not only because it would undercut the principle of majority rule, but because it would thwart the very coalition-building that is at the heart of cooperative legislative endeavor.

The veto makes sense, however, when the institutional setting is instead one designed to manage inevitable competitive tensions. The veto power saves an out-numbered member from the position of marginalization – temporary or long-term – in which it would have to resort to alternative means (like violence) to get its wishes fulfilled. It makes the use of force in the name of the UN exceedingly difficult or rather impossible where any player powerful enough to be one of the P5 is the intended victim of the force. Indeed, it enables any of the P5 to "block" violence by rendering it formally unauthorized.[28]

It is no coincidence that the Security Council structure was devised at the dawn of the Cold War, when the competition between the USSR and the United States ran the risk of overflowing into violence between the two super-powers. The structure did not suffice to

[28] Of course no system is foolproof. The U.S. and the UK relied on their own interpretation of Security Council resolutions to claim justification for the invasion of Iraq, even though they were unable to convince the other members to support a fresh resolution authorizing the invasion.

block the war in Korea, in which one side anomalously fought under the banner of the UN because the Soviet Union happened to be briefly boycotting the Security Council when war broke out. Nor did it stave off the war in Vietnam, wars in Central America, and wars between Israel and the Arab states, all of which were in some ways proxy wars between the U.S. and the U.S.S.R. Arguably, however, all these wars were instances of "successful" management of Cold War international competition, since they did not spiral into broader regional or world wars. Strictly speaking, the competition-management theory of international law allows for wars, which may be a tool for managing competition so long as they remain within controllable bounds.

Indeed, what is most basic about this view is that it acknowledges and recognizes the possibility of war as one of the possible (and indeed legitimate) modes of interaction between states. This is not true, or at least not in the same way, of the cooperation-driven view of international law. Cooperation aims to avoid armed conflict, not simply to manage it. And when conflict occurs, cooperation's writ runs out until the conflict is ended. Cooperation is impossible to achieve during a state of armed hostilities. Coordination may be possible, of course -- either by implicit recognition of mutual interests, or by specific agreements on particular, limited questions.[29] But international cooperation entails a mutual commitment to the improvement of joint well-being that is, I think, inconsistent even with limited warfare, the goal of which involves coercing the counterpart state into some condition which it is resisting. If you are killing people, you are not cooperating with them in the ordinary sense of the term.

[29] See Gabriella Blum, Islands of Agreement: Managing Enduring Armed Rivalries (Cambridge: Harvard University Press 2007).

The management of competition, by contrast, has no stopping place. At every stage of the escalation of hostilities, it is still possible to seek some limitation in the conflict. Even when total war has broken out the parties could still manage competition by reducing the scope of the war. So long as the losing state has not been incorporated into the winner annexation (which would constitute an end to competition, rather than management of it), it is still possible to reel the conflict back in to standards manageable by international law. The law of occupation, for example, acknowledges a kind of state of suspended animation, in which hostile competition continues to exist, albeit managed by a legal regime.

V. Cooperation and Competition Face-to-Face

In the light of the competition-management view's applicability to situations of warfare, it is tempting to think that there is a natural division of labor between the cooperation view and the competition view. Perhaps cooperation is the goal of international law in relative peacetime, while the management of competition kicks in when violence is immediate or in force. International humanitarian law, which is associated largely with the use of force, seems in this way to fit the competition management model. Other areas of international law, including international human rights law and perhaps the law of trade, seem to be oriented more towards cooperation. This would explain also the division of labor also between the Security Council and the GA, with one focused on the

management of competition in the context of use of force, and the other on cooperation in the context of peacetime.

I think this possible reconciliation, functionalist though it might be, would be too facile in attempting to capture two different views of the purposes of international law that are at work here. The reason is that advocates of each view (or rather family of views) believe that their model, as a normative matter, ought to explain both peacetime and situations of conflict. I shall discuss the possible coexistence of these different views in the last section. But for now, I want to notice that both cooperation and competition present themselves as total theories of international law.

