DO NOTE CITE
DRAFT: OCTOBER 2006

THE CONTEXT OF LAW-MAKING AND THE LAW THAT IS MADE: HOW THE INTERNATIONAL LEGAL OPERATING SYSTEM INFLUENCES THE NORMATIVE SYSTEM

by

PAUL F. DIEHL
University of Illinois at Urbana-Champaign

and

CHARLOTTE KU
Cambridge University

Prepared for presentation at the 2006 Shambaugh Conference "Building Synergies: Institutions and Cooperation in World Politics," Iowa City, IA, 12-14 October. The authors would like to thank Michael Findley for his research assistance and Tracy Sulkin, Michael Findley, Xinyuan Dai, Robert Pahre, Todd Allee, and William Bernhard for their literature suggestions.

Introduction

Among the most visible changes in any legal system occur when treaties specify new rules or norms of behavior for its members.[1] In the international legal system, these norms are often specific to a particular problem area. For example, the Convention on Torture reflected the international community's consensus on outlawing certain human rights violations. Similarly, the most recent global trade agreement included provisions to limit the use of national agricultural subsidies. The Kyoto Protocol sets limits on the emission of greenhouse gases. Each of these is a component of what we have referred to elsewhere as the "normative system," (Ku and Diehl, 2003) or the part of international legal system that is quasi-legislative in character by mandating particular values and directing specific changes in state and other actors' behaviors. Yet the normative system is only one half of the international legal system; we refer to the other segment as the "operating system." Asc"oposirch sub"cted the nal ati cng P s84456(s)0.283368(y)3684656(c)0.5346566(
-3.84456(o)-3.65667360.534844456(d)-3.68913(i)-1.21902(r)-0.967728(e)-43.6656(w)-283368(t)-1.-1.21902(i).68913(t)-1l867728(n)465445

International Law as Operating and Normative Systems

Throughout history, international law scholarship has adopted several analytical frameworks to distinguish between and classify its relevant features. The most basic distinction has been the different schools of international law, often labeled naturalist or positivist, based on whether law was derived from reason/religious principles or state practice respectively. Such an approach represents divergence on the origins or sources of international rules. In a related fashion, a hierarchical rendering of international law promotes the notion that there is some law that transcends other portions of international law and represents obligations from which no derogation is permitted. *Jus cogens* is the name given to this class of obligation (Hannikainen, 1988). For our purposes, however, both these frameworks concentrate on what law is and do not directly deal with the issue of how law actually influences behavior or how different aspects of international law influence one another (e.g., Goldstein et. al., 2001). Another approach, the "functional" one, distinguishes between two bodies of law: the law of coexistence and the law of cooperation (Friedman, 1964; Nardin, 1983). The law of coexistence is structural and provides the means to conduct interstate relations through practices such as the legal equality of states, the obligation to observe treaties, and the immunity of diplomats. All participants in international affairs are expected to abide by these rules as the accepted and recognized modes for conducting interstate relations. By contrast, the law of cooperation is directive and encompasses the agreements and institutions set up to move towards specific goals that may be widely, but not universally, accepted (e.g., The Covenant on Civil and Political Rights). Yet this too serves a taxonomic purpose separating different parts of the law, while not allowing analysts much room to explore the interplay between different categories.

Our framework (for a full discussion, see Ku and Diehl, 2003; Diehl, Ku, and Zamora, 2003) takes us in a different direction, away from the sources, hierarchy, or functions of international law to a concern with dynamics or change in international law. The central question we explore is how and when does international law support and facilitate change in global relations? Our approach is to look at international law as a package of related activities that are both structural and directive at the same time. We identify the two threads as operating (structural) and normative (directive).

The Normative System

We chose 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

by mandating particular values and directing specific changes in state and other actors' behaviors. We focus only on normative elements that have a legally binding character. 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 (1961) 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 coming before 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. Our view of the normative system does not necessarily assign primacy to such rules vis-à-vis the operating system. The normative system may be 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 evolution of customary practices, the traditional source of international law. Yet in recent historical periods, normative change has been most often precipitated by new treaties (e.g., the Nuclear Non-Proliferation Treaty) or by a series of actions by international organizations (e.g., UNSCOM activities in Iraq).[2] Nevertheless, the establishment of international legal norms still is less precise and structured than in domestic legal systems where formal deliberative bodies enact legislation.

In contrast to the general terms associated with topics of the operating system (e.g., jurisdiction, actors, or dispute resolution), the topics of the normative system are issue specific, and many components of the system refer to sub-topics within issue areas (e.g., status of women within 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 (e.g., seizure of commercial vessels during war time) also have long pedigrees in customary practice. Yet recent trends in the evolution of the normative system represent expansions in its scope and depth. 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 sixty 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.

