# International Law and International Relations

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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.

symbolic reasons (for example, the adoption of the Universal Declaration of Human Rights), but without substantive impact. Leading states may support human rights norms, for example, while also opposing individual standing before international courts and other operating changes that would facilitate the observance of the norm. If leading states benefit from the status quo, they may be worse off under an operating system change and move to prevent that change;[30] this circumstance may be true for many states, but leading states have the power to protect their interests.

Third and most critically, we see the power of leading states as residing in their ability to block, rather than impose, operating system change. In this way, leading states can act much as the "Big Five" do in the UN Security Council: a veto can prevent action, but no state can compel the adoption of a particular policy. The enforcement of normative rules largely depends on the willingness of leading states to bear the costs of enforcement.[31] Yet strong states have incentives to resist delegating authority to new institutions, one component of the operating system. Strong states bear greater sovereignty costs associated with such delegation.[32] Furthermore, such leading states may have to bear disproportionate burdens in providing the public goods associated with operating system change; the prevalence of free riding and the unwillingness of leading actors to bear those costs may be sources of barriers to policy change.[33]

Thus assessing the preferences of leading states is vital to determining whether and to what extent operating system change occurs. How such operating system change might affect the strategic and economic interests of those states is an important consideration. Equally important are the costs of such change borne by the leading states vis-á-vis the private benefits accrued to those actors. We argue that change will likely *not* occur in the operating system when such an alteration threatens the self-interest of the dominant states or is actively opposed by one or more of those states. If this change does occur, however, the change will prove to be sufficiently minimal and ineffective so as not to challenge the interests of the dominant states. The necessity of consent from the dominant state(s)

[30] Alston 2000.
[31] Goldstein et al. 2000.
[32] Abbott and Snidal 2000.
[33] Alston 2000.

can, therefore, be seen as a condition that needs to be achieved before any effective operating system change takes place.

### Domestic Political Influences

Domestic political concerns may act as intervening factors that affect the outcomes of operating system change. In contrast, some operating system changes require that domestic legal systems be altered. For example, norms against political torture or child marriage necessitate appropriate changes in the domestic legal systems of treaty signatory states. Indeed, any non-self-executing agreement requires some type of domestic political action to give it effect. This goes beyond the ratification process, which may be essential to norm creation. Rather, it involves making changes to domestic legal systems to accommodate the new international norm. This might involve providing remedies for norms within domestic legal institutions, altering jurisdictional rules, or changing the legal standing of individuals or groups to bring claims.

State leaders may be placed in the position of conducting "two-level" games,[34] one with international adversaries and the other with domestic constituencies. Domestic constituencies offer a potential veto point at which operating system change can be stifled. Even a sincere leader may not be able to deliver on promises to enact domestic legal reforms. An insincere leader may actually support the creation of an international norm but move to block the necessary changes in his/her state's legal system for domestic political purposes. Such action permits a principled stance abroad, and a politically popular or necessary position at home. For example, the People's Republic of China signed the Covenant on Civil and Political Rights but has given little indication that it will incorporate many of the treaty's protections into its domestic laws. Beyond leadership incentives, domestic interest groups may seek to block national implementation of international normative changes when their political or economic interests may be harmed by such implementation. For example, labor and manufacturing groups in the United States have sought to weaken the adoption of domestic regulatory mechanisms that give effect to international environmental agreements.

Thus international legal changes with a domestic component will be less likely to be adopted than those without this characteristic. One might also presume that operating system changes requiring domestic

[34] Evans, Jacobson, and Putnam 1993.

action will take longer than those without this restriction, if only because domestic legislative processes are an additional hurdle to operating system change. Operating system change with a domestic political component may also be incomplete or inefficient, given that such changes must be adopted by nearly 190 different states; it might be expected that not all of them will adopt such changes or at least will do so in different ways and to different degrees.

