

# INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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not of utopianism per se, but of utopianism untempered by an appreciation for constraints. In his view pure realism was also problematic because it was deterministic and sterile, unable to do anything more than reconcile us fatalistically to the evils of the world. As a result, “sound political thought and sound political life will be found only where *both* have their place.”<sup>51</sup> Which one should be emphasized at a given time depends on historical conditions. While sometimes “realism is the necessary corrective to the exuberance of utopianism, . . . in other periods utopianism must be invoked to counteract the barrenness of realism.”<sup>52</sup> With the Cold War over, the international community can once again contemplate the utopian side of life, and this volume brings welcome rigor to that impulse. Yet the way it has posed its central question seems still caught up in a realist mentality, oriented toward explaining rather than making, determinism rather than voluntarism.

\*\*\* The different temporalities of explaining and making mean there will always be a gap between a science of the past and a policy for the future. If we want to drive forward rather than just see where we have been, therefore, we need kinds of knowledge that go beyond the causes of institutional design, and we need two in particular: knowledge about institutional effectiveness and knowledge about values.

### **Institutional Effectiveness**

Functionalism assumes that actors will choose those institutional designs that they believe will most efficiently serve their interests. As such, the criterion for whether or not an institution is a rational choice is subjective (at the level of the group), namely that it helps them solve their perceived collective-action problem. \*\*\*

However, institutions are designed to solve problems in the world, and therefore we will also want to know how well they fit or match the reality toward which they are directed. If institutions perform as their designers expected, there is no problem. Functionalism would then correspond to a Dr. Pangloss situation, the best of all possible worlds. But what if designers’ expectations turn out later to have missed the mark? What if an institution has unintended negative consequences of sufficient magnitude that had these been known in advance designers would have made different choices? In short, what if design features are not, in fact,

<sup>51</sup> *Ibid.*, 10; emphasis added.

<sup>52</sup> *Ibid.*

functional? In that case institutional choices might have been rational in the subjective sense, but in the objective sense, a mistake.

Of course, what is objectively rational can only be known after the fact and so is not fully available to us. However, by studying institutional effectiveness we can gain some relevant foreknowledge. \* \* \*

In particular, understanding institutional effectiveness helps us make the future in at least two ways. One is by enhancing the objective accuracy with which design problems are defined, and the quality of our means-end calculations. Here we can see a partial dependence of making on explaining/predicting: to be successful the former depends in part on being able to do the latter. For example, knowing how well different institutions work might enable us to choose better between what Philip Pettit calls “deviant-centered” and “complier-centered” designs.<sup>53</sup> To that extent such research would nicely complement this volume’s agenda.

However, understanding effectiveness could also have a second, more rival impact. What if it turns out that institutions designed according to the criterion of maximizing expected utility frequently have significant negative unintended consequences, so that the gap between what seems functional and what really is functional is often large? In some of these cases it might still be best to try to maximize expected utility, in the hopes of getting as close to the optimal outcome as we can. But in other cases, according to the “theory of the second best” we might be better off not doing so and adopting some other decision rule instead.<sup>54</sup> If learning that we are often very poor at predicting design outcomes leads us to approach design in a new way, then the effectiveness problematique would not complement the Rational Design project’s research program so much as reconstitute its central concept, rationality. Research into the causes of design choices might then be led to ask a new question, Why do states make such *irrational* choices?

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### Normative Desirability

Perhaps even more important than knowledge about what works is knowledge about what is right and wrong. After all, institutions are created to advance certain values, and so we cannot design anything until

<sup>53</sup> Pettit 1996.

<sup>54</sup> On the design implications of the theory of second best, see Goodin 1995; and Coram 1996.

we know what values we should pursue. This knowledge is not considered part of social science as conventionally understood, so some might argue that its production should not take place in IR but over in political theory and normative IR. There is something to this; a division of labor between positive and normative theory is often useful. However, with respect to real-world institutional design their separation is problematic. Given the futural and open-ended character of this problem, a science of design will be more useful if it addresses the relationship between positive and normative in a systematic way.

Assuming that the empirical support for this volume's conjectures holds up, how should we evaluate this result normatively? Is it *good* that the designers of international institutions are "rational?" Not necessarily – that depends on what their designs are for. The possibility that the institutions set up by the Nazis or Imperial Japanese were rational does not mean they should be repeated. However, from the perspective of the Rational Design framework this normative relativity is not a problem because it defines rationality as purely instrumental. Rationality has to do with means, not ends, and as such does not *itself* have normative content.