The effectiveness of the normative system, however, depends largely on the operating system, the mechanisms and processes that are designed to ensure orderly processes and compliance with those norms, and change if problems signal a need for change. The normative system may facilitate compliance in isolation from the operating system by "compliance pull" (Franck, 1990). Compliance pull is induced through legitimacy, which is powered by the quality of the rule and/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" (Franck, 1990). Compliance pull may exist under such circumstances, but it will be considerably weaker than if secondary rules (related to the operating system – see below) are present. Note that we are also speaking of more than compliance concerns in dealing with norms; smooth and efficient operation of actor interactions are also goals of the operating system, and these are elements that legitimacy may not be able to provide. It is to that operating system that we now turn.

Operating System

The dual character of international law results from its Westphalian legacy in which law functions between, 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 are a major portion of constitutions. Nevertheless, constitutions also provide more. Dahl (1998) identified a number of items that constitutions generally provide, including several of which international law also specifies: competent decisions, accountability, and ensuring stability to name a few. We chose the word operating as one would in characterizing a computer's operating system. It is the basic platform upon which a system will operate. When the computer operating system (e.g., 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.

In order for the operating system to maintain vibrancy and resiliency, and to assure the stability necessary for orderly behavior, it 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 do we 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 the operating system may be associated with formal structures, but not all 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 law-making.

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:

1. Sources of Law: These include the system of 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 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 are generally asserted in international forums by their home states although the work of commercial arbitration and particularly the International Centre for the Settlement of Investment Disputes (ICSID) has established a solid basis for the resolution of disputes between private investors and 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 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 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). The operating system also includes what roles these forums play in law-making; that is, the operating system may specify that certain institutions are the contexts for negotiations or treaty drafting.

Our conception of an operating system clearly overlaps with some prior formulations, but is different in some fundamental ways. Regime theory (Hasencleaver et, al., 1997) refers to decision-making procedures as practices for making and implementing collective choice, similar to "regulative norms," which lessen transaction costs of collective action (Barnett, 1995) 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 International Court of Justice may adjudicate disputes involving airspace as well as acts of aggression. Regime decision making procedures are also thought to reflect norms, rules, and principles without much independent standing. Our conception is significantly different, and it is on this point that our conception most dramatically differs from that of Hart (1961)

Hart (1961) 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." 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 (which international law is frequently conceived as). Furthermore, secondary rules are believed to service normative ones, solving the problems of "uncertainty," "stasis," and "inefficiency" inherently found with normative rules.

Our conception of an international legal operating system is somewhat different. For us, the operating system is bigger than 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, past its origin point, 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 maidservant to the normative system, but the former can actually shape the development of the latter – this is the focus of our paper. Neither is the operating system as reflective of the normative system as Hart implies that it is. The operating system may develop some of its configurations autonomously from specific norms, thereby serving political as well as legal needs (e.g., the 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. Indeed, this may explain why in many cases, the operating system for international law is far more developed than its normative counterpart; for example, we have extensive rules and agreements on treaties, but relatively few dealing with the use of force. Furthermore, the operating system has a greater "stickiness" than might be implied in 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. This may be the case because the need for change may emerge through specific issue areas and may not be recognized as requiring broader operating system change. To do so might require recognizing the problem as one that extends beyond a single issue area. For example, the need to address the rights and responsibilities of private parties is perhaps better developed in the economic and trade realm than in the use of force area. Yet, we can now see the relevance of the issue even for the use of force area as we address the accountability and responsibility of private parties serving as military contractors in war zones.

Collectively, except for an occasional heuristic, most legal methods or frameworks are inadequate to deal with the normative-operating system nexus. Many legal approaches tend to be descriptive or prescriptive, rather than explanatory. Many also do not contain a basis to understand international legal change, much less have a coherent theoretical argument to do so. Furthermore, to the extent that our concerns can be accommodated under a given framework, such approaches usually make no distinction between normative and operating systems. Even those that give lip service to Hart privilege discussion of the normative or primary, to the exclusion of the operating or secondary.

Insights From Previous Research

To our knowledge, previous research has not addressed the question of how the operating system conditions the normative system. This is more than a function of differences in terminology. Rather, the conceptual distinction between the two is underplayed or muddled in both the legal and political science literature. Hart's (1961) conception of primary and secondary

rules, roughly analogous to our normative and operating systems, treats the latter as subordinate to the former. Accordingly, it is inconceivable in that framework that the mechanics of the operating system would influence the normative precepts. Other segments of the legal literature do make clear distinctions among international law components and often are untouched by theoretical concerns with causality. On the political science side of the ledger, there are some references to compliance (see below) influencing the choice of norms, but there is a myopic focus on formal institutions to the ignorance of the other components we have identified in the operating system. Too often, because operating and normative elements are subsumed in a given treaty, the treaty becomes the focus or unit of analysis and the external factors are used to account for the treaty. The interrelationship of what are seen as internal components is therefore ignored. Despite these limitations, our own previous work has touched the operating-normative relationship and there are heuristics in the broader legal and political science literatures.

