ourselves from state consent as a foundational myth," he also argues that "there is no point in theorizing state consent away" as it retains an important role in understanding the construction of international law (p. 31). It is the idea that "international law can be traced back to one single formula" (*id.*) that he mostly objects to, and this is particularly well illustrated throughout this valuable book.

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The Changing Practices of International Law. Edited by Tanja Aalberts and Thomas Gammeltoft-Hansen. Cambridge, UK: Cambridge University Press, 2018. Pp. xix, 251. Index.
doi:10.1017/ajil.2019.73

In a 2000 special issue of *International Organization,* Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal explored the legalization of world politics that resulted from the international institution-building that followed the end of World War II.[1] This led to a reliance on legal instruments to regulate aspects of international relations and cooperation. Beth Simmons and Richard Steinberg noted in their collection on the two fields that international relations by the turn of the twenty-first century were "not only built on power relations but also on explicitly negotiated agreements."[2] The end of the twentieth century saw the completion of 158,000 treaties and related actions and the establishment of 125 international courts and tribunals, "legal regimes for each and every issue area in foreign policy" (p. 208). Has this thickening international legal system led to a more orderly and possibly law-abiding world?

This is the question that Tanja Aalberts, professor of public international law at Vrije Universiteit Amsterdam, and Thomas Gammeltoft-Hansen, professor of migration and refugee law at the University of Copenhagen, address in their edited work, *The Changing Practices of International Law.* The book is divided into nine chapters, including an editors' overview of how international law operates in the present international legal and global environment. This is followed by a discussion of how states play "sovereignty games" in order to recover some of the autonomy that international legal regulation and institutionalization may have constrained. Six case studies then follow to demonstrate how conflicting and competing legal standards and regimes have created opportunities for states to pick and choose their legal obligations and responsibilities. This occurs when specific legal instruments and institutions are created to accomplish goals in particular ways, despite the implications of such actions for related international or domestic law. The final chapter includes an appeal for the development of a practice approach to provide "a way to keep in focus the mutually constitutive relationship between international law and politics, which in turn enables a grounded understanding of how international law is politicized without reducing law to an epiphenomenon of power politics, based on various understandings of what power entails" (p. 218).

The editors pay particular tribute to Wolfgang Friedmann's *The Changing Structure of International Law,* entitling their own volume as a continuation of Friedmann's project.[3] As Friedmann did in his classic text, the editors of this volume walk the reader through the present global environment and the specific challenges it poses to international law. These include the problems of "climate change, global economic flows, corporate power and the new forms of governance, each of which remain caught between the need for dynamic regulation and the

[1] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

[2] INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, at xxx (Beth A. Simmons & Richard H. Steinberg eds., 2006).

[3] *See* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

traditional principles of sovereignty still underpinning international law," fragmentation, and an increasing "political backlash to the increased influence of international law" (pp. 6–7). The authors acknowledge in their opening chapter that strategies of interpretive framing or forum shopping to modify or to relax international obligations are not new in the international system. However, these behaviors and practices are more significant today given the pervasive character of international law and its intrusion into areas principally governed until recently at the domestic level. The book examines "international law as increasingly regulating and constraining international relations by defining or reconfiguring the parameters of international political action," while simultaneously "enabling certain policies that exploit the particularities of international law to recoup and legitimize political power" (p. 20).

Legalization as a form of international cooperation has a particular strength—it not only specifies particular normative objectives, but also brings with it specific forms of discourse and behavior set out by the general rules and procedures of international law. H.L.A. Hart described these functions of law as primary and secondary rules.[4] In *The Dynamics of International Law,* Paul Diehl and I analogized the general rules and procedures of international law to a computer's operating system that serves as the platform on which other software, or in the case of international law, specific norms have to function.[5] Aalberts and Gammeltoft-Hansen use the heuristic of sovereignty games to capture this dynamic. The authors chose this metaphor to provide "a more nuanced position, distinguishing between the state as a sovereign player and the changing content of what it means to be a member of international society, based on the fundamental rules and principles that govern that society and the interaction between its members" (p. 31). The authors' goal is to move beyond "the juxtaposition of law and politics and instead examine them as interwoven practices" (p. 32). The case studies explore the use of language, interpretation, and political contestation as illustrations of how the sovereignty games are played. Sovereignty today is not what it was even fifty years ago; it is increasingly defined not as autonomy, but as responsibility within the international system (p. 39).

