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Introduction

The Changing Practices of International Law

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1.1 Introduction

In his seminal work, *The Changing Structure of International Law*, from 1964 Wolfgang Friedmann argued that international law has entered a new phase following the end of the Second World War.[1] In contrast to the formative period of modern international law, where the prime purpose of international law was to ensure co-existence and regulate conflict among sovereign states, contemporary international law has been supplanted by a drive towards deeper transnational cooperation. Next to the classical 'international law of co-existence' a growing 'international law of co-operation' would thus emerge, concerned with topics hitherto considered 'domestic affairs' such as economic development, welfare and good governance.

A cursory view at international law fifty years later largely seems to confirm Friedmann's premonition, and developments in many areas clearly exceed his expectations. The twentieth century has seen an almost exponential growth in multilateral treaties, the multiplication of specialized legal regimes and international institutions taking on a much more pervasive role in international relations.

What is sometimes referred to as the 'legalization of world politics' covers several distinct but related developments at the empirical level. The first is the *multiplication of actors*, or subjects, of international law. By this we mean, first, the increasing number of states participating in the international legal system. The emergence of a range of new states following the end of colonial rule and again following the end of the Cold War has meant

[1] Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964).

a horizontal or geographical expansion of international law from predominantly Western nations to a host of new states. Secondly, the proliferation of international organizations, transnational corporate entities and other non-state actors has increasingly challenged the notion of sovereign states as the exclusive subjects of international law. We may thus identify a similar vertical or functional expansion of international law as international organizations, corporations and individuals are increasingly recognized as parties to instruments and subjects of international law within such varied areas as international criminal law, trade law and human rights.

The second, parallel, development is the *expansion of treaty law*. Since the end of the Second World War, the world has seen a radical expanse of international legal agreements. The UN Treaty Collection currently counts more than 158 000 treaties and subsequent actions.[2] In some areas, political cooperation has extended a web of bilateral agreements; over the past quarter-century, the number of bilateral investment treaties has thus grown almost ten-fold to almost 3000.[3] Perhaps more significant, more than 6000 multilateral treaties have been signed since the beginning of the twentieth century.[4] Of these 30 per cent are general in nature and thus open for all states to sign.[5] Many of these treaties govern issues qualitatively different from the traditional international law of co-existence, challenging traditional conceptions of state sovereignty based on a separation of internal and external affairs. From trade law, to human rights, to environmental law, the growing international law of cooperation presupposes a fundamentally different commitment of participating states to correspondingly adjust domestic affairs as well as a shift of lawmaking powers towards international organizations and other non-state actors.

Thirdly, international law has been backed by much broader and stronger panoply of *international judicial institutions*, coupled to an

[2] Available online at http://treaties.un.org.

[3] http://investmentpolicyhub.unctad.org/IIA. As of 25 May 2017, there are 2960 bilateral investment treaties. In addition, there are 303 other treaties with investment provisions (e.g. free trade agreements). See www.unctad.org.

[4] A development that seems to have slowed down somewhat the last two decades.

[5] ILC Analytical Study 2006, ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc. A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006; Christopher J. Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington International Law Review* 57–80; Charlotte Ku, *Global Governance and the Changing Face of International Law*, ACUNS Keynote Paper (2001–2).

expansion and increasing overlap of their respective jurisdictions. With some 125 international judiciary institutions,[6] international law today is no longer the 'law without courts' as Hugo Grotius once described it.[7] Moreover, over the last decades the International Court of Justice has found violations in a number of controversial and security and human rights related cases.[8] The reach and case load of regional courts, such the European Court of Justice, and the regional human rights courts have similarly expanded; the European Court of Human Rights alone receives around 60 000 applications and issues some 1500 substantive judgments annually.[9] This growing adjudication is partly a result of the two trends above. The ratification of UNCLOS, WTO, NAFTA and the Energy Charter Treaty has each brought with them specialized adjudicatory and dispute resolution mechanisms, many of them encompassing powerful states that have traditionally avoided submitting to international jurisdiction.[10] The expansion in treaty law, such as bilateral investment treaties, has also led to a slew of interstate arbitrations before the Permanent Court of Arbitration (PCA). Yet, today the PCA also provides dispute resolution services in cases involving claims involving non-state actors such as transnational corporations. Similarly, new protocols have expanded the right to individual petition under a number of human rights treaties. Perhaps most noteworthy a host of new adjudicatory mechanisms has emerged since the 1990s. The two ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia were succeeded by the establishment of the International Criminal Court.

In addition to these trends of expansion, the different components of international law arguably display a higher degree of both political and judicial *interdependence* than Friedmann foresaw. In the context of the proliferation of specialized regimes, it is noteworthy that both legal instruments themselves and international legal institutions often make cross-references to other treaties and institutions. This is visible at the judicial level as well. Not only do different regional human rights courts cite each

[6] Calculation from the Project on International Courts and Tribunals, available at www.pict-pcti.org.