Our earlier work (Diehl, Ku, and Zamora, 2003; Ku and Diehl, 2006) explored the connection between operating and normative systems, but from opposite causal direction; we explored the conditions under which changes in the normative system led to changes in the operating system. Our model postulated that the condition of necessity (i.e., did the operating system need alteration to give the new norm effect?) was a prerequisite but that political shocks and the support of leading states were essential to producing operating system changes. The model was illustrated with a case study of genocide law (Diehl, Ku, and Zamora, 2003). Unlike the process implied by Hart, operating system change was not an inevitable consequence of normative change, and therefore the systems were often in imbalance. A follow-up study (Ku and Diehl, 2006) identified four different extra-systemic mechanisms for redressing that imbalance: (1) actions by NGOs and transnational networks, (2) internalization of international law, (3) domestic legal and political processes, and (4) "soft law" mechanisms.

Reversing the causal arrow, in which the operating system affects the normative system, represents an entirely different problem and one in which new models are necessary. Unfortunately, there are only hints at which processes and key variables might exist in this relationship. There is certainly an extensive literature on the origins and development of norms, but it does not address the question posed here. This is largely because operating system elements are ignored or the literature confounds the two systems. We have chosen not review the norm generation literature *in toto*, but instead highlight only the points that might be relevant for our purposes.

Regime theory (for a summary, see Hasencleaver et al, 1997) dominated the study of international cooperation in the 1980s and 1990s. The concept of a regime, however, includes

both elements of what we refer to as the operating and normative systems respectively. Indeed, institutions are sometimes defined as norms, and it is difficult to disentangle the two, much less discern a causal relationship. As Goertz (2003:19)) puts it, "… for many purposes, norms, principles, decision-making procedures, and rules can be considered as synonymous.." Theoretical approaches based on interest, knowledge, or power also do not readily lend themselves to insights about how structures condition norm formation, at least with respect to how we define the two systems. Nevertheless, there are a few hints in that research milieu. For example, Young (1989a) suggests that regimes reduce uncertainty and thereby facilitate future cooperation. This suggests that if operating system components produce this effect, then normative changes might result (an idea we develop in the next section). Indeed, Young (1989b) notes that one component of the operating system, compliance mechanisms, may facilitate rule formation in the environmental area.

A second strand of the international relations literature with possible relevance concerns hegemony. Among the most prominent theoretical schools in international relations is hegemonic stability theory (see Kindleberger, 1973; Keohane, 1984; for a critique, see Pahre 1999). 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 in order 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.

In earlier work (Diehl, Ku, and Zamora, 2003), we noted that leading states played a key role in operating system change, which may fall into the category of a public good necessary to give effect to normative precepts. Here we accept for the moment the assumption of the hegemonic literature that the operating system reflects the hegemon's interests (Ikenberry and Kupchan, 1990). Accordingly, new norms created in international law are likely to only be those consistent with the extant operating system. At first glance, this is of little help in addressing our query. The operating system does not condition the normative system; rather, they are joint outcomes of hegemonic preferences. Nevertheless, this literature does imply that whoever controls the norm or rule making machinery (who can make law) of the operating system determines the content of the normative system. Hegemonic stability theory provides only a single and debatable answer to that question, but it does suggest that we should explore carefully how actors and their powers to make law more broadly condition new normative rules.

Although quite different than hegemonic stability theorists on many dimensions, constructivist scholars also emphasize the influence of actors in the making of international

norms. Constructivist works (e.g., Finnemore, 1996) tend to muddle the operating-normative system distinction because they define structure in terms of shared norms. Yet many constructivist works emphasize the roles of NGOs and other "policy entrepreneurs" in norm creation. This again raises the question of when and how operating systems permit input from them in law-making.

Finally, the institutions literature, most often based on rational choice and sometimes outside of international relations, explores the relationships of structures and legal outcomes. Unfortunately, most of the institutions literature in American politics (e.g., Shepsle and Weingast, 1995) and international relations alike (Koremenos, Lipson, and Snidal, 2003) treats what we would regard as the operating system as endogenous. That is, institutions are instruments of majoritarian interests (in national democratic system) or states involved in crafting laws (in the international system). The story told by rational choice theorists about international law (e.g., Goldsmith and Posner, 2003) is about the coordination, interests, and information. The independent influence of context is not addressed. Nevertheless, we do know anecdotally that rules of legislative process do indeed impact outcomes and may subvert majoritarian interests. In the US Congress, for example, the committee system may produce provisions in bills that would not appear if the legislation were drafted in the committee of the whole. Similarly, US Senate rules on cloture (specifically cutting off a filibuster) may have the effect of modifying legislation to appeal to a minority or block law creation altogether, even if supported by a majority. In international law making, we need to be sensitive to the forums in which treaties are drafted and the rules and process of law making therein.