The belief that instrumental rationality has no normative content suggests two points. First, note that this belief treats as exogenously settled many of the most important questions about international institutional design, namely about the constitution of ends. (1) Who should be the designer? In most cases states are the designers. Is this a good thing? What about those affected by international institutions? (2) What values should states pursue in their designs? Wealth? Power? Justice? (3) For whom should states pursue these values? Nations? Civilizations? Humanity? (4) What should be their time horizon? Should states care about future generations, and if so at what discount rate? (5) Should institutional designs focus on outcomes or procedures? In sum, what constitutes "the good" in a given situation to which designers should be aspiring? All of these normative questions are intensely political, and their answers will strongly condition how design problems are defined. There are still interesting normative questions left once ends are decided (some distributional questions, for example), but it is hard not to feel that by the time this volume's rational designers begin their deliberations much of the politics is over.

Second, is it so clear that instrumental rationality has no normative content? One way to raise doubts would be to invoke Jurgen Habermas's concept of communicative rationality, which Thomas Risse sees as an alternative both to rationalism's logic of consequences and the logic of

appropriateness emphasized by constructivists.<sup>55</sup> According to Habermas, strategic (a form of instrumental) rationality and communicative rationality exhibit different “orientations toward action,” the former being oriented toward success, the latter toward achieving consensus or understanding. An important feature of this difference is that implicit within it are different relationships between Self and Other, which in this case could be one designer to another, or to consumers. Instrumental rationality positions the Other as an object to be manipulated in order to realize the interests of the Self. In this case Self and Other position each other as separate individuals, and power and interest will drive their interaction. Communicative rationality, in contrast, positions Self and Other not as distinct objects but as members of the same community, “team,”<sup>56</sup> or “We.” In this case power and individual interest do not matter (or as much), and instead deliberation, persuasion, and the force of the better argument take over. To that extent the difference between the two rationalities may seem to be one of process rather than outcome, which the Rational Design framework seeks to bracket.<sup>57</sup> However, it matters here because (1) it suggests that acting in an instrumentally rational way is itself a *constitutive choice* about who actors are going to be, which brings us back to the question of performativity discussed earlier,<sup>58</sup> and as such (2) it is a choice that may have normative consequences, distinct from those of the ends that action seeks to realize. \*\*\*

\*\*\* It is certainly desirable that institutional designers know how to calculate, but one would also hope they have wisdom, judgment, and an understanding of the good. These are qualities that a rigid separation of positive and normative theory will do little to cultivate.

## CONCLUSION

A complete, policy-relevant science of institutional design will provide knowledge that answers at least three questions: How and why have design choices been made in the past? What works? And what goals should we pursue? The Rational Design project represents an important step toward answering the first. It addresses the second only implicitly, through the functionalist assumption that states will understand subjectively what is objectively rational. About the third this volume is silent.

<sup>55</sup> Risse 2000.

<sup>56</sup> On “thinking like a team,” see Sugden 1993.

<sup>57</sup> Koremenos, Lipson, and Snidal [2001], 781.

<sup>58</sup> On different design rationalities as constitutive choices, see Dryzek 1996.

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One can fairly ask whether a science that combined all three questions would really be a “science.” It probably would not be on conventional understandings of that term. However, one lesson I took away from this volume is that, if we are to make social science relevant to the problems of institutional design facing real-world decision makers (and us, their consumers), we need to broaden our conception of social science to integrate positive and normative concerns – to develop a “practical” understanding of social science, in both its everyday and philosophical senses. Different images of a practical social science can be found in work inspired by Aristotle, Dewey, Buchanan, and Habermas.<sup>59</sup> But with the partial exception of Habermas, these traditions have made little impact on IR, which continues not only to maintain a high wall between positive and normative concerns but also to actively marginalize the latter.

One reason for this marginalization is probably the strong influence of positivism on our discipline, but it has received further impetus from the long theoretical dominance of realism.<sup>60</sup> If international politics is condemned to be a realm of eternal conflict, then the future cannot be different from the past, and normative concerns can be dismissed as “fantasy theory.”<sup>61</sup> The third question that a practical science of institutional design should answer – What values should we pursue? – does not come up, since we have no value choices to make. The best we can hope to do is survive, and for that all we need is a positive social science, one that looks to the past to guide our journey “back to the future.”<sup>62</sup> In such a closed and deterministic universe the idea of institutional “design” is irrelevant.

Yet this volume’s premise is that states do design international institutions, that these choices matter, and (presumably) that social scientists should try to help make them better. As such, its premise is at least implicitly one of voluntarism and an open future, where things do not have to be done as they have in the past. To fully realize the potential of this premise, however, we need to think harder about the nature of the design problem, its differences from our traditional social scientific

<sup>59</sup> See Salkever 1991; Cochran 1999; Buchanan 1990; and Linklater 1998, respectively. Given its rationalist basis, the absence of the Buchanan tradition in this volume, as represented in the journal *Constitutional Political Economy*, is particularly noteworthy.