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## ILLUSTRATING THE INTERACTION BETWEEN THE OPERATING AND THE NORMATIVE SYSTEMS: THE CASE OF THE GENOCIDE NORM

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Genocide is selected as the issue area for illustration in large part because of the breadth of acceptance for the norm in the world community. Unlike many other areas of human rights, such as economic well-being, there is less controversy concerning the idea that genocide is wrong.[35] This legal issue area provides us with an opportunity to view operating system change for a norm in which consensus appears broad and strong, among the purest cases for analysis. In contrast, norms on the use of force have historically been more controversial. Another important consideration in selecting genocide is that it deals with behavior at both international and domestic levels. Genocide law is primarily focused on the treatment of individuals within state borders, but changes in statutory limitations and jurisdictional rights for the prosecution of crimes such as genocide have had an equally important impact on enforcing human rights norms at the international level. Although some may argue that the genocide norm has distant roots in natural law, its development and accompanying operating system changes are almost exclusively post–World War II phenomena. Thus genocide provides us with a case of norm adoption, much similar to those in international environmental law, that developed in the modern era and represents the new wave of international lawmaking. This issue area allows us to more closely examine a narrow time period, a more manageable task in this limited space than perusing an expansive period such as that covering the development of the law of the sea.

[35] We, of course, recognize that there is some controversy over the specific provisions of the genocide norm, as reflected in some states' initial reluctance to sign the Genocide Convention or the reservations they attached to their acceptance.

We explore genocide by first identifying major normative and operating system changes in the period under study. Yet we do not consider only actual operating system changes. Rather, we also consider instances in which operating system change did *not* occur in some areas or was merely proposed in the wake of a normative change. *** [This] involves properly identifying the normative and operating system changes, specifying their causal sequence, and searching for the major factors suggested by the approach. Although there are a number of changes in this issue area, for space and illustration purposes we describe only three, which are among the central components of the operating system: jurisdiction, institutions, and actors.

## The Genocide Norm

That the systematic killing of national, ethnic, racial, or religious groups – genocide – was against international law was probably established before World War II. Indeed, some international and national court cases (for example, *Reservations to the Convention on the Prevention and Punishment of Genocide*, 1951) explicitly make this argument. Nevertheless, the genocide norm was solidified and extended (the prohibition of genocide no longer being confined to wartime) in 1946 with the adoption of UN General Assembly Resolution 96, and codified in the Convention on the Prevention and Punishment of the Crime of Genocide (1948). Before this time, there were few legal structures with which to deal with genocide. States had to rely on diplomatic protest or armed intervention (something not recognized under international law at the time) as mechanisms to punish those who committed genocide. After World War II, genocide has clearly been recognized as contrary to international law. Yet most of the debate surrounding the adoption of the Genocide Convention, and throughout the 1950s, concentrated on refining the definition of genocide and the groups that might be subsumed under the definition.[36] That is, prospective changes in international law dealt more with the normative system than the operating one.

The Genocide Convention has now passed its fiftieth birthday and is generally regarded as a symbolic triumph of international human rights consensus in a world of cultural and political diversity. Yet it is equally regarded as a failure in its ability to prevent genocide or to punish those responsible. A review of the international law of genocide over the past

[36] Kader 1991.

fifty-plus years reveals a mixed bag of operating system changes designed to give the treaty effect, as well as many missed opportunities to revise the operating system toward that same end. Clearly, most analysts regard the operating system for genocide as weak and largely ineffective.[37]

## Jurisdiction

Article VI of the Genocide Convention lays out the jurisdictional limits for the prosecution of individuals suspected of genocide. The primary basis of jurisdiction is the territorial principle, whereby criminals are prosecuted according to where the offenses allegedly took place; territorial jurisdiction is not necessarily exclusive as criminals might also be prosecuted under the nationality or passive personality principles depending on national laws. That article of the treaty recognizes the jurisdiction of an international penal tribunal, assuming one has been created and accepted by the relevant states. Most notable is the absence of provisions for universal jurisdiction,[38] whereby any state having the defendant(s) in custody could conduct a genocide trial. Of course, universal jurisdiction for genocide may exist based on customary law, rather than the Genocide Convention; some national court decisions (for example, *Attorney General of Israel v. Eichmann,* 1961) have taken this position, although it is far from certain that this is widely accepted.

