International Law and International Relations

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CAMBRIDGE www.cambridge.org/9780521861861

theory[8] refers to decision-making procedures as practices for making and implementing collective choice, similar to "regulative norms,"[9] 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[10] 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."[11] 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

[8] Krasner 1982.
[9] Barnett 1995.
[10] Hart 1994.
[11] Ibid., 94.

creation of an international organization that also performs monitoring functions). In the relatively anarchic world of international relations, we argue that this is more likely than in the domestic legal systems on which Hart primarily based his analysis.

*** [The] operating system has a greater "stickiness" than might be implied by Hart's formulations. The operating system may be more resistant to change and not always responsive to alterations in the normative system or the primary rules. It is this formulation that suggests, and makes interesting, our concern with how operating system change follows or not from normative change. This is not merely a matter of moving from a primitive legal system to a more advanced one (as Hart would argue), but of considering how adaptive the two systems are to each other. Finally, our formulation sees effective norm development as dependent on the operating system or the structural dimension. A failure to understand this dependence may stall or obstruct a norm's effectiveness. Again, the metaphor of the computer operating system may be useful as the failure of the operating system to adequately support a specific software application will slow down or render inoperable features of that application for the user.

The evolution of the operating system in all of the areas enumerated above has been toward expansion – in the number of actors, in the forms of decision making, and in the forums and modes of implementation. Although international law remains principally a body of rules and practices to regulate state behavior in the conduct of interstate relations, much of international law now also regulates the conduct of governments and the behavior of individuals within states, and may address issues that require ongoing transnational cooperation. Human rights law is an example of the normative system regulating behavior within states. Such human rights law, however, may configure elements of the operating system in that the human rights granted may convey legal personality onto individuals, thereby rendering them capable of holding or exercising legal rights. ***

[Participants] in the international legal process today include more than 190 states and governments, international institutions created by states, and elements of the private sector – multinational corporations and financial institutions, networks of individuals, and NGOs. ***

There has also been an expansion in the forms of law. This has led to thinking about law as a continuum "ranging from the traditional international legal forms to soft law instruments."[12] This continuum

[12] Chinkin 1989; see also Weil 1983.

includes resolutions of the UN General Assembly, standards of private organizations such as the International Standards Organization, and codes of conduct developed in international organizations,[13] such as the code of conduct on the distribution and use of pesticides adopted by the Food and Agriculture Organization in 1985. The concept of a continuum is useful because these modes are likely not to operate in isolation, but rather to interact with and build on each other. ***

The forums and modes for implementation have also expanded. *** Although international law still relies on domestic legal and political structures for implementation, the international community has also created new international institutions and recognized transnational legal processes that have over time become recognized forums in which to engage in decision making, interpretation, and recently even the prosecution of individuals on the basis of violations of international law.[14] Not only do representatives of states continue to meet to make law, but they also meet routinely in international settings to ensure its implementation and compliance (for example, CSCE follow-up meetings after the Helsinki accords in 1975). ***

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The Normative System

We choose the word normative to describe the directive aspects of international law because this area of law functions to create norms out of particular values or policies. Using a different set of analogies, we could imagine "normative" processes as quasi-legislative in character, as they mandate particular values and direct specific changes in state and other actors' behaviors. References to the term "norms" abound in the study of international relations, and it is not always clear what is conveyed by a particular construction. In the regimes literature,[15] norms and principles (for example, orthodox versus embedded liberalism in trade) are broader philosophies of how states and other actors should behave. Although they tend to be issue-specific (for example, addressing trade or human rights), regime norms are not generally defined at the microlevel (for example, precise changes in rules governing certain human rights

[13] Charney 1993.
[14] See Ku and Borgen 2000.
[15] Krasner 1982.

violations). In this sense, they are similar to what Barnett[16] refers to as "constitutive norms." Our conception of norms is on the one hand narrower and more precise. We focus only on normative elements that have a legally binding character, analogous to the idea of rules in the regime literature. Because we are interested in the international legal system, we are not concerned with acts of "comity" or with so-called "soft law," which might be appropriate subjects for a broader inquiry of international norms. On the other hand, we have a deeper conception of norms that goes beyond broad general principles to include specific elements about behavior. That is, our normative system is concerned with particular prescriptions and proscriptions, such as limitations on child labor.