<sup>60</sup> For a classic discussion, see Wight 1966.

<sup>61</sup> Schweller 1999.

<sup>62</sup> Mearsheimer 1990.

concern with explanation, and the implications for the kind of knowledge we seek to produce. Driving may be difficult when it is dark outside, but a science that tries to see the road ahead by using only the rearview mirror makes little sense, especially if we are building the road as we go along. The Rational Design project has performed a valuable service for IR by raising such an interesting problem. Having done so, the hope is that it will lead eventually to a more forward-looking, practical social science.

## The Dynamics of International Law: The Interaction of Normative and Operating Systems

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International law provides the framework for political discourse among members of the international system. The framework does not guarantee consensus, but it does foster the ongoing discourse and participation needed to provide conceptual clarity in developing legal obligations and gaining their acceptance. In playing this role, international law performs two different functions. One is to provide mechanisms for cross-border interactions, and the other is to shape the values and goals these interactions are pursuing. We call the first set of functions the “operating system” of international law, and the second set the “normative system.”<sup>1</sup>

The purpose of this article is to describe the basic components of the operating and normative systems as a conceptual framework for analyzing and understanding international law. We also explore, in a preliminary fashion, the interaction of these two systems, specifically the conditions under which operating system changes occur in response to normative changes. We present a number of theoretical arguments and illustrate them by reference to the norm prohibiting genocide and the subsequent steps taken by states to change international legal rules so that this norm could influence state behavior.

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<sup>1</sup> Ku and Diehl 1998.



\*\*\* [Most] scholarship has been devoted to how norms arise,<sup>2</sup> with special attention to the moral character of the norm and how it becomes accepted broadly by the international community. Such scholarship has not often paid attention to the ways in which the international community has sought to ensure that such norms actually influence state behavior. Either this was assumed to be a tautology (some argue that behavior modification is an essential component of a norm)<sup>3</sup> or dismissed as a fundamentally different question. Our analysis seeks to assess whether particular factors will likely help or hinder a norm's effectiveness.

More broadly, our analysis answers the call<sup>4</sup> to bridge international legal and international relations theories. Although not exclusively concerned with international regimes,<sup>5</sup> our analysis has implications for how regimes are designed and what mechanisms exist for their maintenance. As Slaughter et al.<sup>6</sup> indicate, "effective regime design requires a theory of why states cooperate through institutional arrangements and why those arrangements might not succeed." We hope to offer insights on when states will build institutional as well as other mechanisms to ensure that regime norms are not empty ideals. In effect, operating system provisions become a necessary part of the legal regime in a given issue area. Thus understanding how normative change prompts operating system change could be a major component of understanding the development and, ultimately, the effectiveness of international regimes.

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#### INTERNATIONAL LAW AS OPERATING AND NORMATIVE SYSTEMS

International law's existence today as a collection of rules, prescriptions, and aspirations governing the conduct of states seems well established. Yet there seems to be a vacuum of inquiry into the relationship between the structures and processes of international law and its normative content. Our study examines this by stepping away from the traditional approaches of sources, hierarchy, or functions of international law toward a concern with dynamics or change in international law. Our approach is to look at international law as a package of related activities that

<sup>2</sup> For example, Klotz 1995; and Finnemore 1996.

<sup>3</sup> Goertz and Diehl 1992.

<sup>4</sup> Slaughter, Tulumello, and Wood 1998; Beck 1996.

<sup>5</sup> For a review, see Hasenclever, Mayer, and Rittberger 1997.

<sup>6</sup> Slaughter, Tulumello, and Wood 1998, 385.

are both structural and directive at the same time. We identify the two threads as operating (structural) and normative (directive). We chose the word “operating” as one would conceive of a computer’s operating system. It is the basic platform upon which a system will operate. When the computer operating system (for example, Microsoft Windows) functions to allow the use of specific word processing programs, spreadsheets, or communications software, there is little direct consideration given to that system by the user. Similarly, the operating system of international law provides the signals and commands that make multiple functions and modes possible, and when functioning, often requires little conscious effort. \*\*\*

### Operating System

The dual character of international law results from its Westphalian legacy in which law functions among, rather than above, states and in which the state carries out the legislative, judicial, and executive functions that in domestic legal systems are performed by separate institutions. The operating system of international law therefore functions in some ways as a constitution does in a domestic legal system – by setting out the consensus of its constituent actors (primarily states) on distribution of authority and responsibilities for governance within the system. Legal capacity can be expressed and recognized in terms of rights and duties, and is a major portion of constitutions. Nevertheless, constitutions also provide more. Dahl<sup>7</sup> identified a number of items that constitutions generally specify, several of which are also specified by international law. These include competent decisions, accountability, and ensuring stability, to name a few.