The argument is easier to see, of course, in the case of the view that the management of competition is the purpose of international law. The partisans of this view need not concede that the cooperative elements of, say the GA, provide a sufficient account of its true purposes. Instead they can maintain, quite plausibly, that instances of cooperation are simply intended to serve the greater purpose of managing competition. The fact that the GA lacks lawmaking authority tends to support their view; for them, the GA is simply a forum aimed to lower the transaction costs for countries that want to talk about their differences before resorting to force. The Churchillian jaw-jaw adage applies.

To take another concrete example, the international trade regime, established by treaty, includes complex multilateral institutions with responsibility for resolving trade disputes. An advocate of cooperation as the true purpose of international law would no doubt

emphasize the repeated interactive features of this regime. But it can also be argued that these arbitral bodies are needed to avoid trade wars that would otherwise be a familiar feature of international relations.

Indeed, taking their view in its strongest form, advocates of the competition-management view could maintain that international law's unwillingness to designate a single international sovereign is strong evidence that its ultimate goal must be to manage the struggle among different sovereigns. According to this strong form of the view, different sovereigns can cooperate so as to make laws; but they have been, thus far, unprepared to cooperate in the abolition of their own sovereignty. The mere fact that they have insisted on maintaining that sovereignty suggests that any agreements into which they enter are designed to serve their interests at sovereigns. From here it is a short step to the conclusion that the point of all of these agreements -- that is, of international law -- is to perpetuate the continued existence of these sovereign agents, reducing the likelihood of the harm that they may do each other in war.

So the totalizing aspect of the competition-management view can easily be construed. But what about the view that the purpose of international law is cooperation? Doesn't cooperation cease to be a defensible goal while hostilities are ongoing? And doesn't this restrict the reach of this justification for international law to conditions of peace?

Cooperation is certainly a goal most logically pursued in peacetime, with the specific aim of reducing the chances of war. But a cooperation-driven theory of international law need

not restrict its purposive aims to peacetime, or concede that the laws of war are designed to manage state competition. The advocates of this view can take the interpretive move of the competition-management theorists and turn it on its head. They can claim, in other words, that the management of competition is simply a step along the way to the higher goal of cooperation -- a goal construed as far more desirable from the standpoint of enhancing well-being.

It is true that countries engaged in hostilities are not cooperating in that moment. But if they are adhering to international legal norms governing *jus in bello* that were reached before the outbreak of war, then they are, in wartime, reflecting the successes of prewar cooperation. If they find themselves engaged in total war, flouting *jus in bello*, well then, cooperation has failed every bit as much as the management of competition. Any attempt to pull back from the brink would represent, on this view, a partial step in the direction of eventual cooperation.

The law of occupation, according to this view, makes demands of cooperation on the parties bound by it – cooperation that international law seeks to immunize from the charge of collaboration. Even a treaty of total surrender, such as that of Japan to the Allies after World War II, can be construed in cooperative terms. A competition-management theorist would say that it is a document of international law designed to manage the relation between the two states in a way that reduces conflict going forward. But one who sees cooperation as the ultimate goal would doubtless argue that such a treaty sets the terms of cooperation between the two countries.

VI. One Theory or Two?

If it is indeed possible to redescribe the same legal institutions in terms of the goals of cooperation and competition, what does that tell us about the heuristic value of my claim that these goals generate distinctive theories of international law? One possibility is, of course, that the two approaches are not sufficiently different to generate alternative normative pictures. The reason this challenge is especially serious is that, from the standpoint of some theorists of international law, these two theories look very similar, since they start from similar premises. Neither begins with justice or natural law and reasons to the best institutional arrangements; and neither assumes that international law is impossible in an environment where there is no single international sovereign. Both hold, too, that reducing violent conflict between countries enhances welfare.[30] Do these shared premises make the two views I have been exploring so similar that the distinction between them is not sufficiently generative to meet our need to explain and justify the contradictory features of contemporary international law institutions?