Our conception of a normative system is similar to what Hart[17] defines as primary rules that impose duties on actors to perform or abstain from actions – but there is an important difference. Hart sees primary rules as the basic building blocks of a legal system, logically and naturally preceding the development of what we define as the operating system components. For Hart, a primitive legal system can be one with developed rules, but without substantial structures to interpret or enforce those rules. We see a more developed international legal system where norms may exist without specific reference to the operating system but cannot function without using the operating system's mechanisms. Nevertheless, the normative system may remain somewhat autonomous from the operating system and may even lag behind in its development.

In defining the normative system, the participants in the international legal process engage in a political and legislative exercise that defines the substance and scope of the law. Normative change may occur slowly with the evolution of customary practices, a traditional source of international law. Yet in recent historical periods, normative change has been precipitated by new treaties (for example, the Nuclear Non-Proliferation Treaty) or by a series of actions by international organizations (for example, UN Special Commission activities in Iraq).* Nevertheless, the establishment of international legal norms is still less precise and structured than that in domestic legal systems, where formal deliberative bodies enact legislation.

In contrast to the general terms associated with topics of the operating system (for example, jurisdiction or actors), the topics of the normative system are issue-specific, and many components of the system refer to subtopics within issue areas (for example, the status of women within

[16] Barnett 1995.
[17] Hart 1994.

the broader topic area of human rights). Many of these issues have long been on the agenda of international law. Proscriptions on the use of military force have their roots in natural law and early Christian teachings on just war. Many normative rules concerning the law of the sea (for example, seizure of commercial vessels during wartime) also have long pedigrees in customary practice. Yet recent trends in the evolution of the normative system represent expansions in its scope and depths. Some current issue areas of international legal concern, most notably with respect to human rights and the environment, have developed almost exclusively over the past fifty years. Furthermore, within issue areas, legal norms have sought to regulate a wider range of behaviors; for example, international law on the environment has evolved beyond simple concerns of riparian states to include concerns with ozone depletion, water pollution, and other problems.

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The effectiveness of the normative system, *** depends largely on the operating system, the mechanisms and processes that are designed to ensure orderly processes and compliance with those norms and to bring about change if problems signal a need for change. The normative system may facilitate compliance in isolation from the operating system by "compliance pull."[18] Compliance pull is induced through legitimacy, which is powered by the quality of the rule or the rule-making institution. Still, "primary rules, if they lack adherence to a system of validating secondary rules, are mere ad hoc reciprocal arrangements."[19] Compliance pull may exist under such circumstances, but it will be considerably weaker than if secondary rules (related to the operating system) are present. Note that we are speaking of more than compliance concerns in dealing with norms. Regime theory has typically assumed that it is the desire to improve the efficiency of interstate interactions (for example, by reducing transaction costs) that drives the adoption of normative rules. Our view is that states adopt normative rules largely to promote shared values in the international system. Rule adoption and institution creation (largely operating system changes) may be helpful in implementation and in reducing transaction costs, but are not a necessary element or purpose of normative change.

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[18] Franck 1990.
[19] Ibid., 184.

CORRELATES OF OPERATING SYSTEM CHANGE

*** We argue that the operating system does not necessarily optimally support the normative system. One major question *** arises from this conceptual framework: How does change in the normative system affect the operating system? Our theoretical argument specifies several necessary conditions for normative change to produce operating system change, with other factors essentially operating as limiting conditions or veto points. ***

There are some assumptions and caveats underlying our analysis below. First, we focus on operating system changes that succeed normative change. This is not to say that the reverse is not possible or that the process is not recursive. Obviously, both processes occur, but we want to isolate and examine the "norms produce structural changes" process as a first step in understanding the complex interaction. Thus because we take norms as a given, their genesis (including the influences of structure) is outside the scope of this study. Second, we assume that the international legal operating system is somewhat "sticky," and thereby has an inertial resistance to change. Thus the operating system is not merely a reflection of the normative system and does not necessarily move in synchronous fashion with alterations in the latter.

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The Necessity of Necessity

The operating system for international law only changes in response to necessity. That is, one might anticipate operating system change only when the status quo system cannot handle the requirements placed on it by the adoption of new normative standards. There is also the assumption, of course, that states actually want to implement normative provisions, rather than let them linger with largely symbolic effects.