How the Operating System Influences the Normative System

` In our assessment of how the normative system affects the operating system (Diehl, Ku, and Zamora, 2003), we noted that changes in the former could produce direct and relatively quick changes in the latter, although this was far from certain. Reversing the causal arrow in this paper, we do not expect to find similarly strong relationships. Generally, the specific content of treaties, especially their normative prescriptions and proscriptions, will not be a function of the operating system provisions. Rather, one would expect that the preferences of those involved in drafting and signing the treaty, as well as the capabilities of those actors and the information available (Cook, 2004), to determine the degree and direction of the cooperation. There is an extensive literature on cooperation and what makes states agree to treaty provisions (e.g., Axelrod and Keohane, 1985; Stein, 1990; Taylor, 1987; Young, 1989; Goldsmith and Posner, 2005) and none of this refers to elements of the operating system per se.

Although the operating system, and changes therein, does not have a deterministic influence on the content of the normative system, we have identified five different processes that do connect the two systems. Most of these are indirect, but nevertheless still influence whether or not treaties are signed and to some degree certain content in those treaties.

Setting the Parameters of Acceptability

At the most fundamental level, national constitutions set the parameters on what kinds of laws are permitted. Normally, we think of such documents as granting powers to make rules, but they also limit the scope of those powers and in some cases prohibit the creation of certain rules. For example, the 10th Amendment to the US Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This provision essentially excludes federal legislation on any subject that falls within the purview of state's rights.

The anarchy of international system leaves it without the equivalent of a central defining document that forms the basis for all global governance. Nevertheless, the nearest equivalents may be found in the charter or covenants of international organizations, especially general purpose organizations. The UN Charter lays out what might be called the fundamental principles and institutions for a significant portion of the international legal operating system. Similarly, various constitutive agreements of the European Union (e.g., Treaty of Rome, Maastricht Treaty) define the scope of this partnership among nations. Other major regional organizations, such as the African Union and the Organization of American States, have similar documents, albeit many are much less developed.

Such constitutional equivalents do not determine in a positive sense the content of new normative treaties, but they may prevent the adoption of certain normative elements. For example, the Charter of the Organization of the African Unity (OAU) contained provisions supporting "the non-interference in the internal affairs of states." (Umozurike, 1979) This essentially precluded the creation of norms that would infringe on the exclusive domestic jurisdiction of states. Perhaps not surprisingly then, this continent has not adopted many human rights provisions (save those dealing with self-determination) as they would violate the Charter framework. So too have the organization members been reluctant to endorse armed humanitarian interventions in places such as the Sudan.

Much as a national constitution defines the space for law-making, international organization charters rule out normative system changes that are "unconstitutional" and thereby channel rule-making into the directions permitted by these central documents. One should not,

however, make too much of this effect. Operating system frameworks are reflective of prevailing interests at the time of adoption and states choose limitations to norm adoption largely to exclude future changes in those norms; thus, the causal influence of the operating system is likely to come over time (if at all) from stickiness as states' preferences change and formerly excluded laws become desired. Second, there are not that many overarching charters or covenants in existence and even these do not contain expansive rules and provisions so as to preclude numerous sets of actions. Thus, this operating system influence is probably much less common than those elucidated below.

Providing Credible Commitment

A second way that the operating system influences the normative system is through providing credible commitment. States may share a common interest to incorporate a given norm in a treaty, but this is no guarantee that an agreement or one including the norm in question will result. States may have reason to fear that other parties will renege on performing actions required in the treaty, and therefore may be reluctant to sign or ratify a treaty without some assurance of compliance. Credible commitment theory has been applied most prominently to the termination of civil wars (e.g., Walter, 2002), but it has also been an important part of studies of international cooperation in general (e.g., Fearon, 1998; Leeds, 1999).

With respect to international law, there are certainly numerous reasons, beyond convergent interests, why states agree to treaties, including the behavior of neighboring states (Simmons, 2000). Yet we posit that the existence of compliance institutions, one of the core elements of the operating system, is necessary for treaty negotiations to reach fruition. If states know that existing monitoring mechanisms, courts, or dispute resolution mechanisms exist, they will be more likely to commit to agreements.

This is a relatively simple argument, but we cannot expect that the operating system to have a uniform effect on all treaty negotiations. First, we might anticipate that this influence to be most prominent in the security realm and/or between less than friendly states. The former poses potentially the greatest risk of defection and therefore the need for compliance. The latter represents a case in which trust is already limited and outside guarantees for compliance may substitute for mutual trust. Second, the effect also depends on the utility of less formal mechanisms for compliance. McAdams (1997) argues that the risk of detection is necessary for the emergence of norms, but some norms are virtually self-enforcing. If reciprocity, reputation, and "habit" (Henkin, 1977) are sufficient for compliance, then external credible commitments may not be necessary. Yet when these are not, the operating system may provide mechanism to

assure potential signatories that fellow parties will honor their obligations. One might argue that parties could create their own compliance institutions and embed those provisions in the treaty. Yet this can be a costly enterprise in many cases and in any event does not always occur (Diehl, Ku, and Zamora, 2003). It is even the case that extant arrangements and institutions will be insufficient to assure compliance and ultimately parties will need to rely on domestic political actors (Dai, 2005) or other mechanisms outside of the formal legal operating system (Ku and Diehl, 2006).

