International Law and International Relations

Edited by Beth A. Simmons and Richard H. Steinberg

CAMBRIDGE www.cambridge.org/9780521861861

behavior of the leading states and the domestic political factors did not loom as large as impediments to change.

The United States initially opposed the creation of an international criminal court. Other important states, such as Great Britain, were also reluctant to support such an initiative. Consequently, while the idea of such a court persisted, it did not start on the road to becoming a reality until recently. This, together with the absence of political shocks, helps explain why few institutional changes were evident in the operating system over an extended period. Although the United States has not led the charge for an international criminal court, it has not actively opposed its creation in recent years; indeed, the Clinton administration supported the general concept of the ICC.[46] U.S. opposition has related more to certain provisions for the court, and the United States has sought changes in the ICC treaty before becoming a party. Thus this position is not equivalent to active and unequivocal opposition. Indeed, the United States has also been a leader in pushing for the ad hoc war crimes tribunals that might be considered predecessors to the permanent court. In addition, only seven states opposed the Rome Conference resolution supporting the court, and virtually all of Western Europe, as well as Russia, voted in favor. Furthermore, except for some opposition among Republican representatives in the U.S. Congress and segments of the U.S. military, the creation of such a supranational institution does not necessarily raise issues of domestic legal changes that might block or dilute its implementation.[47] There is also less perceived risk that national citizens will be dragged before an international criminal court if a state, such as the United States, does not ratify the ICC treaty or attaches significant reservations to its adherence.[48] There are few such assurances that personnel would be sheltered from foreign courts under a system that permitted universal jurisdiction. Despite a lengthy lag time after the adoption of the normative change, however, operating system change in the form of ad hoc tribunals and the ICC still occurred.

[46] President Bill Clinton signed the treaty before leaving office, but ratification prospects are uncertain given significant opposition in the U.S. Senate and less support of the institution by President George W. Bush.

[47] Except perhaps with respect to extradition; the lack of agreements with some neighboring states on handing over suspects to the war crimes tribunal for the former Yugoslavia has created some "safe havens" for war crimes suspects.

[48] That perception may be misguided, as some legal opinions suggest that U.S. military personnel may be subject to the ICC whether the United States ratifies the treaty or not.

Subjects/Actors in International Law

Identifying the actors who have rights and responsibilities is a major element of the international law operating system. Traditionally, public international law has assigned most of these rights and responsibilities to states, although there is a more recent trend toward raising the status of individuals, groups, and organizations.[49] The Genocide Convention holds individuals directly responsible for genocidal acts (Article IV), with no ability to hide behind the veil of the state, consistent with the emerging operating system change and the Nuremburg precedent. Other than piracy and a few other concerns, such international crimes are unusual when the norm is to hold states responsible. Yet the Genocide Convention has few provisions for state responsibility, even though one might expect many acts of genocide to be committed by individuals acting on orders from state authorities. Article IX provides for referral of disputes over interpretation, application, or fulfillment of the Convention to the ICJ. Yet this avenue has rarely been pursued. Despite efforts of some NGOs, signatory states were unwilling to press a case concerning Khmer Rouge killings in Cambodia, and a case involving Pakistan and India was withdrawn after a negotiated agreement between the two states. Only the case brought by Bosnia-Herzegovina against Yugoslavia (*Bosnia and Herzegovina v. Yugoslavia, Serbia, and Montenegro,* ongoing) has directly fallen under this provision of the treaty. The ICJ has recognized its jurisdiction over the case based on Article IX, but almost a decade after the original filing, a final ruling has yet to be made as of this writing.

The major question is why the operating system, at least with respect to genocide, concentrated on individual responsibility to the neglect of state responsibility. The inertia of the extant system provides some explanation. Individual responsibility for genocidal acts could fit quite comfortably with the prevailing territorial and nationality jurisdiction principles, prevalent in the international legal system for criminal behavior and reiterated in Article VI of the Genocide Convention. To rely exclusively on state responsibility would have been inconsistent with extant operating system practice. State responsibility is usually handled on the diplomatic level and through claims commissions (note the agreement between the United States and Germany on compensation to Holocaust victims and their families) or international courts. Imputing individual responsibility only makes sense if there are proper legal mechanisms for trying

[49] Arzt and Lukashuk 1995.

individuals suspected of genocide; yet the operating system still lacks the evidentiary standards and extradition to make this process efficient.[50] Because many of the perpetrators would be committing genocide at the behest of the state, holding states *and* individuals responsible would seem necessary. The provision for ICJ intervention in state disputes over genocide proved to be inadequate in the long run, given that many states accepted the Genocide Convention only with reservations that lessened the likelihood that Article IX on ICJ referral would ever be operative.