The six case studies demonstrate how states play the sovereignty games by picking and choosing their international legal obligations. The first case study by Margareta Brummer discusses the use by the United States of extraterritorial jurisdiction at Guantánamo Bay (Cuba), on the island of Diego Garcia (British Indian Ocean Territory), and in the village of Stare Kiejkuty (Poland). These three locations were used by the U.S. Central Intelligence Agency to conduct its secret detention and extraordinary rendition programs. The United States arranged to use each of these locations through an agreement with the territorial sovereign. It therefore did not trample on the sovereign prerogatives of other states, but also avoided its own possible legal liability, since U.S. law may have forbidden the use on U.S. territory of the interrogation and detention practices used abroad. "The result is that a state exercising control over a zone outside its sovereign borders may argue for the legal liability or responsibility of that state on whose territory it operates, in order to circumvent legal obligations that could arise from the exercise of jurisdiction or control" (p. 48). In the case of the United States, conducting these operations (with the consent of the relevant territorial sovereign) allowed the Bush Administration to avoid the due process and equal protection obligations of the Fifth and Fourteenth Amendments to the U.S. Constitution.

International law was therefore used to conclude lawful agreements between two sovereigns in order to allow one sovereign to escape legal responsibility and liability under its domestic law. The U.S. Supreme Court, however, determined that the writ of habeas corpus applied to detainees held at Guantánamo Bay because the United States exercised exclusive jurisdiction over this territory even though it did not have

[4] H.L.A. Hart, The Concept of Law (2d ed. 1994).

[5] Paul F. Diehl & Charlotte Ku, The Dynamics of International Law (2010).

https://doi.org/10.1017/ajil.2019.73 Published online by Cambridge University Press

ultimate sovereignty.[6] In the cases of the United Kingdom and Poland, both the UK High Court and the European Court of Human Rights found that responsibility still remained with those states and that courts were in a position to hold governments responsible for what took place.[7] Escaping or avoiding responsibility in one context does not necessarily mean that a state will avoid all responsibility and liability.

The case study by Malcolm Langford, Daniel Behn, and Ole Kristian Fauchald examines the investment treaty regime of some 3,500 bilateral investment treaties created by states to provide protection to foreign investors. This network of treaties and its strong system of investor-state dispute resolution have subjected states to increasing scrutiny of their domestic laws and practices by international arbitral tribunals. "The litigation has resulted in sizeable compensation awards [to foreign investors] for actions that many states believe are both legitimate and within their exclusive purview as sovereigns" (p. 74). This has resulted in a backlash where states are limiting the legal rights granted to foreign investors (*id.*). These limits range from pulling out entirely from investment treaties, as Ecuador had then announced its intention to do, to renegotiating the agreements to weaken foreign investor rights (p. 102). These new treaty provisions, however, remain subject to the dispute resolution provisions of bilateral investment treaties and therefore subject to interpretation by arbitrators in the case of a dispute (p. 86). States also now seek to renegotiate specific treaty provisions to strengthen their case if a dispute arises or refuse to enforce an arbitral award (pp. 94–95). Langford, Behn, and Fauchald conclude that these practices not only weaken the investment treaty system, but also the international rule of law generally (p. 102).