[7] Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to Interntional Law* (Cambridge: Cambridge University Press, 2012), 203–27.

[8] Malcolm Langford, 'The New Apologists: The International Court of Justice and Human Rights' (2015) 48(1) *Retfærd* 49–78.

[9] Kingsbury, 'International Courts', 208.

[10] J. H. H. Weiler et al., 'Special Issue: Changing Paradigms in International Law' (2009) 20 *European Journal of International Law* 21–109.

other, the appointment of prominent human rights lawyers to the International Court of Justice has arguably lend a stronger human rights profile to this institution as well.[11] Inter-operation equally works to break down the national-international divide.[12] Legislation allowing for universal jurisdiction in criminal cases and domestic incorporation of e.g. human rights instruments have allowed national institutions to play a much more decisive role in enforcing international law, and many national courts have become more confident to interpret and refer to international legal instruments.[13]

At the political level, different bodies of international law today interact to an extent where it becomes difficult to disentangle formally separate legal commitments. Recent suggestions have been made by some countries to renegotiate the 1951 Refugee Convention, yet the corner-stone of that instrument – the principle of non-refoulement – is enshrined in, or follows from, numerous other international and regional human rights treaties. Among EU Member States, any move to step down from the European Convention on Human Rights would further have political repercussions within the EU system, and informally the Strasbourg and Brussels Courts are clearly doing much to coordinate and avoid adjudicative conflicts. Interdependence is also evident at the level of treaty law, where cross-referencing multilateral obligations is becoming increasingly commonplace as part of bilateral agreements. Thus, foreign investment treaties may require the signing state to legally and politically commit to international standards in a wide range of other areas in order to secure a stable investment environment. States choosing to completely ignore property rights, labour laws and good governance principles thus ultimately risk financial isolation.[14]

Last, but not least, this changing landscape of international law clearly impacts its subjects. A number of scholars have pointed to the fact that the international law of cooperation and increasing powers granted to

[11] Rosalyn Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *Leiden Journal of International Law* 745–751, at 746.

[12] André Nollkaemper, 'Inside or Out: Two Types of International Legal Pluralism', in Jan Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2014), 94–142.

[13] Kingsbury, 'International Courts', 222; B. S. Chimni, 'Legitimating the International Rule of Law', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to Interntional Law* (Cambridge: Cambridge University Press, 2012), 290–308, at 296.

[14] H. R. Fabri, 'Regulating Trade, Investments and Money', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 352–372, at 359.

international legal institutions are undercutting national sovereignty and marginalizing the role of states as singular actors in the international legal field. In today's world, trans-governmental regulatory organizations,[15] transnational corporations[16] and NGOs[17] are becoming increasingly important actors in the development and governing of international law.

This normative thickening and expansion of law at all levels of international life has led some scholars to suggest that we live in an unprecedented era of 'legalization'.[18] This concept was originally forwarded as part of a particular theoretical framework, carrying with it a number of both analytical and normative assumptions with which we do not necessarily agree.[19] We use it here as a purely descriptive term. Legalization, in other words, is employed as a short-hand for the different developments in regard to international law described above. That across issue areas, resort to international law and institutions has become an 'ubiquitous presence' in political, academic and public discourse.[20] This empirical observation is shared by international lawyers across a wide range of theoretical positions. As David Kennedy observes:

> Although it is easy to think of international affairs as a rolling sea of politics over which we have managed to throw but a thin net of legal rules, in truth the situation today is more the reverse. There is law at every turn – and only the most marginal opportunities for engaged political contestation.[21]

[15] Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 177–205, at 204.

[16] Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law' (1983) 4 *Duke Law Journal* 748–88.

[17] Christine Chinkin, 'Human Rights and the Politics of Representation: Is There a Role for International Law', in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000), 131–48.

[18] Judith Goldstein et al., 'Introduction: Legalization and World Politics' (2000) 54 *International Organization* 385–99.

[19] For an engagement with and critique of this theoretical framework, see Chapter 7 in this volume; André Nollkaemper, 'The Process of Legalisation after 1989 and Its Contribution to the International Rule of Law', in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Oxford: Hart, 2012) 89–102; Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014).

[20] James Crawford and Martti Koskenniemi, 'Introduction', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 1–21, at 1.

[21] David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 *Sydney Law Review* 5–28, at 5.