During the past fifty years, there has not been much change in jurisdiction provisions for genocide. The recent war crimes tribunals for the former Yugoslavia and for Rwanda both include provisions for concurrent jurisdiction between national courts and the tribunals, but international courts are given primacy. Part of establishing territorial jurisdiction involved creating domestic legislation to make genocide a crime (as provided in Article V). Yet years later, very few states have incorporated the necessary provisions in their own legal codes. Largely, the operating system for criminal acts has undergone little dramatic change with the adoption of the Genocide Convention. What best explains these circumstances?

Necessity for operating system change seems to be present. That necessity does not, however, derive from incompatibility. States may have chosen the territorial principle for genocide because that was the most widely accepted basis for establishing jurisdiction for other crimes. Rather,

[37] See Lippman 1998; and American Society of International Law 1998 for a historical retrospective on genocide law.

[38] Part of what Van Schaack (1997) calls the convention's "blind spot."

necessity comes more from the insufficiency and ineffectiveness of the operating system to give effect to the genocide norm. As no permanent tribunal existed ***, implementing genocide norms would fall to national courts. Although there has been a recent upsurge in national courts dealing with international human rights issues,[39] relying on national courts has proven ineffective historically. The expectation that states would prosecute their own leaders or elites, perhaps for crimes authorized by the state, is highly dubious. Only when those guilty of genocide are the losers in a war and the friendly regime is overthrown can one expect national courts to do the job, as was the case for some war crimes cases in Rwanda.[40] The other possibility is some type of occupation government that would prosecute those accused of genocide. Even then, note that a special "international" tribunal was used to try Nazi war criminals at Nuremberg rather than going through German courts. Given the character of the crime and the likely perpetrators, ineffectiveness was an impetus for operating system change and the move toward universal jurisdiction. Universal jurisdiction is not merely necessary to ensure prosecution of criminals; its presence may actually serve to make national courts work better. The option of "international" prosecution may create incentives for domestic courts to prosecute, lest the prosecution occur outside of the control of national authorities.[41]

As we argued above, necessity is not enough to prompt operating system change as political shocks must be present to spur action. That condition was present in the genocide case, although not until decades after the initial adoption of the Genocide Convention. Various political shocks, including those directly relevant to genocide, took place in the period following the adoption of the Genocide Convention. These included mass killings in Cambodia, acts of genocide in Rwanda, and ethnic cleansing in Bosnia. These crises and the calls to hold individuals accountable did indeed prompt calls for changes in the international legal system. Yet despite the inadequacy of the operating system and the presence of political shocks, only minimal operating system change with respect to jurisdiction took place: recent ad hoc war crimes tribunals have had primacy over national courts in jurisdiction, but only within those defined areas and frameworks. The reason may lie in the opposition of leading states to, and the absence of domestic political incentives for,

[39] Ratner and Abrams 1997.
[40] Ferstman 1997.
[41] Dunoff and Trachtman 1999.

universal jurisdiction, which identifies factors that could block change. It is also the case that other operating system changes rendered the need for universal jurisdiction moot.

The United States and other leading powers, such as Great Britain, opposed a universal jurisdiction provision for the Genocide Convention.[42] The fear was that other states would try U.S. and British citizens, for example, for crimes allowable under national law or directed by the government. Such opposition was enough to prevent expansion of jurisdiction after World War II, and the opposition of leading states continues today. In addition, most states have been unwilling to change national laws unilaterally so as to permit prosecution of crimes that took place outside of their jurisdiction and by aliens. There are few domestic political incentives for states to adopt such enabling legislation; after all, none of its citizens may have been directly affected by the crime. Furthermore, there are significant risks that one's own citizens would be unduly subject to foreign courts if other states followed suit; that is, significant sovereignty costs might accrue to the creation of universal jurisdiction rules. Overall, the expectations of the model are fulfilled. The basic conditions for international legal change have been present, but such change has been arrested by opposition of leading states as well as domestic political conditions not conducive to the change.

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**Institutions**

As much of the contemporary debate over genocide has focused on compliance mechanisms, it is perhaps not surprising that the most profound changes, proposed and actually implemented, center on institutions designed to ascertain and punish violations. It is in this part of the operating system that the most changes have been contemplated, although the number and scope of those implemented are considerably less.