To frame an adequate answer, it is necessary to focus on the purpose for which I introduced the distinction between these two families of views in the first place. Unlike some theorists, I am not committed a priori to proving the logical inconsistency of the two views I have sketched. In fact, in what follows I am going to explore the ways in

[30] Thus it can be said of contemporary international law studies that "[t[he relevant literature is obsessed with questions such as how and why States use international institutions to 'manage interstate co-operation or conflict'" Koskenniemi, Gentle Civilizer of Nations, (citing Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations" (1998) 42 Journal of Conflict Resolution, p. 8).

which they might be made to coexist while still remaining philosophically defensible. But it is crucial to the project of this essay that the two approaches be sufficiently different so that each can explain different and apparently contradictory features of international legal institutions.

I therefore want to argue that, while both of the theories aspire to totality, in fact they both do a good job of explaining some features of international legal practice, and a bad job of explaining others. That is, although both start from common premises, they are actually capturing competing normative visions of the goals of international law. The question I will then ask is whether international law might defensibly have two different pictures of its normative goal, both of which claim unconvincingly to offer full justification.

First, let me point to some of the limits of the two theories. The greatest normative drawback of the cooperation theory of international law is that it assumes as a general matter that the institutional practices – including binding laws – that will emerge from the cooperative process will enhance well-being more than they will detract from it. On its face this assumption is not terribly worrying. After all, some similar assumption is at work in the picture of the liberal democratic state: we assume that, generally speaking the existence of governing institutions will improve well-being. To help ensure this comes true, we rely in part on substantive normative commitments to individual rights, and in part on institutional design (constitutional courts, legislatures, and so forth). Recognizing that even a state with all these features can do badly or even collapse

(Weimar Germany looms), we nevertheless affirm the Churchillian hunch that our liberal democracy is the worst form of government except for all the others.

The difficulty with transposing this perspective to the level of states arises from the doctrine of sovereign equality. In municipal liberalism, respect for the rights of the individual guarantees certain values of autonomy, and is attractive for that reason. We acknowledge and struggle with limits to that autonomy that derive from economics, family and gender relations, and social pressures; but in the end we tell ourselves (correctly, in my view), that protecting the individual serves the core liberal value of self-making.

In the context of states, the doctrine of sovereign equality does not translate directly into individual autonomy. It is a metaphor that is then in practice mediated through the institution of the state. If the state is one that protects liberal autonomy, then respecting that stat's sovereign equality will likely translate into improved well-being for human individuals. If, however, the state is illiberal, then respecting its sovereign equality may have the opposite effect. (Leave aside for the moment the non-liberal but morally acceptable state of Rawls' *Political Liberalism*). The costs to individual autonomy come in two forms. Muncipally, the illiberal state may restrict autonomy of its citizens, protected behind the shield of its sovereignty. (This is the more familiar problem.) Internationally, the problem is that the illiberal state may, in the realm of cooperation, support policies that are themselves not conducive to individual autonomy. (Saudi Arabia, say, opposing a treaty that enhances women's rights.) In this scenario, the

equality part of sovereign equality reduces autonomy of individuals in general and so, by hypothesis at least, reduces well-being.

Advocates of the cooperation theory of international law have a proposed answer to this problem: the international legal commitment to human rights. Of course, they concede, illiberal states could rely on the principle of sovereign equality to protect their own illiberal policies and promote illiberalism elsewhere. But within their states, they are in principle bound by the international conventions on human rights which they have signed. In the sphere of international cooperation, institutions are guided by declarations of human rights and (under some conditions at least) bound by formal legal conventions. It is not only that liberal individual rights are actively enhanced by these declarations and conventions. Because these human rights instruments embody the value of individual autonomy, they counteract the formal protections for illiberalism embedded in the doctrine of sovereign equality.