In order for the operating system to maintain vibrancy and resiliency, and to ensure the stability necessary for orderly behavior, the operating system must provide for a dynamic normative system that facilitates the competition of values, views, and actors. It does so by applying the constitutional functions as described above when including new actors, new issues, new structures, and new norms. Who, for example, are the authorized decision makers in international law? Whose actions can bind not only the parties involved, but also others? How does one know that an authoritative decision has taken place? When does the resolution of a conflict or a dispute give rise to new law? These are the questions that the operating system answers. Note, in particular, that where the operating system may be associated with formal structures, not all

<sup>7</sup> Dahl 1998.

operating system elements are institutional. For example, the Vienna Convention on Treaties entails no institutional mechanisms, but does specify various operational rules about treaties and therefore the parameters of lawmaking.

The operating system has a number of dimensions or components, typically covered in international law textbooks, but largely unconnected with one another. Some of the primary components include the following:

1. Sources of Law. These include the system rules for defining the process through which law is formed, the criteria for determining when legal obligations exist, and which actors are bound (or not) by that law. This element of the operating system also specifies a hierarchy of different legal sources. For example, the operating system defines whether United Nations (UN) resolutions are legally binding (generally not) and what role they play in the legal process (possible evidence of customary law).
2. Actors. This dimension includes determining which actors are eligible to have rights and obligations under the law. The operating system also determines how, and the degree to which, those actors might exercise those rights internationally. For example, individuals and multinational corporations may enjoy certain international legal protections, but those rights might only be asserted in international forums by their home states.
3. Jurisdiction. These rules define the rights of actors and institutions to deal with legal problems and violations. An important element is defining what problems or situations will be handled through national legal systems as opposed to international forums. For example, the Convention on Torture (1985) allows states to prosecute perpetrators in their custody, regardless of the location of the offense and the nationality of the perpetrator or victim, affirming the “universal jurisdiction” principle.
4. Courts or Institutions. These elements create forums and accompanying rules under which international legal disputes might be heard or decisions might be enforced. Thus for example, the Statute of the International Court of Justice (ICJ) provides for the creation of the institution, sets general rules of decision making, identifies the processes and scope under which cases are heard, specifies the composition of the court, and details decision-making procedures (to name a few).

Our conception of an operating system clearly overlaps with some prior formulations, but is different in some fundamental ways. Regime

theory<sup>8</sup> refers to decision-making procedures as practices for making and implementing collective choice, similar to “regulative norms,”<sup>9</sup> which lessen transaction costs of collective action. Although these may be encompassed by the international law operating system, our conception of the latter is broader. The operating system is not necessarily issue-specific but may deal equally well (or poorly) with multiple issues – note that the ICJ may adjudicate disputes involving airspace as well as war crimes. Regime decision-making procedures are also thought to reflect norms, rules, and principles without much independent standing.

Hart<sup>10</sup> developed the notion of “secondary rules” to refer to the ways in which primary rules might be “conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”<sup>11</sup> This comports in many ways with our conception of an international legal operating system. Yet Hart views secondary rules (his choice of the term “secondary” is illuminating) as “parasitic” to the primary ones. This suggests that secondary rules follow in time the development of primary rules, especially in primitive legal systems (to which international law is sometimes compared). Furthermore, secondary rules are believed to service normative ones, solving the problems of “uncertainty,” “stasis,” and “inefficiency” inherently encountered with normative rules.

Our conception of an international legal operating system is somewhat different. For us, the operating system is usually independent of any one norm or regime and, therefore, is greater than the sum of any parts derived from individual norms and regimes. The operating system in many cases, after its creation, may precede the development of parts of the normative system, rather than merely reacting to it. In this conception, the operating system is not merely a maid-servant to the normative system, but the former can actually shape the development of the latter. For example, established rules on jurisdiction may restrict the development of new normative rules on what kinds of behaviors might be labeled as international crimes. Neither is the operating system as reflective of the normative system as Hart implies it to be. The operating system may develop some of its configurations autonomously from specific norms, thereby serving political as well as legal needs (for example, the

<sup>8</sup> Krasner 1982.

<sup>9</sup> Barnett 1995.

<sup>10</sup> Hart 1994.

<sup>11</sup> *Ibid.*, 94.