

INTRODUCTION TO THE SYMPOSIUM ON MEGAN DONALDSON, “THE SURVIVAL OF THE SECRET TREATY: PUBLICITY, SECRECY, AND LEGALITY IN THE INTERNATIONAL ORDER”

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[Megan Donaldson’s article](#) examines the history and content of the norm of treaty publication found in the UN Charter.¹ She uses that exploration as a lens through which to consider the multiplicity and malleability of forms in treaty-making, the relationship between domestic legal requirements and the use of secrecy internationally, and the relationship between treaty publication and perceptions of legality. In so doing, she also teases out deep tensions that arose within states such as France, the United Kingdom, and the United States, which simultaneously embraced the norm of publication and resisted its application in specific cases.

This symposium contains two essays that build on this historically rich article. Each focuses on the continued use of secret agreements in international law today and explores how the procedural requirement of treaty publication interacts with other bodies of international law.

[Danae Azaria](#) illustrates several important ways in which international law today is agnostic about whether a particular agreement has been publicized.² The UN Charter registration requirement reflects an interest in insuring that states register their treaties, thus making the contents public for all to see. Azaria argues that other aspects of international law are not committed to that outcome. She first demonstrates, using several International Court of Justice opinions, how the law of treaties does not require a treaty to be registered in order for it to constitute a binding international agreement. She then examines the Vienna Convention on the Law of Treaties, and identifies several ways in which states may employ secret treaties as a means of interpretation of other, public treaties. She also notes that, under the Vienna Convention, secrecy will not generally invalidate a state’s consent to be bound to a treaty. Moving away from treaty law to the law of state responsibility, Azaria highlights different ways by which a state, faced with a partner’s violation of a secret treaty obligation, may employ different enforcement tools, including non-UN tribunals and countermeasures, to obtain redress. She concludes that states’ willingness to continue to employ secret treaties ultimately demonstrates their continued faith in decentralized means of enforcing international law.

[My essay](#) focuses on a different aspect of contemporary secret agreements: the unexpected fact that many of these agreements appear to be substantively consistent with the international legal obligations of the states that conclude them.³ One might expect states to employ secrecy in their international agreements in order to conceal violations of their existing legal commitments—but they do not seem to do so. This puzzle requires some explanation, and Donaldson’s article sheds light on one possible answer: the important role of international lawyers. Donaldson’s history demonstrates an important role for foreign ministry lawyers in guiding their state toward

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¹ Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, 111 AJIL 575 (2017).

² Danae Azaria, *Secret Treaties in International Law and the Faith of States in Decentralized Enforcement*, 111 AJIL UNBOUND 469 (2018).

³ Ashley S. Deeks, *The Substance of Secret Agreements and the Role of Government Lawyers*, 111 AJIL UNBOUND 474 (2018).

outcomes that were consistent with that state's treaty registration obligations. She further shows that where that outcome was politically impossible, those same lawyers guided the state toward actions that minimized the international law violation. I argue that a similar mechanism accounts for the limited number of Charter violations that appear in modern secret agreements. Not only is there evidence of a multi-decade-long bureaucratic commitment to the procedural aspects of international law, then, but there also is evidence—extracted from an examination of secret agreements that have come to light—of the same bureaucratic commitment by government lawyers to the substance of international law. This bureaucratic commitment likely plays an important role in explaining more broadly why states comply with their international legal obligations.

In sum, Donaldson's article serves as an important stimulus for international lawyers to confront nonobvious features surrounding the use of secret agreements and other aspects of treaty-making.