The trouble with the human rights response to the challenge is, of course, the under-enforcement (not to say non-enforcement) of the international human rights regime – a result, doctrinally speaking, of the power of sovereign equality. States have been only too happy to sign human rights treaties, but have not proven themselves willing to enter into cooperative arrangements that would subject their officials to rigorous enforcement. Perhaps it could be argued that the ICC embodies a last-resort model for prosecution of the worst human rights violators. But the ICC is focused mostly violations of the laws of war, not ordinary human rights; and as I noted above, only in the framework of Security

Council influence. The result is that states wishing to behave illiberally can benefit greatly from the doctrine of sovereign equality, to the detriment of individual autonomy.

This risk that cooperation might make individuals worse off, not better, represents, then, a significant limitation on the normative appeal of the cooperation theory of international law.[31] The fact of this limitation shows, I want to suggest, that whatever its aspirations to explain all aspects of international law, the cooperation-driven theory does a poor job of justifying a crucial feature of the international law regime. This opens the door to the competition-management theory, which can make better sense of sovereign equality. The theory that international law serves the goal of competition-management acknowledges that states may behave illiberally within their borders. But it denies that it is normatively desirable to cooperate with other states except insofar as that cooperation might help manage conflict.

The competition-management theorist accepts the likelihood that different states will have different values, some liberal, some illiberal. (This fact may even contribute to the likelihood of conflict.) He reasons that sovereign equality only leaves us better off insofar as it is a principle that makes competition less likely to spill over into conflict. He rejoices that cooperation will not be allowed to lead to state of affairs in which overall well-being is reduced. If he is the sort of competition-management theorist who cares about democratic legitimacy at the state level, he will be happy that the citizens of liberal

[31] Cf. Koskenniemi, Gentle Civilizer of Nations, 486 ("If law is only about what works, and pays no attention to the objectives for which it is used, then it will become only a smokescreen for effective power… In this process, benevolent jurisprudential intentions may sometimes be enlisted for dubious causes.").

democratic states will not find themselves bound by cooperative arrangements with non-democratic states.

That is not all. For someone who views competition between states as valuable, sovereign equality also has a further important, normatively appealing role to play: it defines the entities that are to be competing with each other, and sets the rules for their competition. Recall that the key analogy for those who favor international competition is an analogy to business competition. Businesses, of course, do not compete in a vacuum. They compete within the context and confines of markets that are legally regulated and confer certain basic rights (ordinarily, property rights) on the participants. Business competition is not the competition of natural selection, whatever analogies may be drawn.

For states to compete in a similar way to businesses, they must not be competing in some state of nature, without rules, but according to some set of norms that mimic a basic market structure. Sovereign equality sets these terms of competition. Coke cannot invade Pepsi to steal its market share. "Hostile takeover" is a metaphor, and is limited significantly by the rule that the acquirer must obtain the consent by voting of the majority of the shareholders, who will be compensated for their decision, usually handsomely.[32]

[32] Indeed, even where, with purported Security Council authorization, a state has been in effect destroyed and occupied (as in Iraq), the presumption is that sovereignty is exercised only temporarily by the occupier, who acts as trustee for the people of the country, and who will restore sovereignty at the first possible moment. See, for example, Noah Feldman, What We Owe Iraq: War and the Ethics of Nation-Building (Princeton: Princeton University Press, 2004). Part i. The old doctrine of debellatio, which sovereignty is imagined to have been destroyed, was never formally adopted by the U.S.-led coalition during the Iraq occupation. If it had been, it would have been only in a new form that allowed sovereignty to be reorganized on behalf of the sovereign Iraqi people.