Proving that the operating system was critical in facilitating a normative agreement is difficult as it requires establishing that the treaty or treaty provision would not have been concluded otherwise except for the extant institutions. Cases in which agreements did not occur because of operating system deficiencies are "dogs that don't bark," and therefore not transparent. Still, one might offer a few plausible candidates to illustrate the argument. The Nuclear Non-Proliferation Treaty (NPT) might never have been signed had it not been for the presence of the International Atomic Energy Agency (IAEA) and its inspections protocol. This is not to say that the IAEA did not need to change some of those mechanisms or that the organization has proven to be infallible in its duties. Rather, its existence gave underdeveloped and developed states assurance that NPT violations would be detected and that certain other rights (e.g., right to nuclear energy) would be protected.

Thus, the second process, rooted in credible commitments, permits the operating system to facilitate the expansion of the normative system. The effect is not so much to determine individual provisions, but rather to affect dramatically whether treaty negotiations produce an agreement or not.

Actor Specification

A central part of the operating system is the specification of the rights and obligations of different kinds of actors. For our purposes here, the key concern is with the rules that designate which actors have what rights to make international law. Traditionally, this has been the exclusive purview of states. Yet over the past several decades, a number of new actors have had input into the treaty making process or in the case of some international organizations has direct power to create law (Alvarez, 2002). The specification of the law making power of actors in the international legal operating system can have a significant impact on the actual provisions that appear in certain treaties.

Which kinds of actors legitimately participate in law-making can have an effect on the final provisions of a treaty or legally binding resolutions. We begin with the assumption that

treaty provisions are the aggregated preferences of those involved in drafting the document and ultimately those who approve it. A related assumption is that actors involved in treaty negotiations also provide information that affects the choice of certain sets of provisions over others in the final draft. To the extent that the operating system allows more and varied actors into the process, there may be resulting changes in the normative outcomes.

Cakmak (2004) explores the area of human rights, but the author's analysis might easily apply broadly to most areas of international law. Cakmak focuses on one particular category of actors, non-governmental organizations (NGOs), going so far as to suggest that NGOs may have acquired virtual "sovereign rights" in the process of law-making. Cassese (1990) is less sanguine, although he writes a decade and a half earlier, stating that NGOs have only a right to be heard. In any event, NGOs and related epistemic communities (see Keck and Sikkink, 1998) influence normative outcomes in several fashions from several different sources of power granted to them in the operating system.

NGOs are sometimes permitted access to the law making process in international organizations. Occasionally, this is guaranteed formally as in the provisions of Article 71 of the UN Charter: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence…." Similar provisions exist in Article 70 for specialized agencies, allowing international organizations access to the law-making processing of other organizations. These provide "consultative" status for those actors, but do not give them a place at the table. A stronger legal basis for participation is found in "observer" status, which may entitle NGOs to admittance and participation to all meetings (e.g., Koenig, 1991). At other times, the roles of NGOs and other actors in the law-making has evolved gradually and more informally. NGOs are now regularly part of international conferences, including those that draft international agreements. As noted below, they are regularly a part of deliberations in drafting treaties, although they do not have voting rights and cannot become parties to the treaty.

As the operating system has opened its door to NGO (and other actor) participation, those actors have assumed a number of roles. First, they play an agenda setting role in bringing topics or issues to the attention of the state members (e.g., Aviel, 2000). This does not assure new norms will be created, but it does mean that some norms would not otherwise be codified or at least at a particular point in time without the impetus of NGOs. Second, NGOs can submit statements or make presentations in the course of treaty drafting. One might expect that their greatest influence will occur on more technical matters in which the expertise of the organizations grants greater legitimacy to NGO input. The net result is that provisions of a treaty may more

closely coincide with NGO preferences than would otherwise be the case without their participation. NGOs may also be involved in the drafting of convention language, either directly or indirectly through alternative operating system structures. For example, Cakmak (2004; see also Breen, 2003) notes that NGOs formed the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child and actually contributed substantive articles to the final convention.

Perhaps the most notable instance, and certainly the most cited, of NGOs influencing normative treaties concerns the so-called Ottawa Treaty, officially the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997). Rutherford (2000) details the influence of NGOs in all aspects of that treaty. NGOs highlighted the damaging effects of landmines at international conferences as well as outside the operating system through media campaigns. This agenda setting laid the basis for eventual drafting of the landmine ban, despite the opposition of some states such as the United States.

