PREFACE

Existential threats are powerful motivators for international cooperation. In the twentieth century, two calamitous world wars and the advent of nuclear weapons persuaded states to embrace cooperation as humanity's last, best chance for survival. Through the Charter of the United Nations, states pledged to resolve their disputes through peaceful means and work together to suppress threats to international peace and security. Although the international community has not always honored these commitments, cooperation through the United Nations has been the principal institutional means for affirming sovereign equality and pursuing lasting peace.

The threats humanity faces today are no less dire and, in some respects, even more complex than those that catalyzed the establishment of the United Nations. Great power rivalries, violent extremism, and nuclear weapons continue to jeopardize international peace and human security. Accelerating technological innovation and a globally networked digital economy have spawned new dangers. Computer viruses, political disinformation, and financial contagion now traverse national borders at lightning speed. Scientific advances that deliver miraculous cures for disease can also be abused to create terrifying bioweapons. And looming over these challenges is the great existential crisis of our time: global climate change, which threatens to inflict catastrophic environmental harm on a planetary scale. None of these calamities can be averted without robust international cooperation.

A substantial obstacle to progress in countering these threats is the conventional wisdom that states are free to decide for themselves whether to embrace international cooperation. National leaders often assume that because their states enjoy sovereignty under international law, they may sit on the sidelines while other states pursue solutions to global challenges. Within the past several years, for example, some states have refused to contribute meaningfully to international efforts to combat climate change, protect refugees, suppress cyberattacks, prevent global

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pandemics, and prosecute international crimes. While these policies have attracted criticism, few question the prevailing wisdom that international law permits states to opt out of international cooperation if they so choose.

In this book, we argue that the prevailing wisdom is mistaken: international law requires states to cooperate with one another to address matters of transnational or global concern – even in the absence of treaty-based obligations. Obligations of international cooperation are now firmly embedded in the international legal regimes that govern transboundary rivers, oceans, disputed territories, landlocked states, pollution, international peace and security, and human rights, among other topics. We describe these regimes as cases of *mandatory cooperation*.

A recent advisory opinion from the International Tribunal for the Law of the Sea (ITLOS) illustrates the power and promise of mandatory cooperation. In December 2022, a consortium of small-island nations threatened by sea level rise asked ITLOS to clarify states' legal obligations with respect to the impacts of atmospheric pollution on the global marine environment. The tribunal delivered its opinion in May 2024.[1] Citing the UN Convention on the Law of the Sea (UNCLOS), the tribunal declared that international law requires states to cooperate with one another to protect the oceans from warming temperatures, acidification, and other harm from greenhouse gas emissions.[2] This obligation to cooperate applies to all states under "general international law," the tribunal asserted, regardless of whether states have joined UNCLOS,[3] and it is not limited to states' voluntarily determined contributions under the 2016 Paris Climate Agreement.[4] Thus, the tribunal concluded that states must participate as full and active partners in the fight against climate change, accepting their fair share of global greenhouse gas reductions, even if they have not voluntarily undertaken this legal obligation.[5]

[1] Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 21 May 2024, ITLOS (quoting UNCLOS article 197).

[2] Ibid. para. 321 (quoting UNCLOS article 197).

[3] Ibid. para. 296 (citing MOX Plant (Ireland/U.K.), Provisional Measures, Order of 3 Dec. 2001, ITLOS Reports 2001, p. 95, at p. 110, para. 82).

[4] Ibid. para. 311.

[5] Following the ITLOS tribunal's advisory opinion, the International Court of Justice and the Inter-American Court of Human Rights both issued advisory opinions concurring that customary international law obligates states to cooperate in suppressing and mitigating the adverse effects of climate change. See Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 ICJ Rep., paras. 140–42, 301–15 (23 July); Climate Emergency and

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Setting aside the advisory opinion's far-reaching implications for climate change law and policy, the tribunal's assertion that states must cooperate to fight climate change raises important questions about the role of international cooperation within the international legal order. For example, if states are obligated to cooperate with one another to prevent and suppress climate change, what is the basis for that obligation? When must states pursue international cooperation, and when are they free to chart their own independent course? And which kinds of requirements – substantive or procedural – are entailed in mandatory cooperation?