There was an older strain of international law theory, going back to the nineteenth century and associated especially with German thought, that explicitly maintained that war was desirable precisely so as to reveal the power relations between states, and willingly embraced the notion that one state would take over another as the result of its superiority. (Without, presumably direct compensation or consent for the citizens of the target, though perhaps, according to the theory, to their ultimate benefit.) Today, however, the competition-management theory of international law is considerably tamer. It restricts competition to non-destruction of all parties. Sovereign equality functions as the doctrinal statement of this important limitation.

Nevertheless, competition-management itself suffers from notable normative deficits as a total theory of the goal of international law. The problem is not, as is sometimes imagined, that such an approach is devoid of normative ideals; or that it mistakenly reasons from the fact of international competition to its inevitability and thence to its desirability. As I have suggested, the goal of competition-management does rest on a normative vision of enhancing well-being. It can, in its different incarnations, have recourse both to the general observation that competition improves performance, and to the democratic ideal of municipal legitimacy. Nor is it necessary for this view to maintain that competition between states is inevitable. Cooperation can always be re-described as a mechanism for managing competition.

The normative drawback of the competition-management approach lies in its inability to explain satisfactorily the myriad instances where state actors (and others) speak and act

as though they were committed to the normative goal of cooperation – and even the elimination of competition altogether. The most quotidian cases involve the participants in international institutions who, though often appointed by a process that identified them by their states of origin, take on both the rhetoric and the instrumental rationality of persons who are acting on behalf of the institutions themselves. From UN bureaucrats to the lawyers and judges in international courts or administrative bodies, there are many examples of people who are acting not simply to mage competition, but to enhance cooperation.

Of course the theorist of competition-management can argue that these actors are in fact tools of a greater project driven by the goal of managing competition. It does not matter, he may argue, what the UN bureaucrat thinks or how he acts – what matters is the structure in which is in fact embedded – a structure best described in terms of competition-management. This answer cannot be dismissed outright. It is not a sufficient answer to insist that the theory explaining a social practice must account for the subjective beliefs of the participants in that practice. The reason is that there exist some social practices in which self-delusion is a regular, even constituent feature of the participants' professional lives. Some people think that municipal law is such a social practice; but even if we reject that view, international law might certainly qualify insofar as, the cynic will note, it can be observed to be used selectively by powerful players. It might be necessary for "believers" in cooperation as the goal of international law to delude themselves some of the time, especially when the stakes are high.

If the theorist of competition-management will not concede the argument from subjective experience, there is a still clearer case of which he cannot easily make normative sense. This is the situation, rare but familiar, where competition eliminated by cooperation – when states come together to form federations that then take on the character of states themselves. The United States is the great example, in which the process, stepwise though it was, eliminated the sovereign character of the original members as a matter of international law. Today, the EU is the great (ambivalent) example, as its members concede progressively more and more features of their sovereignty without, thus far, eliminating their official international status as sovereign states.[33]

The EU itself has moved steadily, though by no means inexorably, toward greater and greater cooperation. No doubt the original motivation for the European community was grounded in the management of competition. The former Allies thought it would be better to constrain Germany into a union – even if that meant giving it a great deal of power – than to fight another war against it. And the United States liked the idea of an increasingly unified (if lightly militarized) Western Europe as a crucial piece of its Cold War face-off with the Soviet Union. But it can no longer credibly be claimed that ever-increasing cooperation between the EU member states is driven solely by the goal of managing European great-power competition.

[33] It is worth noting that the doctrine of sovereign equality – and also the membership of the P5 – creates overwhelming disincentives for the EU states ever to disclaim their sovereignty and call themselves a single state. They would lose their votes in the GA and Britain and France (if they were part of the EU as then configured) would lose a vote in the P5.

From the standpoint of a system designed to manage competition, it is very difficult to make sense of a decision to eliminate the very conditions of identity that allow for competition among members to exist at all. Yet many participants in international law construe this result as a model for the end-state of cooperative international ventures in general – and international law not only allows for this possibility, but displays features that one might imagine as encouraging such a result. Treaty regimes are increasingly cooperative, with collective decision-making bodies that wield increasing amounts of enforcement capacity. The trade regime is the best example, although many others could be adduced.