In short, international law has moved from being the *Buchrecht* of esoteric academics, to occupying a central position in diplomacy and public discourse. The question remains, however, what implications the legalization of world politics has for political life. For the original proponents of the legalization argument, the assumption was that the room for politics consequently narrowed and that conflicts would increasingly be resolved by or through legal means. As we shall see, however, not only has international law come to face substantial challenges, the very conception of international law and politics as a zero-sum game underlying such claims is fundamentally flawed.[22]

1.2 The Challenges to International Law

The 'legalization of world politics' is only part of the story. As part of its expansion and deepening, international law has also been confronted with certain structural and political challenges. First, the picture of legal codification has been questioned by those emphasizing the continued blind spots, gaps and inefficiencies. Critics have correctly pointed out that international law has yet to find satisfactory solutions to some of the world's most pressing problems. Globalization has brought with it a range of issues that do not easily fit the ordering categories of international law as traditionally defined. International law has thus struggled to respond to challenges brought on by e.g. climate change, global economic flows, corporate power and new forms of governance, each of which remain caught between the need for dynamic regulation and the traditional principles of sovereignty still underpinning international law. Moreover, breaches of international law continue to flourish in many areas. This is particularly evident in the area of international humanitarian law and human rights, where an obvious gap exists between rights and realities. Despite important developments, some human rights treaties are still associated with weak or selective monitoring and enforcement mechanisms, making the effect of ratifying human rights treaties no guarantee for actual implementation.[23] Despite the flurry of litigation, economists similarly disagree whether investment treaties actually deliver foreign investments. If we do live an era of legalization, this is still very much work in progress.

Secondly, the expansion of international law has also created concerns that international law may be losing internal coherence. The decentralized

[22] See further Chapter 2, this volume.

[23] Kingsbury, 'International Courts', pp. 203–27; Oona Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 71 *University of Chicago Law Review* 469–536.

structure of international law means that the proliferation of treaty law and international judicial institutions have not developed in the systematic fashion imagined by the international law's founding fathers. Rather, specialized regimes, functional differentiation and multiple fora for adjudication have emerged in a non-hierarchical setting, carrying with them an increased potential for conflicts between different bodies of law and centres of legal authority.[24] Conflicts may be sought resolved through tribunals, committees and commissions, but international law itself far from always provide clear solutions.[25] Concerns have been raised that growing fragmentation of international law will create normative incoherence.[26] While such concerns are hardly new,[27] international law has arguably become a much more messy place, harder for lawyers and judges to systematize and more demanding for states to navigate. For some this is both a natural and preferable outcome of an inherently pluralist international legal order.[28] For others this has led to calls for constitutionalism and the establishment of clearer hierarchies and enforcement mechanisms as known from national legal systems.[29]

Third, and perhaps most important, the political backlash to the increased influence of international law has become undeniable. States have voiced repeated concerns that international law is imposing unrealistic burdens and that international legal institutions are undermining democratic decision making and national sovereignty.[30] In Europe, several states have criticized its two regional courts, The Court of Justice of the European Union (CJEU) and the European Court of Human

[24] Karin J. Alter and Sophie Meunier, 'The Politics of International Regime Complexity' (2009) 7(1) *Perspectives on Politics* 13–24; Fischer-Lescano, Andreas and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046; Margaret A. Young (ed.), *Regime Interaction in International Law. Facing Fragmentation* (Cambridge: Cambridge University Press, 2012); Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Panelists Are from Venus' (2015) 109 *American Journal of International Law* 761–805.

[25] J. Klabbers and T. Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013), 7.

[26] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553–79.

[27] W. Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401–453.

[28] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

[29] Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

[30] Ivan Anthony Shearer, 'In Fear of International Law' (2005) 12 *Indiana Journal of Global Legal Studies* 345–78.

Rights (ECtHR), for 'judicial activism' and overly dynamic interpretation, not least in regard to sensitive political issues such as welfare distribution, immigration and minority rights.[31] In 2016, the Danish Supreme Court, in clear defiance of the interpretation of the CJEU, reasserted the pre-eminence of Danish domestic law in a case concerning employment rights.[32] Resistance to the jurisdiction of the CJEU similarly played a prominent role in the UK campaign to leave the European Union, just as it has in the ensuring negotiations of the Brexit process.[33] In the US, the Trump administration announced withdrawals from both the Trans-Pacific Partnership Agreement (TPPA) on trade and the Paris Agreement on climate change, in addition to introducing a moratorium on new multilateral treaties.[34]

In sum, while we have seen an expansion and deepening of international codification and judicial institutions that place international law at the heart of international politics, any 'liberal progressive narrative'[35] must also take account of the mounting challenges to international law. International law far from always deliver on its promises. It does not necessarily resolve internal or external conflicts. Last, but not least, in a number of areas the international law has developed to a point where states feel threatened by their own creation. Never before has international law been so important, and never before subject to such intense political contestation.

[31] Mark Dawson, B. De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Cheltenham, UK: Edward Elgar, 2013); Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights' (2016) 79 *Law and Contemporary Problems* 141–78.