In this book, we develop an account of mandatory cooperation that answers these questions. Our account defends three theses. First, we argue that *mandatory cooperation is based on, and responsive to, the principle of sovereign equality*. As enshrined in the UN Charter and other instruments, the principle of sovereign equality requires states to respect one another as formal equals, possessing equivalent sovereign rights and authority, regardless of the disparities in resources, power, and influence that otherwise inform their relations. The sovereign equality of states reflects the equal rights and self-determination of their peoples. International courts and tribunals also bear special responsibilities to affirm states' equality before the law. An important application of the principle of sovereign equality, we argue, is that a state may not hold itself out as judge and party to the same cause (*nemo iudex in causa sua*) with respect to matters that touch and concern other states' rights and authority. Whenever a state cannot exercise its sovereign powers without impacting matters subject to another state's competency, there is a risk that it will undermine the principle of sovereign equality. The only way to resolve this potential conflict, consistent with the principle of sovereign equality, is for the states concerned to negotiate or otherwise reach a peaceful settlement through international cooperation. Respect for sovereign equality implies that states must work together to address common concerns. This is the basis for mandatory cooperation under international law, we argue.

Our account of the legal basis for mandatory cooperation leads to a second thesis: *mandatory cooperation applies whenever states lack exclusive sovereign rights or authority with respect to a matter of international concern*. An important function of international law is to distribute authority among states, establishing spheres within which states possess mutually exclusive sovereign jurisdiction. These spheres of

Human Rights, Inter-Am. Ct. H.R, Advisory Opinion OC-32/25, 29 May 2025, paras. 247–65.

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mutually exclusive jurisdiction make it possible for peoples around the world to practice self-determination free from foreign domination.

In some settings, however, states do not have mutually exclusive rights or authority under international law, raising the possibility that the exercise of power by one state might have the effect of subordinating other states. When this is the case, respect for sovereign equality mandates international cooperation. These insights allow us to identify four categories of cases in which mandatory cooperation applies: (1) unsettled jurisdiction, (2) concurrent jurisdiction, (3) jointly shared jurisdiction, and (4) rights conflicts. These four categories account for all of the diverse settings in which international law currently recognizes obligations of mandatory cooperation. As we shall see, these categories also draw attention to other sectors of international law where the international community has been slow to recognize mandatory cooperation thus far, but where respect for sovereign equality arguably requires states to cooperate (e.g., refugee protection, regulating international cartels, and so on).

Our third thesis is that *mandatory cooperation imposes a common set of substantive and procedural requirements whenever it applies*. Substantively, states must endeavor to resolve their disputes in accordance with equitable principles, paying due regard to other states' sovereign rights and authority. Procedurally, states must investigate, consult, and negotiate with one another in good faith. If negotiations fail, states must pursue mediation, arbitration, adjudication, or other third-party dispute resolution. These requirements ensure that when states lack exclusive rights or authority, they can nonetheless resolve their disputes in a manner that affirms their equal sovereignty.

Significantly, our account of mandatory cooperation is firmly grounded in state practice and the judgments of international courts and tribunals. Rather than reason from first principles toward an ideal theory that might be only dimly realized in legal practice, we provide a "rational reconstruction" of mandatory cooperation:[6] we take the actual practice and self-understanding of states and international institutions seriously as the object of our analysis, and we seek to distill a principled justification that best explains this practice and self-understanding. Across the thirteen chapters that follow, we make the case that mandatory cooperation is a set of substantive and procedural requirements common to the distinct contexts addressed in those chapters. Taken together, these requirements

[6] Jűrgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg transl., Cambridge: MIT Press, 1996), p. 82.

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are a feature of general international law that it is best explained and justified by reference to the principle of sovereign equality.

This book construes sovereign equality as a constitutional norm of international law. By invoking constitutionalism, we do not mean to claim that international law has a written constitution akin to those that govern some domestic legal systems.[7] Instead, following the usage of most scholars who study international constitutionalism, we employ the term to emphasize how certain international norms perform constitutional functions, facilitating international law's development as a coherent normative system.[8] We argue that the principle of sovereign equality operates as an organizing idea of international legal order by governing a number of international law's constitutional aspects, including: international law's allocation of equal sovereign authority to states; international law's framework for the production and validity of international customary and treaty norms; and international law's framework for the peaceful resolution of conflicts, including through mandatory cooperation. By requiring states to cooperate with one another to resolve disputes, the principle of sovereign equality restricts the unilateral exercise of sovereign power, spurs states to address common concerns based on shared interests and values, and promotes the growing conformity of the international system with an appropriately international rule of law.

A major theme of this book is that mandatory cooperation's promise has been only partially realized at the quarter mark of the twenty-first century. This should come as no surprise. Legal scholars have recognized that constitutionalization is a process that tends to unfold haltingly, and rarely in a linear fashion.[9] Over the past century, international law has followed a halting and uneven path of constitutionalization, evolving from a thin "law of coexistence" into a more robust "law of cooperation"

[7] For an argument that the UN Charter is a constitution for the international legal system, see Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 CJTL 529.