Forum Specification

Related to actor specification, the operating system also defines the institutions or forums in which law is made. In the United States for example, the Constitution specifies that all money bills must originate in the House of Representatives and that international agreements must be ratified by the President subject to advice and consent of the Senate. In the international legal arena, the operating system is more diffuse. Technically, any two states can create international legal obligations between themselves, with direct negotiations being the most common forum for this. Yet the most significant treaties and other law (custom, binding resolutions) arise from multilateral interactions in forums whose structures and rules are part of the operating system.

There are several ways that characteristics of the operating system with respect to law-making forums influence final outcomes in the form of normative treaties. First, such forums determine which kinds of actors may participate and in what fashions. These aspects are discussed in the previous section. Second, every forum carries with it certain norms that conditions the expectations and participation of those involved in the treaty drafting. Cook (2003) notes that actors rely on institutional rules and information to develop expectations. Although these elements were developed by the participants in the past, they are not necessarily changed easily and they may be very "sticky" as they affect future deliberations. For example, negotiations on trade under the auspices of GATT/WTO include a series of norms (e.g., major interests, development) that will affect specific provisions of any final treaty (Finlayson and

Zacher, 1981). For example, the major interests norm will produce an agreement whose precise subjects and specific provisions will be more closely aligned with the interests of leading states (and others most affected by the treaty) than it will be for other parties, even as the agreement was negotiated in a large multilateral setting.

The institutional arrangements also influence the kinds of provisions that find their way into final drafts of agreements. UN bodies, such as the International Law Commission, include participation from many different states, many of whom may have few direct interests in most provisions. Yet these bodies operate on principles of consensus, even though a treaty will not become binding on any state other than a signatory. Bargaining in such forums will produce treaty provisions that are necessary to promote that consensus. This may mean that the language of the document is deliberatively vague, as are many articles of the Covenant of Civil and Political Rights, so as to facilitate multiple and self-interested interpretations. It may also produce "package deals" in which articles or subsections are added to a treaty to secure the support of a certain group of states. For example, the Convention on the Law of the Sea, negotiated under the UN Conference on the Law of the Sea, includes guarantees for access to the high seas by landlocked states, a provision designed to secure the support of that set of conference participants.

Because where international law is made helps determine what that law is, strategic actors may seek to have law created in certain forums as opposed to other alternatives when such options exist. We usually associate the process of "forum shopping" (e.g., Weintraub, 2002) with litigants searching for the optimal venue in which to file suit. Yet it is also applicable earlier in the legal process when actors are seeking to create law. Some forums may be better suited for the interests of certain states than others. Stiles (2006) provides an excellent illustration, discussing anti-terrorism law and the United Nations. The UN General Assembly, through its Sixth Committee, had worked for a number of years on drafting conventions dealing with terrorism. Yet its procedures for operating on consensus and its track record of taking actions, such as trying to carve out exceptions to terrorism norms for national liberation groups, made it an anathema to major power states. Not surprisingly, after the 9/11 attacks, the United States and the United Kingdom sought to use the Security Council, a forum much friendlier to their interests and subject to their control, to carve out new legal rules on terrorism. The success of efforts to draft rules on terrorism will depend on which forum is privileged and any convention emanating from those two bodies is likely to contain very different provisions. By providing several options for law-making, the operating system influences the likelihood and kinds of outcomes in international law-making.

Direct Law Making

The final process by which the operating system affects the development of the normative system may seem a bit surprising: institutions of the operating system create new normative laws. This goes beyond empowering particular actors to make laws or allowing certain bodies to craft agreements. Rather, it involves the creation of law as part of the normal procedural functioning of the operating system rather than from statutory authority.

The primary example of such law creation comes from international tribunals. International courts do not have the same powers as many domestic courts and technically cannot make the law per se; the absence of *stare decisis* on the international level limits the last influence that judicial action may have on the law. Traditional operating system rules establish that court decisions may be used as evidence of custom, but are not law-making in and of themselves. Yet Scheffer (1999) argues that rape as a war crime existed under customary law, but its existence is murky at best. It was only when the crime was recognized by the Yugoslav and Rwandan war crimes tribunals that one might be able to truly say it is international law, especially given (1) rape is rarely if ever mentioned in legal lists of such crimes, and (2) no international court had ever convicted an individual for rape as a component of genocide before this was done by the Rwandan tribunal.

Danner (2006) finds evidence of judicial law making in a number of different courts. Specifically, she notes (2006: 47-48) "The International Court of Justice of has reshaped the law on transboundary resources, including rivers and fish stocks. The Iran-US Claims Tribunal has clarified and shaped the international law of unlawful expropriation. Most of these decisions have been subsequently accepted as valid by states, despite their often weak textual or customary law bases." Yet Danner claims that much of the effect is likely to be manifest in temporary international courts. Her argument is that this is most appropriate as a mechanism for revision of treaties when those agreements are old and no longer reflect current conditions, but there is little prospect for revision any time soon.