[32] Mikael Rask Madsen, Henrik Palmer Olsen and Urska Sadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' 23 *European Law Journal*, Issue 1–2, pp. 140–150.

[33] As noted by Theresa May in her speech at Lancaster House on 17 January 2017, 'We will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country'. Available at www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

[34] Jack L. Goldsmith, 'The Trump Onslaught on International Law and Institutions', Lawfare Blog, 17 March 2017. Available at www.lawfareblog.com/trump-onslaught-international-law-and-institutions; Monica Hakimi, 'International Law in the Age of Trump', EJIL:Talk!, 28 February 2017. Available at www.ejiltalk.org/international-law-in-the-age-of-trump.

[35] Tilmann Altwicker and Oliver Diggelmann, 'How Is Progress Constructed in International Legal Scholarship?' (2014) 25 *European Journal of International Law* 425–44.

1.3 Changing Politico-Legal Practices

The above characterization of simultaneous proliferation and growing challenges to international law are often presented as separate narratives or world views on the status of international law in contemporary society, and dealt with in isolation by legal and political scholars alike. In contrast, this volume aims to explore the interplay between these two dynamics and its implications for the development of international law. While other works have focused on what these developments mean for the role of international courts,[36] international organizations[37] or private actors,[38] such as transnational corporations or individuals, our focus is on how states as the original masters navigate the increasingly complex international legal order in which they find themselves embedded.

The starting premise for our analysis is that in this expanded web of bilateral and multilateral treaties, internationally empowered institutions and arbitrational bodies, the room for politics *outside* international law has arguably diminished. For the vast majority of states today, global governance means that international law has increasingly become a *sine qua non* for doing politics. At the same time, the shackles of international law have left many states eager to recoup sovereign power in areas of particular political importance. In extreme cases, this may lead states to resign from existing multilateral agreements. Yet, although the UK leaving the European Union, or the US abandoning the TPPA may well have deep-seated implications for the development of international law also beyond these specific regimes, it is far from clear that they spell a diminished role for international law as such. In their wake, different forms of international law are likely to emerge, spinning a web of bilateral and intergovernmental agreements. As several of the chapters point to, we may be seeing a qualitative transformation of international law towards different and more 'disaggregated' forms of international cooperation.[39]

At the same time, however, the multiplication of legal regimes, overlapping jurisdictions and shifting centres of authority seems to have opened up an increased playing field for political contestation *within* international

[36] See e.g. Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Cambridge: Cambridge University Press, 2014).
[37] See e.g. Jan Klabbers, 'Two Concepts of International Organization' (2005) 2 *International Organizations Law Review* 277–94.
[38] See e.g. Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).
[39] This terminology comes from Chapter 6, this volume.

law. As states are increasingly required to translate and justify their actions in legal terms,[40] governments have become much more adept at navigating and manoeuvring legal structures. When governments rely more heavily on their legal advisors,[41] it is not just to ensure compliance with international law or to successfully stake their claims as part of legal challenges, but also to resort to what might be called 'creative legal thinking'.[42]

As H. L. A. Hart famously noted, international obligations are by definition 'open-textured', and interpretation thus often depends on general principles, transnational adjudication and state practice.[43] Normative developments in the form of further codification, adjudication and soft law are often assumed to remedy this problem by further clarifying interpretation. As international law has developed, however, it could well be argued that this may also work in reverse. The multiplication of legal regimes, overlapping jurisdictions and diffusion of authority also provides for more conflicts within and between international law. This in turn opens up an increased room for political manoeuvring in relation to international law, where governments are able to apply a pick-and-choose approach across different legal regimes, standards and adjudicatory venues. International law in this sense is not only regulating and constraining but also enabling, legitimizing and constituting certain politics, often unforeseen and far removed from the original intentions behind the particular legal regimes and instruments in question. From migration control, to surveillance and trading of emission and fishing quotas, states are increasingly designing policies and actions to work at the fringes or in between the mazes of international law, exploiting interpretative uncertainties, reverting on soft law standards, or establishing novel categories and concepts on the basis of domestic or other parts of international law.

The range of these practices is broad, not only in terms of the different issue areas where they can be observed, but also in terms of the kind of strategies that may be identified. At the more general level at least six

[40] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford: Oxford University Press, 2011).

[41] Kennedy, 'Challenging Expert Rule', 5; see also Anna Leander and Tanja Aalberts, 'Introduction: The Co-Constitution of Legal Expertise and International Security (Symposium)' (2013) 26 *Leiden Journal of International Law* 783–92.

[42] Thomas Gammeltoft-Hansen, 'The Role of International Refugee Law in Refugee Policy' (2014) 27 *Journal of Refugee Studies* 574–95.

[43] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 121–44; Brian Bix, 'H.L.A. Hart and the "Open Texture" of Language' (1991) 10 *Law and Philosophy* 51–72.