[8] See, e.g., Erika de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51; Jeffrey L. Dunoff and Joel P. Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (New York: Cambridge University Press, 2012) 3; Andreas Paulus, 'International Legal System as a Constitution' in Dunoff and Trachtman (eds.), *Ruling the World?*, at 69; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579.

[9] Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge: Cambridge University Press, 2014), pp. 15–16.

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which requires states to work together to address common concerns.[10] The chapters that follow highlight various "constitutional moments"[11] when subfields of international law have shifted decisively to embrace mandatory cooperation. However, the broader historical narrative developed in this book suggests that international law's turn to mandatory cooperation has been a gradual and partial process, reflecting an ongoing paradigm shift in the self-understanding of international law by its practitioners toward a "constitutional mindset."[12]

In recounting the rise of mandatory cooperation, this book illuminates many positive contributions that international law has made in safeguarding humanity from serious threats and promoting the peaceful settlement of disputes. It also highlights the need for further international cooperation to address the new perils of the twenty-first century. As the ITLOS tribunal recognized, international cooperation will be essential in the years to come to prevent and mitigate the adverse environmental impacts of global climate change, including devastating storms, droughts, fires, and sea level rise. Without international cooperation, states will also struggle to protect their people from pandemics, cyberattacks, terrorist violence, and economic upheavals produced by the introduction of artificial intelligence and other new technologies. Mandatory cooperation offers a budding and promising legal framework for facilitating multilateral solutions to these global challenges. Most ambitiously, we hope to persuade the reader that our constitutionalist interpretation of mandatory cooperation offers a plausible explanatory and normative account of the practice as it has developed over the past century. Less ambitiously, the book is a plea for recognizing mandatory cooperation as an organizing idea of international legal order that no credible account of contemporary international law can ignore.

These features of international law could not be more timely or important today. As this book goes to press, resurgent nationalism in some countries has catalyzed an "anti-globalization backlash," unsettling the legal norms and institutions that have sustained international cooperation since World War II.[13] Emboldened by Brexit, the United Kingdom's

[10] Wolfgang Friedmann, *The Changing Structure of International Law* (New Haven, CT: Columbia University Press, 1964), pp. 61–62.

[11] Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press 1991), pp. 3, 5.

[12] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflection on Kantian Themes About International Law and Globalization' (2007) 8 *Theoretical Inquiries L.* 9.

[13] Eric Posner, 'What Happened to International Law?', Project Syndicate, 16 January 2025.

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controversial departure from the European Union, anti-globalists have pressured their governments to abandon multilateral treaties and withdraw from the compulsory jurisdiction of international courts. The United States has exited the World Health Organization, disavowed the Paris Agreement on climate change, and sidelined the World Trade Organization by avoiding its dispute-resolution mechanism and blocking appointments to its Appellate Body. Afghanistan, Burundi, and the Philippines have pulled out of the International Criminal Court. Several states in Latin America and the Caribbean have withdrawn from the compulsory jurisdiction of the Inter-American Court of Human Rights. Meanwhile, some powerful states have taken aggressive measures to expand their spheres of influence in violation of international law, including Russia's military aggression against Ukraine and China's efforts to establish de facto sovereign control over the South China Sea. Since returning to the White House in January 2025, US President Donald Trump has expressed similar imperialistic ambitions, threatening to annex Canada, Gaza, Greenland, and the Panama Canal. These developments have undermined the international legal order established under the UN Charter, which envisions states working together to affirm "the equal rights . . . of nations large and small," to suppress "the scourge of war," and "to establish conditions under which justice and respect for . . . international law can be maintained."[14]

Time will tell whether the current anti-globalization backlash is merely a temporary setback or a more enduring obstacle to international cooperation and the rule of law. As UN Secretary-General António Guterres cautions in the epigraph to this book, humanity has reached a crucial "inflection point in history" beyond which it will no longer be possible for societies to survive and thrive while retreating into isolation within their national borders.[15] International cooperation will be necessary not only to address existential threats, such as nuclear proliferation, deadly pandemics, and climate change, but also to secure humanity's future as a global community governed by the rule of law, and not the unilateral will of powerful states. Mandatory cooperation explains how all states, large and small, can coexist and interact with one another within a legal framework that makes sovereign equality and global justice possible. At a time when national authorities around the world are revisiting their

[14] UN Charter pmbl.

[15] UN Secretary-General António Guterrez, *Our Common Agenda – Report of the Secretary General* (New York: United Nations 2021), p. 3, available at www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf.

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commitments to international norms and institutions, this book illuminates what is at stake in the choice between cooperation and unilateralism – what humanity stands to gain when states honor their legal obligations to work together as good neighbors, and what humanity will lose if they do not.

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