For those who see the goal of international law as competition-management, this process of increasing cooperation poses a serious explanatory problem. They could claim that sometimes, the problem of competition is so serious (Europe in the first half of the twentieth century, say, or the struggle between North and South in the period of the U.S. Civil War), that cooperative elimination of the competing parties is in fact a strategy for managing competition effectively. According to this view, the rarity of such an apotheosis of cooperation may itself be significant – the exceptional occurrence of super-cooperation that proves the general rule of competition.

I do not want to dismiss this argument simply by saying that it proves too much – that it could explain any factual scenario and is therefore empty. Cooperation to the point of eliminating competition is in fact rare in international affairs. Indeed, its rarity is especially notable when compared to the municipal context, where forms of competition

between citizens are restricted to certain highly limited, economic and social domains, while competition of other forms is largely replaced by cooperation under the coordinating hand of the state.

Yet the instances of international cooperation that both stop short of total cooperation and also are arrayed on a continuum with it give reason to accept the observation that competition-management is an inadequate normative account of international law as it exists today. Cooperative international endeavors take on a life and logic of their own, one that transcends the image of separate competitive entities whose interaction must be managed. Put another way, the state remains a highly durable entity. Its demise is in no way imminent. But the state no longer has (if it ever did) a total purchase on the conceptual structure of how we organize the notion of human interests and well-being in the international sphere. A cooperation-driven theory of international law ultimately recognizes the flexibility of the groupings in which we organize the human beings whose well-being is at the heart of our normative theories. Competition among states is therefore an incomplete normative theory of international law.

VII. Two Theories, One System?

I have argued that both cooperation and competition, construed as the purposes of international law, provide the basis for complete accounts of what international law is for and why it is justified. I have also claimed that neither theory is fully convincing when

offered as a complete account. What, then, are the options for understanding the relationship between these two normative approaches?

One possibility is to construe the practice of international law as committed to two distinct theories of its own purpose. Both the cynic and the legal critic will be able to embrace this course of argument. Both, for related though ultimately opposite reasons, will be perfectly happy to conclude that the two theories are not logically compatible. The cynic considers it perfectly ordinary for social institutions to serve contradictory purposes: one is a private purpose, conceived by those with power to serve their own ends; the other is a public purpose, deployed by the powerful to make the institutions appear legitimate and contrive public acquiescence rather than resistance. If there is a contradiction between these two purposes, it is relevant only to the extent that it might be noticeable by the public, and therefore undercut the usefulness of the public purpose to legitimate the private one. This is a purely instrumental concern. Ultimately, the cynic is blissfully undisturbed by logical incoherence.

The legal critic is also comfortable with the existence of contradictory purposes; indeed, the distinctive interpretive practice that characterizes critical legal studies is the identification of contradictory, usual dual or dialectic forms of legal reasoning that are said to coexist in constant tension and alternation. Unlike the cynic, however, who professes indifference at incoherence, and gladly embraces it as a method of legitimation, the legal critic typically suspects the system of equivocation to be a cover for the

supposedly neutral distribution of power under terms of law.[34] Revealing incoherence is often said to be the first step toward the redistribution of power. The implication is that there is something reprehensible about the equivocation between legal theories and the resulting reinforcement of the existing distribution of power.[35]

Is it only the critic and the cynic who can confront with equanimity the possibility of a social practice apparently based on two different, contradictory purposive justifications? What about someone who shares the general approach this essay takes, and wants to account for international law and justify it on philosophical grounds? Can we accept comfortably the coexistence of two different purposes for the same set of practices? The question would be much easier if the justifications could be shown to be supplementary, or at least not in contradiction. By analogy, we might, for example, like liberal democracy both because it treats individuals as rights-bearing beings with dignity, and also because it enables people to live alongside each other and make collective decisions despite the differences between the end they pursue. Arguably (this is my view, though I do not argue for it here), the proper work of liberal democratic political theory consists precisely in working through and attempting to reconcile the potential contradictions between liberalism and majoritarianism. It is no coincidence, of course, that the name liberal democracy has two parts. Liberalism and democracy stem from distinct, though related philosophical traditions. It is, in other words, a hybrid, as are many social practices. Making their goals compatible is not an easy matter – but neither is it hopeless.