Moritz Baumgaertel's case study focuses on migrant rights and the steps states have taken to avoid legal jeopardy in the European Court of Human Rights and the Court of Justice of the European Union. The author groups these strategies into four categories: interpretation of the relevant international obligations related to migrants and asylum seekers, including public policy implications and procedural requirements; adoption of temporary measures to remove cases from the international courts through individual out of court settlements; mobilization of peer states through third party intervention in proceedings before the two courts; and compliance or confrontation with international legal judgments (p. 126). In practical terms, this means that a state can advance contradictory arguments in different courts if that serves its policy objectives, in addition to putting other forms of pressure on courts to decide against the migrant or asylum seeker.[8] Based on interviews with government officials and civil society representatives, the author concludes that states will continue to use court proceedings "to maximize their political room for manoeuver" even as organizations and lawyers working on behalf of migrants seek protection for their clients through these courts (p. 127).

Itamar Mann's chapter explores the sharing of surveillance data collected by intelligence networks, including the U.S. National Security Agency and various European intelligence services, and how those data are used in possible violation of domestic privacy laws. Multilateral agreements like the Five Eyes agreement, the Sigint Seniors Europe, the Sigint Seniors Pacific, and the Afghanistan Sigint Coalition are supplemented by U.S. bilateral agreements with countries like Israel, creating a network for

[6] *See* Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 553 U.S. 723 (2008).

[7] *See* Husayn (Abu Zubaydah) v. Poland, Judgment, App. No. 7511/13 (Eur. Ct. Hum. Rts. July 24, 2014); The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence, Judgement of 12 August 2005, Case No. CO/3673/2005, [2005] EWHC1809 (Admin).

[8] See the example of UK practice before the two European Courts in Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* and *M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, (2011) ECR I-13905, and *Sufi and Elmi v. the United Kingdom*, App. Nos. 8319/07, 11449/04 (Eur. Ct. Hum. Rts. June 28, 2011), cited in Chapter 5 of the book written by Baumgaertel, *Part of the Game*, 103, 112.

https://doi.org/10.1017/ajil.2019.73 Published online by Cambridge University Press

global surveillance. The conflict between the gathering of such information on the basis of national security needs and the privacy of those whose data are collected and analyzed was well highlighted following the leak of national security material by Edward Snowden in June 2013 (p. 133). Although the U.S. Congress has tried to limit the collection and use of information on U.S. citizens, no such protections are afforded non-U.S. citizens. European states, in particular, have pushed back and pointed to the protections of the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Charter of Fundamental Rights of the European Union as protecting their nationals—even extraterritorially in the United States. Nevertheless, this network of mass surveillance not only pits the data sharing enabled by international agreements against the constitutionally and otherwise mandated protections of individual privacy, it also enables countries to contribute to the metadata used to identify targets for military actions even where there may be no authorization for a government to take part in such actions (p. 134).

In the fifth case study, Jaye Ellis examines international environmental law, noting that, "[s]tates have been very careful in their approach" to the development of this issue area, "leaving them room to manoeuvre by crafting a plethora of self-contained, highly specialized regimes in which generally applicable rules of law have little purchase" (p. 158). This fragmentation creates opportunities for states to pick and choose their obligations vis-à-vis each other with little overall coherence for international law generally (p. 163). Environmental agreements are often technical "and framed in highly instrumental terms: rather than aiming at overarching objectives such as fairness, consistency, reasonableness or stability, they are at the service of the regime's objectives" (p. 165). Ellis concludes that this fragmented approach has allowed "the objectives of individual regimes to hold priority over the coherence of legal discourse across regimes and issue areas" (p. 187).