The shock of World War II and the Holocaust shaped not only the normative system changes that were to occur, but also the operating system changes. The experience at Nuremburg probably led drafters of the convention to emphasize individual responsibility given the frequent claims of Nazi officers that they were only following orders and the absence of any real state to hold responsible (note that both Germany and Japan had occupation governments). Yet subsequent acts of genocide in Cambodia and elsewhere, shocks in and of themselves, did not produce any further operating system changes with respect to state responsibility. Whether the genocidal acts in Rwanda and Yugoslavia will prompt further changes in actor responsibility is an open question and may depend on the disposition of the ongoing cases at the ICJ. Thus political shocks do provide some purchase in understanding operating system change, although they are suggestive of more change than actually occurred in recent times.

The focus on individual responsibility may be partly accounted for by reference to U.S. policy, as well as that of its allies and some other leading states. After World War I, the United States opposed individual responsibility for war crimes but switched positions at the time of the Genocide Convention, thus removing an obstacle to system change. Still, the United States resisted new powers to hold states accountable for actions. It was feared that the United States could be hauled in the courts of another country, representing a potential threat to the idea of sovereign immunity. This is a fear shared by many other states, including the People's Republic of China. The United States did not ratify the convention, even with its narrow focus, until the late 1980s, again indicating that it was reluctant to grant sweeping powers under the convention. Indeed, U.S. reservations with respect to the compulsory jurisdiction of the ICJ led to the dismissal of Yugoslavian claims against it for NATO actions in Kosovo; U.S. allies also sought to exclude ICJ action based on jurisdictional grounds. Accordingly, there is opposition among leading states

[50] Ratner and Abrams 1997.

to redressing the inadequacies of ICJ supervision of state behavior, and indeed those states have relied on that inadequacy. Domestic political opposition, especially in the United States, has prevented any further expansion of legal powers to act against states accused of genocide. The UN Security Council remains the primary multilateral mechanism to punish state perpetrators of genocide (and other threats to international peace and security); the Security Council is also the organ empowered to give effect to ICJ judgments. The major power veto and the general limitations of that organization prevent it from playing a major role. With respect to genocide, states have been reluctant to implement national legislation to bring other sovereign states before their own courts, fearing reciprocal consequences for their actions.

CONCLUSION

In this article, we present a new conceptualization of the international legal system, focusing on it as both an operating system and as a normative system. Our conception fundamentally challenges traditional ones in international law and international relations. Unlike previous works that suggest a symmetry between normative and operating systems, we argue that the operating system does not always respond to normative changes, and this may account for suboptimal legal arrangements.

There are many theoretical questions that follow from the framework embodying a normative and operating system. We briefly outline one of those in this article, namely how the operating system changes. In doing so, we seek to address the puzzle of why operating system changes do not always respond to alterations in the normative sphere. A general theoretical argument focuses on four conditions. We argue that the operating system only responds to normative changes when response is "necessary" (stemming from incompatibility, ineffectiveness, or insufficiency) to give the norm effect, and when the change is roughly coterminous with a dramatic change in the political environment (that is, "political shock"). We also argue, however, that opposition from leading states and domestic political factors might serve to block or limit such operating system change. These arguments were illustrated by reference to three areas of the operating system as they concern the norm against genocide. Clearly, a more complete model could include other factors, including those specific to the normative issue area involved.

* * *

PART VI

LAW AND LEGAL INSTITUTIONS

18

Europe Before the Court: A Political Theory of Legal Integration

Anne-Marie Slaughter [Burley] and Walter Mattli

European integration, a project deemed politically dead and academically moribund for much of the past two decades, has reemerged as one of the most important and interesting phenomena of the 1990s. The pundits are quick to observe that the widely touted "political and economic integration of Europe" is actually neither, that the "1992" program to achieve the single market is but the fulfillment of the basic goals laid down in the Treaty of Rome in 1958, and that the program agreed on for European monetary union at the Maastricht Intergovernmental Conference provides more ways to escape monetary union than to achieve it. Nevertheless, the "uniting of Europe" continues.[1] Even the self-professed legion of skeptics about the European Community (EC) has had to recognize that if the community remains something well short of a federal state, it also has become something far more than an international organization of independent sovereigns.[2]

An unsung hero of this unexpected twist in the plot appears to be the European Court of Justice (ECJ). By their own account, now confirmed by both scholars and politicians, the thirteen judges quietly

* * *

[1] The reference is to the title of Haas's magisterial study of early integration efforts focused on the European Coal and Steel Community. See Ernst B. Haas, *The Uniting of Europe* (Stanford, Calif.: Stanford University Press, 1958).

[2] See, for example, Robert Keohane and Stanley Hoffmann, "Conclusions: Community Politics and Institutional Change," in William Wallace, ed., *The Dynamics of European Integration* (London: Pinter, 1990), pp. 280–81.

working in Luxembourg managed to transform the Treaty of Rome (hereafter referred to as "the treaty") into a constitution. They thereby laid the legal foundation for an integrated European economy and polity. * Until 1963 the enforcement of the Rome treaty, like that of any other international treaty, depended entirely on action by the national legislatures of the member states of the community. By 1965, a citizen of a community country could ask a national court to invalidate any provision of domestic law found to conflict with certain directly applicable provisions of the treaty. By 1975, a citizen of an EC country could seek the invalidation of a national law found to conflict with self-executing provisions of community secondary legislation, the "directives" to national governments passed by the EC Council of Ministers. And by 1990, community citizens could ask their national courts to interpret national legislation consistently with community legislation in the face of undue delay in passing directives on the part of national legislatures.