Ginsburg (2005) indicates a broader effect, arguing that judicial law-making is "inevitable." Primarily, he notes that courts and related institutions make laws in several different ways. Judicial decisions have increasingly been used by subsequent courts to guide decisions, even though precedent is not an established rule. The International Court of Justice also can issue advisory opinions, providing another avenue to reinterpret the law or establish new principles. Furthermore, courts have the power to interpret treaties and detect custom. Such judicial law-making, however, is not unlimited. States can still "overrule" judicial actions by subsequent

contrary action or constrain ("discipline") tribunals who make undesirable law, thereby limiting future judicial law-making.

Conclusion

In previous work, we made the distinction between the operating and normative systems of international law. To the extent that extant research even recognizes this or related distinctions, the components of the operating system are largely ignored, confounded with the normative system, or considered subservient. In any event, the operating system is not considered to have an independent effect on international law-making. This paper explored the ways that the operating system might influence the normative system. The result was the identification of five different processes through which the operating system might affect which norms are adopted as well as the specific configurations of those norms. Although we do not contend that the operating system exercises a dominant influence on new treaties, we do contend that models based solely on interests, power, and information are incomplete in accounting for how international cooperation is achieved and structured.

There are several implications from the finding that the operating system influences the normative system. Most of the trends in the operating system are toward expansion, in the number and kind of actors, in the creation of new courts, and the scope of international law-making (Ku and Diehl, 2003). One might suspect that this will continue well into the future. This suggests that the operating system will exercise a greater influence on future law-making. Much of this may be unintended, but nevertheless real. For example, a court created for a specific purpose, such as the International Criminal Court, may play a critical role in the development and application of international humanitarian law. The desirability of this reality is already being debated (e.g., Posner and Yoo, 2005; Helfer and Slaughter, 2005), but that reality is not in question.

References

José Alvarez. 2002. "The New Treaty Makers," Boston College International & Comparative Law Review 25: 213-227.

Axelrod, Robert, and Robert O. Keohane. 1985. "Achieving Cooperation under Anarchy: Strategies and Institutions." *World Politics* 38: 226-254.

Aviel, JoAnn F. 2000. "Placing Human Rights and Environmental Issues on ASEAN Agenda: The Role of Non-Governmental Organization." *Asian Journal of Political Science* 8 (2): 17-34.

Barnett, Michael N. 1995. "The United Nations and Global Security: The Norm is Mightier than the Sword." *Ethics and International Affairs* 54 (3): 37-54.

Brand, Ronald A. 2002. "Comparing Forum Nonveniens and the Hagues Convention of Jurisdiction and Judgments." *Texas International Law Journal* 37: 467-498.

Breen, Claire. 2003. "The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict." *Human Rights Quarterly* 25 (2): 453-481.

Cakmak, Cenap. 2004. "The Role of Non-Governmental Organizations (NGOs) in the Norm Creation Process in the Field of Human Rights." *Alternatives: Turkish Journal of International Relations* 3 (1): 100-122.

Cassese, Antonio. 1990. *Human Rights in a Changing World.* Temple University Press.

Cook, Randall. 2003. "Dynamic Content: The Strategic Contingency of International Law." *Journal of Comparative & International Law* 14: 89-123.

Dahl, Robert A. 1998. *On Democracy.* Yale University Press.

Dai, Xinyuan. 2005. "Why Comply? The Domestic Constituency Mechanism." *International Organization* 59 (2): 363-398.

Danner, Allison Marston. 2006. "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War." *Vanderbilt Law Review* 59 (1): 2-65.

Diehl, Paul F., Charlotte Ku, and Daniel Zamora. 2003. "The Dynamics of International Law: The Interaction of Normative and Operating Systems." *International Organization* 57: 43-75.

Fearon, James. 1998. "Bargaining, Enforcement, and International Cooperation." *International Organization* 52 (2): 269-305.

Finnemore, Martha. 1996. *National Interests in International Society.* Ithaca, NY: Cornell University Press.

Finlayson, Jock, and Mark Zacher. 1981. "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions." *International Organization* 35: 561-602.

Franck, Thomas M. 1990. *The Power of Legitimacy Among Nations.* Oxford University Press.

Friedmann, Wolfgang. 1964. *The Changing Structure of International Law.* Columbia University Press.

Ginsburg, Tom. 2005. "Bounded Discretion in International Judicial Lawmaking." *Virginia Journal of International Law* 45 (3): 631-673.

Goertz, Gary. 2003. *International Norms and Decision Making: A Punctuated Equilibrium Model.* Oxford, UK: Rowman and Littlefield.