The final case study by Thomas Gammeltoft-Hansen and Tanja Aalberts examines the laws covering search and rescue at sea in connection with the now hundreds of thousands of migrants and refugees trying to reach Europe. This flood of individuals has prompted European countries to create a "virtual border" across the Mediterranean with naval patrol vessels, surveillance planes, and radar stations (p. 188). The complex array of laws that governs the responsibilities of countries at sea and the status of individuals apprehended has created opportunities for countries to pick and choose their obligations and responsibilities and resulted in less protection for the individual migrant or refugee. States set up barriers to shift responsibility to another state or authority, for example, by preventing individuals from entering territorial waters or other areas where the state would incur responsibility for their care and protection. As the authors conclude, "the codification of the *Mare Liberum* has simultaneously created loopholes that enable states to barter off their sovereignty at the expense of their responsibility towards those in distress at sea" (p. 207).

Since the mid-twentieth century, international law has transformed the practice of international relations. The international legal regimes governing human rights, economic, and environmental law introduced and empowered new private actors in the global arena that changed the dynamics and power structures of world politics. But the increased legalization of international relations is not a "purely progressive project beyond politics" (p. 208). *The Changing Practices of International Law* reminds us that states remain players in world politics and make policy choices to advance their objectives. This volume demonstrates how states and other actors use international law to meet such objectives, including escaping international responsibility, avoiding domestic legal scrutiny, and creating procedural barriers to restrict review of their conduct by international courts and tribunals. States exploit the loopholes created by overlapping but inconsistent legal regimes and engage in forum shopping to escape international or domestic responsibility while they also make policy choices to assume new obligations, change existing

https://doi.org/10.1017/ajil.2019.73 Published online by Cambridge University Press

obligations, and take calculated steps to ensure compliance.

The "Dark Side of Legalization," as the final chapter of this book is titled, concludes that the development of international law is not a smooth and straight line toward creating international regimes. Two overarching points emerge from the authors' analysis:

1. Global politics is dynamic and international law is a factor in shaping those politics, sometimes toward, sometimes away from, particular normative objectives; and
2. The more complex international law becomes by engaging increasing numbers of technical subjects and high value areas, the more institutions and individuals at multiple levels of governance become involved and create more opportunities for forum shopping and other ways to avoid compliance.

By analyzing state practice, the editors and case study authors have provided readers with an opportunity to see where and how different international legal regimes have engaged with domestic law and institutions in several issue areas. They demonstrate the range of policy options, from opting out of treaty obligations, as in the case of the investment treaties; to careful selection of the law to avoid legal responsibility, as in the case of the detention centers for interrogation and the handling of migrants at sea; to the drafting of agreements that allow states to pick and choose their obligations. Although disquieting to those who have devoted an enormous amount of effort to concluding international agreements and creating international institutions, such state behavior seems inevitable given the number and complexity of issues now requiring cross-border and transnational attention.

Returning to Friedmann's observation nearly sixty years ago that "the purpose of law is the ordering of social relations,"[9] we can see that the growth of international law in those decades has focused more on directing and prohibiting specific conduct and meeting particular normative objectives than on understanding the relationships that underpin the behaviors and objectives of states and other international actors. This has led to the sovereignty games discussed in the volume and to the fragmentation of international law described by the International Law Commission in 2006.[10] We are still a far cry from the global order that early proponents of legalization hoped for in the wake of two world wars. However, it may be more appropriate to consider the current situation as a moment in time in the ongoing project of legal development and global order.[11]

Awareness of the loopholes and the "sovereignty games" in these legal regimes may well prompt remedial actions to provide coherence and order to the multiple layers and institutions of international law. *The Changing Practices of International Law* provides a multidisciplinary approach to understanding the overarching principles, dynamics, and relationships necessary to support a functioning international legal system. In the words of the volume's editors, such a system would come from accepting the "mutually constitutive relationship between international law and politics" (p. 218). Indeed, the volume reminds us that a mutually constitutive relationship exists between all law and politics, both domestic and international.

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[9] Friedmann, *supra note* 3, at 3.

[10] Int'l L. Comm'n Study Group Rep., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L/682 (Apr. 13, 2006).

[11] See, for example, Transnational Legal Orders (Terence C. Halliday & Gregory Shaffer eds., 2015) for a systematic treatment of law and social ordering.

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