Some of the logic underlying the necessity requirement is related to the contractualist model of international regime formation.[20] In this model, states cooperate and build institutions to lessen the "transaction costs" associated with the negotiation, monitoring, and enforcement of agreements. In particular, regimes are designed to mitigate the latter sanctioning problems that arise at the international level when seeking to ensure that states follow certain prescriptions. Thus such approaches to

[20] Keohane 1984.

regime formation focus on the efficiency of new structural arrangements. Necessity goes beyond simple efficiency bases, however, and stresses that the operating system must change to give effect to new standards. Thus necessity assumes that some actions must be completed (an inherent increase in efficiency), but it does not presuppose that the operating system change will necessarily be the most efficient arrangement, and therefore may fall short of rationalist expectations. The contractualist approach to regimes recognizes that institution creation is not done in a vacuum, but rather in the context of past efforts and institutional experiences. Thus the status quo becomes an important reference point for potential regime alterations. With respect to our concern with the international law operating system, extant system arrangements vis-à-vis new norms become critical. Accordingly, there seem to be three separate elements of necessity that may precipitate changes in the operating system: insufficiency, incompatibility, and ineffectiveness.

When legal norms are completely *de novo,* and therefore dissimilar to existing norms, it is likely that the legal operating system does not possess relevant provisions to deal with them. When the operating system is therefore insufficient to give effect or regulate relations surrounding the new norm, changes might be expected to occur in that operating system to accommodate the new rules. An example of such change would include the construction of a committee for regulating the observance of a new environmental law, similar to the creation of UN's Commission on Sustainable Development following the Conference on Environment and Development in 1992.

Related to the insufficiency of current operating arrangements is their incompatibility vis-à-vis alterations in legal prescriptions. The extant operating system in international law may not simply be inadequate to deal with new norms, it may be contrary to them. At that point, some reconciliation is necessary. For example, holding national leaders responsible for torture or other crimes (Convention on Torture) creates new norms but is incompatible with notions of sovereign immunity[.] *** Exceptions to foreign sovereign immunity may need to be created for the operating system to be consonant with these new agreements and the legal norms embedded within them.

A third variation of the necessity argument concerns ineffectiveness. Unlike insufficiency, which presupposes the complete absence of relevant operating arrangements, the ineffectiveness variation finds operating mechanisms present, but not well designed to meet the challenges presented by the new or modified norm. Thus some specific changes in the

operating system are needed that specifically reflect the new norm. For example, compliance mechanisms based on reciprocity may be largely ineffective with respect to emerging norms in areas such as human rights. There, the violation of legal standards by one state has little commensurate effect on the probability that other states will also violate the law (and thereby impose costs on the original violator). Indeed, reciprocity concerns may undermine compliance as states implicitly cooperate *not* to sanction one another for such violations. This is illustrated by UN member countries' refusal to denounce human rights atrocities committed by their neighbors.

Although we argue that some necessity is required for operating system change, we leave the question of what proposed changes appear on the international agenda and which actors press for those changes as exogenous. At this stage, we believe that proposals for change are always available in the marketplace of ideas. This is consistent with public policy analyses postulating that there are always "solutions" present in the system, but these solutions must wait for the right conditions before they are seriously considered or adopted. Many of those proposals will arise and be promoted by a concatenation of actors in the international policy process. These would most prominently include states with a direct interest in facilitating operating system change (for example, coastal states seeking compliance with pollution rules), epistemic communities, and other policy entrepreneurs (for example, international lawyers) as well as international governmental organizations and NGOs. The major point in this section, however, is that the efforts of these actors to propose or champion operating system change will fail unless necessity considerations prevail.

The Impetus of Political Shocks

There is inherent inertia in any political system, and international law has been characterized as changing more glacially than other legal systems. Accordingly, we posit that some significant impetus must be present before the operating system adjusts to the normative change. That impetus must come from a significant political shock.[21] Political shocks can be discrete events, such as world wars, acts of terrorism, or horrific

[21] The notion of political shocks producing significant environmental change has been adopted by scholars of American public policymaking drawing heavily from biological models of punctuated equilibrium. See Baumgartner and Jones 1993. For an application to international relations phenomena, see Diehl and Goertz 2000.

human rights abuses. Shocks might also appear as significant processes, such as global democratization, that extend over a period of time. All political shocks, however, represent dramatic changes in the international political environment, which in turn facilitate changes in the international legal operating system. Of course, the type of political shock one might expect to see will vary according to the issue area in question. For example, a shift away from the gold standard might be expected to affect international economic law rather than human rights law. This is in contrast to the traditional view of international law as a slowly evolving body of rules, traditionally articulated by customary law, which almost by definition presupposes gradualist change.