At the birth of the Genocide Convention, extant institutions were assumed to bear the primary burden for monitoring compliance with the norm and dealing with violations. In part, this may be a function of the available institutions for these purposes, but there was also significant opposition to proposed new structures. The convention itself contains provisions (Article VIII) that "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the

[42] See LeBlanc [1991] on the United States and the Genocide Convention.

Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide . . . ."[43] The UN was just beginning to create the operating mechanisms to deal with human rights violations. The Commission on Human Rights was the logical UN organ to deal with the problem of genocide, and certainly other organs, such as subcommittees dealing with the treatment of minorities, would have also been appropriate. Of course, threats to international peace and security stemming from and involving genocide could be handled by the Security Council. Article IX of the convention also provided for referral of disputes to the ICJ.

Although genocide was to be handled within UN institutions, there were various proposals for a permanent international criminal court. Indeed, such ideas date back to the earlier years of the century, but opposition from some major states killed those proposals. Although there were already precedents for ad hoc tribunals (Nuremburg and Tokyo) stemming from World War II, support in the international community was not strong enough to create a permanent court.

It soon became obvious that UN human rights mechanisms were inadequate to deal with human rights violations in general, and with genocide in particular. Throughout the next forty years, various proposals for special committees or courts dealing with genocide were suggested, although never adopted. Seemingly recognizing the futility of pursuing these ideas, the international community began to create alternatives both within and outside the international legal system. The failure to make changes within the operating system has led some scholars and diplomats to suggest that the normative system be altered in ways that enhance enforcement. For example, there has been an attempt to legitimize the norm of humanitarian intervention – that states could militarily intervene in the affairs of other states for the purposes of redressing human rights violations or humanitarian emergencies.[44] Although not fully accepted, this type of intervention would provide a mechanism to deal with genocidal acts, one that is only appropriate if supranational mechanisms are lacking. ***

The 1990s have seen renewed activity in terms of institutional changes in the operating system. Clearly, the UN system has been more intimately involved in genocide issues as the Security Council, ICJ, and other organs have dealt with the conflicts in Rwanda and the former Yugoslavia. Yet this

[43] Convention on the Prevention and Punishment of the Crime of Genocide. UN6AOR Res. 260A (III), 9 December 1948, Article VIII.

[44] Chopra and Weiss 1992.

level of activity is perhaps still below what might have been envisioned or hoped for at the time the Genocide Convention was adopted. More significantly, specific institutions have been created to deal with genocide. The UN created a war crimes tribunal in 1993 to address the conflict in Bosnia and surrounding territories and then adopted a similar tribunal a year later in response to the Rwandan civil war. Yet both of these courts were ad hoc, with their scopes limited to particular incidents. Only in 1998 did the proposal for a permanent ICC finally receive support from a broad cross-section of states. ***

The critical questions here are (1) why has the international community not been more successful in creating institutions to deal with genocide? and (2) what accounts for the recent flurry of activity in this issue area? Although it is clear that the theoretical operation of UN institutions remained compatible with the genocide norm, it soon became evident that such institutions proved inadequate and ineffective in practice. By the 1950s, it was evident that UN agencies would not be able to meet the requirements for norm compliance for a range of human rights, not the least of which was genocide. At that point, the push for an operating system change would be renewed or in some cases would begin. Yet it was more than four decades before such a necessity was addressed. In large part, it was the political shocks of the 1990s that brought proposals for an international criminal court back to the international agenda.

The movement toward an ad hoc, and now one permanent, court to handle genocide and other concerns lies in the political shocks of the last decade. Indeed, policymakers explicitly cite such shocks as prerequisites for such occurrences. The UN sees the genocidal acts in Yugoslavia and Rwanda as the triggering events * while others cite the end of the Cold War as the facilitating condition. * In any case, it did appear that a dramatic change in the political environment was necessary for a revival of the international criminal court idea. Either a rearrangement of political coalitions or shocking the conscience of civilized nations (or perhaps both) provided the necessary impetus.[45]

The conditions were then ripe for an operating system change in the form of new institutions, just as they were ripe for moving toward universal jurisdiction. Yet the international legal system adapted in the direction of the former, rather than the latter, largely because the

[45] Of course, previous acts of genocide in Cambodia did not spur new action. As a necessary condition, political shocks may not always produce operating system change, even in the presence of other conditions. ***

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.