The ECJ's accomplishments have long been the province only of lawyers, who either ignored or assumed their political impact. * Beginning in the early 1980s, however, a small coterie of legal scholars began to explore the interaction between the Court and the political institutions and processes of the EC. However, these approaches do not explain the *dynamic* of legal integration. Further, they lack microfoundations. They attribute aggregate motives and interests to the institutions involved to illustrate why a particular outcome makes theoretical sense, but they fail to offer a credible account of why the actual actors involved at each step of the process might have an *incentive* to reach the result in question.

On the other side of the disciplinary divide, political scientists studying regional integration in the 1950s and 1960s paid, surprisingly, little attention to the role that supranational *legal* institutions may play in fostering integration.[3] Even more puzzling is that much of the recent literature on the EC by American political scientists continues to ignore the role courts and community law play in European integration.[4]

We seek to remedy these deficiencies by developing a first-stage theory of the role of the Court in the community that marries the insights of legal scholars in the area with a theoretical framework developed by

[3] A noteworthy exception is Stuart Scheingold, *The Rule of Law in European Integration* (New Haven, Conn.: Yale University Press, 1965). Other early works on the Court will be discussed below.

[4] The one major exception, discussed below, is Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market," *International Organization* 46 (Spring 1992), pp. 533–60. ***

political scientists. We argue that the legal integration of the community corresponds remarkably closely to the original neofunctionalist model developed by Ernst Haas in the late 1950s. * By legal integration, our dependent variable, we mean the gradual penetration of EC law into the domestic law of its member states. This process has two principal dimensions. First is the dimension of formal penetration, the expansion of (1) the types of supranational legal acts, from treaty law to secondary community law, that take precedence over domestic law and (2) the range of cases in which individuals may invoke community law directly in domestic courts. Second is the dimension of substantive penetration, the spilling over of community legal regulation from the narrowly economic domain into areas dealing with issues such as occupational health and safety, social welfare, education, and even political participation rights.[5] Cutting across both these categories is the adoption of principles of interpretation that further the uniformity and comprehensiveness of the community legal system.

We find that the independent variables posited by neofunctionalist theory provide a convincing and parsimonious explanation of legal integration. We argue that just as neofuctionalism predicts, the drivers of this process are supranational and subnational actors pursuing their own self-interests within a politically insulated sphere. * The distinctive features of this process include a widening of the ambit of successive legal decisions according to a functional logic, a gradual shift in the expectations of both government institutions and private actors participating in the legal system, and the strategic subordination of immediate individual interests of member states to postulated collective interests over the long term.

Law functions as a mask for politics, precisely the role neofunctionalists originally forecast for economics. The need for a "functional" domain to circumvent the direct clash of political interests is the central insight of neofunctionalist theory. This domain could never be completely separated from the political sphere but would at least provide a sufficient buffer to achieve results that could not be directly obtained in the political realm. Law *** is widely perceived by political decision makers as "mostly technical," and thus lawyers are given a more or less free hand to speak for the EC Commission, the EC Council of Ministers and the national governments. * The result is that important political outcomes are debated

[5] A quantitative illustration of the growing importance of community law is the number of cases referred to the ECJ by domestic courts. The number jumped from a low of nine in 1968 to a high of 119 in 1978.

and decided in the language and logic of law. Further, although we make the case here for the strength of neofunctionalism as a framework for explaining *legal* integration – an area in which the technicality of the Court's operation is reinforced by the apparent technicality of the issues it addresses – the principle of law as a medium that both masks and to a certain extent alters political conflicts portends a role for the Court in the wider processes of economic and even political integration.

This specification of the optimal preconditions for the operation of the neofunctionalist dynamic also permits a specification of the political *limits* of the theory, limits that the neofunctionalists themselves recognized. The strength of the functional domain as an incubator of integration depends on the relative resistance of that domain to politicization. Herein, however, lies a paradox that sheds a different light on the supposed naiveté of "legalists." At a minimum, the margin of insulation necessary to promote integration requires that judges themselves appear to be practicing law rather than politics. Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning. In a word, the staunch insistence on legal realities as distinct from political realities may in fact be a potent political tool.

The first part of this article [focuses the inquiry on the more specific question of explaining legal integration and offers a brief review of the principal elements of neofunctionalist theory. The second part details the ways in which the process of legal integration as engineered by the Court fits the neofunctionalist model.] *** The final part returns to the larger question of the relationship between the ECJ and the member states and reflects on some of the broader theoretical implications of our findings.

* * *

A RETURN TO NEOFUNCTIONALISM

An account of the impact of the Court in terms that political scientists will find as credible as lawyers must offer a political explanation of the role of the Court from the ground up. It should thus begin by developing a political theory of how the Court integrated its own domain, rather than beginning with legal integration as a fait accompli and asking about the interrelationship between legal and political integration. The process of legal integration did not come about through the "power of the law," as