[34] Cf. Koskenniemi, From Apology to Utopia, Postscript.
[35] If this implication is usually unstated, it is because of some residual embarrassment at the fact that the legal critic expects any legal system to have these features, and yet does not want to abandon legality altogether a s asocial practice – hence must be prepared to embrace such equivocation provided some alternative, preferred power distribution emerges.

Continuing the analogy, it may be that the work of international law theory should properly lie in reconciling the potential contradictions between facilitating cooperation and managing competition. On the surface, however, this task does not appear especially promising. One view hopes and expects precisely the thing – greater cooperation – that the other view seeks to avoid in the hopes of maintaining a healthy competition. This is not the same as liberalism and democracy, whose aspirations sometimes come into conflict – as where the majority seeks to infringe on individual rights – but are not in their nature inherently contradictory.

A pragmatist of a certain sort might think that the answer to a resolution may lie in finding a real-world overlapping point between the quantity of cooperation sought by one approach and the quantity of competition-management sought by the other. After all, neither approach is necessarily absolute. What we need, according to this view, is a balancing (horrid word) between two poles of ideological commitment that could be arrayed at opposite ends of a continuum. The analogy here might be to the balance between liberty and security. Our task – and that of actual institutional actors – might be to determine for each particular instance of international law just how much cooperation will enhance well-being, and how much competition will do the same. Since both approaches profess to share a common set of goals (at least as I have constructed them), we can conclude happily – if perhaps a little trivially – that our goal must simply be balance.

The background assumption of the pragmatist balancing solution to the challenge of contradiction is that the debate between the two sides can be reduced to an empirical one: how much cooperation or competition will bring us the most welfare? The two approaches, on this view, differ from each other mostly in their account of what will work best in the world. They are, in this view, like two contemporary macroeconomists arguing over monetary policy, debating how much deficit spending is useful to stimulate growth and how much debt will have a retarding effect. Their disagreement is, at bottom, predictive.

I do not think this possible solution can explain the disagreement sufficiently. The reason is that there are normative value differences between the two approaches to international law, not just instrumental differences between them. It is true that both approaches think the ultimate justification for their approach is to enhance well-being. In the most general sense, then, it can be said that they agree that the ultimate purpose of international law is human well-being. But this apparent agreement is illusory, because their conception of well-being is informed by different substantive visions of what human well-being looks like in relation to the interaction between states.

This difference can be glimpsed in the way that each view seeks to redescribe the other as a version of its own view. *Why* should an advocate of cooperation want to say that managing competition is only good insofar as it is an instance of cooperation? *Why* should the advocate of competition want to insist that cooperation is useful only as a means for managing competition? The answer, surely, is that the former considers it

normatively better for states to cooperate than for them to compete, while the latter thinks the opposite. The normative preference could, in principle, inhere in a prediction about what will work better according to a common vision of the good. But the cooperation theorist seems also to believe that the mode of cooperation is inherently a better mode of state interaction than the mode of cooperation. The competition theorist thinks the opposite.

Why? I said from the start of the essay that I would not fall back onto the geneaologically relevant but normatively unattractive answer that the two theories have competing accounts of human nature. I intend to abide by that promise. So what I am really asking is whether there is any *good* normative reason to prefer state cooperation to state competition or vice versa. The answer, I think, has to do with the claim that we are doing better vis-à-vis other people when we cooperate with them than when we compete. The reason is not that we are made to cooperate, but that cooperation brings out features of our capacities that improve the quality – not just the quantity – of our well-being. Cooperation, on this view, places us in relations of respect and commonality. Those relations are themselves partly constitutive of what it means to live well.