Political shocks can have a number of effects on international relations and thereby facilitate operating system change. First, political shocks may radically reorder relations between states, such that previous impediments to cooperation are removed. Previous animosities or divisions may give way to alliances between former enemies. *** Operating system change may not have been possible previously because of disputes between states or restrictions imposed by the international environment. A change in that environment may break down the barriers to the adoption of new policies – or new legal structures or provisions. Second, political shocks may place issues or policies on the global agenda and thereby prompt the community of states to take action on them. For example, some human rights concerns only become salient issues following catastrophic violations. Thus even though operating system change may be needed, there may be no action until the issue becomes salient. We know from numerous studies of public policy that while a multitude of problems exist, only a subset receives government action, often at the impetus of dramatic events or changes in the political environment (for example, a new government). We envision that international political shocks perform a similar agenda-setting function with respect to the international legal system.

Political shocks may have the effect of changing the normative and operating system simultaneously or sequentially. That is, an initial political shock may prompt a normative change (for example, restrictions on the use of military force after World War I), and this may include corresponding changes in the operating system (for example, the creation of the League of Nations and its provisions for dealing with aggression). In contrast, the operating system change may not result from the same shock as that which prompted the initial normative change. Thus it may take another shock, potentially many years later, for the operating system

to be altered. Thus our model recognizes that normative and operating change may not be coterminous and provides a specification of the process under which this might happen. As conceptualized, political shocks provide the necessary, but not always sufficient, conditions for operating system change. That is, not every political shock will produce an operating system change; some shocks will occur with little or no after-effects.

Although we see operating system change flowing from requirements of necessity and spurred on by political shocks, two factors may limit or stifle operating system change even under those conditions: the opposition of leading states and domestic political factors.

The Role of Leading States

Among the most prominent theoretical schools in international relations is hegemonic stability theory.[22] According to this approach, typically applied to international economics, a system leader and its preferences define and shape the interactions that occur within the international system. The hegemon also subsidizes the provision of public goods to enhance the stability of the system. The leading state must have the capacity and the willingness to produce the resources or infrastructure necessary for the smooth operation of the system. The United States (following, in some conceptions, Great Britain) has fulfilled that role for the world since 1945.

If one were to adopt some hegemonic version of operating system change, then such change would only occur when it was the self-interest of the hegemon and when that state took the lead in facilitating the change. This leading role may mean providing the public goods necessary for norm compliance. Yet we are hesitant to adopt the hegemonic stability model as an explanation for international legal change. The model has come under intense criticism[23] and even one of those who helped formulate it acknowledges the limited empirical support it has received.[24] Furthermore, Keohane[25] also admits that a hegemon is neither necessary nor sufficient for cooperation, and by implication, therefore, for operating system change.

Despite these limitations, there is good reason to consider revised and more modest elements of the hegemonic stability idea as relevant for

[22] See Kindleberger 1973; and Keohane 1980.
[23] See more recently, Pahre 1999.
[24] Keohane 1984.
[25] Ibid.

international legal change. That hegemonic stability theory is inadequate or incorrect does not mean that the behavior of leading states is unimportant. Whether in creating law or institutions or in developing general standards of behavior (that is, custom), the history of international law has predominantly been written by Western states, and in particular, the major powers. In arguing that leading states can arrest or inhibit operating system change, however, we break from hegemonic stability models in several ways. First, we do not confine ourselves to the influence of one leading state, but instead focus on several powerful states. No one state has been able to impose its will on the international legal system. Furthermore, the identity of leading states has often varied by issue area; for example, leading naval powers have exercised a disproportionate share of the power in shaping the law of the sea.

Second, we differ in our emphasis on the operating system, as opposed to hegemonic stability's preoccupation with norm development. Some scholars[26] have argued that normative change may only arise with the active support of the hegemon. Our concern here is not with the origins of normative change, but rather its consequences for the operating system. Yet a hegemonic view of norm origination seems to suggest that operating system change would automatically follow from the original normative change. Thus normative and operating changes stem from the same cause. Nevertheless, we deviate from this perspective. We can conceive of circumstances in which norms arise outside the purview of leading states in the world. As Sikkink[27] notes, hegemonic views of norms have great difficulty accounting for the rise of human rights and other norms. Moreover, interpretive[28] and other approaches[29] make compelling cases for the role of nonstate actors in norm formation. Yet it may be the case that norms can arise without the support of, or even with active opposition from, leading states in the system.

Nevertheless, leading states may be the major actors determining whether norms are reflected in the actors, jurisdictional requirements, and institutions that make up the operating system. Even if we accept that norm origination requires the consent of the leading states in the system, it is conceivable that such states may still choose to block operating system changes. Support for normative change may largely be for

[26] Ikenberry and Kupchan 1990.
[27] Sikkink 1998.
[28] Klotz 1995.
[29] Keck and Sikkink 1998.