Goldsmith, Jack L., and Eric A. Posner. 2005. *The Limits of International Law.* Oxford University Press.

Goldstein, Judith L., Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter (eds). 2001. *Legalization and World Politics.* IO Foundation and MIT Press.

Grieco, Joseph. 1990. *Cooperation among Nations: Europe, America, and Non-Tariff Barriers to Trade.* Ithaca, NY: Cornell University Press.

Hannikainen, Lauri. 1988. *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status.* Coronet Books.

Hart, H.L.A. 1961. *The Concept of Law*. Oxford University Press.
Hasenclever, Andreas, Peter Mayer, and Volker Rittberger. 1997. *Theories of International Regimes.* Cambridge: Cambridge University Press.
Helfer, Laurence, and Anne-Marie Slaughter. 2005. "Why States Create International Tribunals: A Response to Professors Posner and Yoo." *California Law Review* 93 (3): 901-956.
Henkin. Louis. 1977. *How Nations Behave: Law and Foreign Policy. Columbia University Press.*
Ikenberry, John, and Charles Kupchan. 1990. "Socialization and Hegemonic Power." *International Organization* 44 (3): 283-315.
Keck, Margaret E., and Kathryn Sikkink. 1998. *Activists Beyond Borders: Advocacy Networks in International Politics.* Cornell University Press.
Keohane, Robert. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton: Princeton University Press.
Kindleberger, Charles. 1973. *The World in Depression, 1929-1939.* Berkeley, CA: University of California Press.
Koenig, Christian. 1991. "Observer Status for the ICRC at the United Nations: A Legal Viewpoint." *International Review of the Red Cross* 280: 37-48.
Koremenos, Barbara, Charles Lipson, and Duncan Snidal (eds.). *The Rational Design of International Institutions.* Cambridge: Cambridge University Press.
Ku, Charlotte, and Paul F. Diehl (eds.). 2003. *International Law* 2nd edition. Boulder: Lynne Rienner.
Ku, Charlotte and Paul F. Diehl. 2006. "Filling in the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System." *Global Governance* 12: 161-183.
Leeds, Brett Ashley. 1999. "Domestic Political Institutions, Credible Commitments, and International Relations." *American Journal of Political Science* 43: 979-1002.
McAdams, Richard H. 1997. "The Origin, Development, and Regulation of Norms." *Michigan Law Review* 96 (2): 338-433.
Nardin, Terry. 1983. *Law, Morality, and the Relations of States.* Princeton University Press.
Pahre, Robert. 1999. *Leading Questions.* Ann Arbor, MI: University of Michigan Press.
Posner, Eric, and John Yoo. 2005. "Judicial Independence in International Tribunals." *California Law Review* 93 (2): 957-973.
Rutherford, Kenneth R. 2000. "The Evolving Arms Control Agenda: Implications of the Role of NGOs in Banning Antipersonnel Landmines." *World Politics* 53 (3): 74-114.
Scheffer, David J. 1999. "Rape as a War Crime." Lecture presented at Fordham University, October 29th.
Shepsle, Kenneth A., and Barry R. Weingast. 1995. "Positive Theories of Congressional Institutions." In *Positive Theories of Congressional Institutions*," Kenneth A. Shepsle and Barry R. Weingast (eds) University of Michigan Press: 5-35.
Simmons, Beth. 2000. "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs." *American Political Science Review* 94 (4): 819-835.
Stein, Arthur. 1990. *Why Nations Cooperate: Circumstances and Choices in International Relations."* Ithaca, NY: Cornell University Press.
Stiles, Kendall W. 2006. "The Power of Procedure and the Procedures of the Powerful: Anti-Terror Law in the United States." *Journal of Peace Research* 43 (1): 37-54.
Taylor, Michael. 1987. *The Possibility of Cooperation.* Cambridge: Cambridge University Press.
Umozurike, U. O. 1979. "The Domestic Jurisdiction Clause in the OAU Charter." *African Affairs* 78 (311): 197-209.
Walter, Barbara. 2002. *Committing to Peace: The Successful Settlement of Civil Wars.* Princeton: Princeton University Press.

Weintraub, Russell. 2002. "Introduction to Symposium on International Forum Shopping." *Texas International Law Journal* 37 (3): 463-467.
Young, Oran. 1989a. *International Cooperation: Building Regimes for Natural Resources and the Environment."* Ithaca, NY: Cornell University Press.
Young, Oran. 1989b. "The Politics of International Regime Formation: Managing Natural Resources and the Environment." *International Organization* 43: 349-376.

[1] In this paper, we use the terms "norms" and "rules" interchangeably to signify the existence of a binding international legal obligation.
[2] We do, of course, recognize that even with the trend toward treaties as the primary source of new international law, many treaties in the last several decades have largely codified existing customary practice (e.g., significant portions of the Law of the Sea Conventions).