Oddly, as I suggested in passing earlier, it is possible that both advocates of cooperation as a goal of international law and of competition as the goal agree with this picture of the general benefits of cooperation. But they must certainly disagree about whether the state is an entity that can meaningfully be said to facilitate cooperation of the valuable kind that I am describing. The cooperation theorist must believe the answer is yes – that when

states cooperate, they are acting on our behalf, and improving the stances of their citizens toward each other. The competition theorist has reasons to believe otherwise. States cooperating are far from the lives and interests of ordinary people. It is hard enough to cooperate within the sphere of the state, and to construe municipal law as a cooperative endeavor. Mediated through the state, cooperation at the international level might well vitiate the individual moral benefits of being in relations of cooperation. It could, as we have seen, potentially undercut the cooperative ties that we hope to produce within states. International community may be a term so hopelessly symbolic that its use weakens the idea of community itself.

If this is so, then we need to go back to the question of how it might be appropriate to deal with the differing normative visions of international law that I have sketched in this essay. If we want a philosophically coherent and attractive account of international law, must we opt for just one of them? And if so, which?

I want to consider the possibility that two logically incompatible purposes for the same social practice do not vitiate the defensibility of the practice, provided we understand the practice as a venue for the ongoing dispute between the two views. Maybe international law is best construed as a set of practices designed for states to experiment with the incompatible goals of cooperation and competition. The argument is in need of greater development than I can provide here, but in structure it would proceed as follows:

It is a matter of genuine uncertainty whether the normative benefits of the cooperation that we value in the municipal sphere may be effectuated in the relations between states. There are good reasons to accept both cooperation and competition as plausible, though incompatible goals of international law. It is therefore normatively desirable and justified to construct international law as a social practice in which states try both cooperation and managed competition, and individuals can see which one works better. Eventually, if one purpose seems to enhance our well-being more than the other, we can conclude that the best way to organize international law is to effectuate that purpose.

Return to the example of the structure of the United Nations. Like nearly all real-world institutions, it was not built in a moment of certainty or confidence. Rather, institutions are typically brought into being when there is a powerful felt need for them. The felt need results from a previous failure and fear of future repetition. The UN was built in the aftermath of World War II, the failure of the League of Nations, and in full view of the terrible threat of future nuclear annihilation. Institutions, in other words, are often born as experiments. In the case of the UN, the experiment incorporated both the goal of managing competition, borrowed from the nineteenth century's balance of powers, and the goal of cooperation, borrowed from the rubble of the League and the ghostly remnants of pre-war cosmopolitanism. Its contradiction can be construed as an experiment in seeing if the world could do better.

And it did. The UN is in many ways a preposterous organization – its contradictory structure is only the most philosophically interesting manifestation of its multifarious

absurdities – but it also played a role in staving off World War III and enhancing global cooperation. Notwithstanding its troubles, it has performed far better than its predecessor organizations.

When our goal is pursuit of scientific knowledge, the test of an experiment's value is whether it yields results. In the sphere of human affairs, however, experiments – call them life-experiments – cannot always be measured by their capacity to produce crisp answers. We cannot run controlled experiments with our lives, nor perhaps would we want to even if we could. The same is true of complex social institutions understood at the global scale. We might accidentally run across some natural experiments in international cooperation – the EU, say, or the United States in the first half of the nineteenth century – but we would not design the world so as to run such experiments.

The experimentally contradictory structure of the UN has not (yet) resolved the contradiction between cooperation and competition in international affairs. It may never produce a convincing answer. But that was never its purpose. Its purposes were to see if people's well-being improved during its institutional tenure. The answer is far from unequivocal. The post-war regime of international law has not meant the end of genocide or war. Yet it seems to have produced meaningful benefits. The experiment can be defended on these grounds.