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Filling In the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System

Charlotte Ku and Paul F. Diehl

What happens when there is an imbalance between the operating and normative systems of international law? One obvious outcome is nothing; the imbalance remains, and the norms of the system are not given full effect. For example, human rights provisions abound, but they can be widely ignored in the absence of enforcement mechanisms. In this article, we identify several other possibilities. Our contention is that adaptations occur that compensate for, or at least mitigate, the effects of the operating-normative systems imbalance. Specifically, we explore four kinds of extrasystemic (at least from the perspective of the international legal system) adaptations: (1) actions by nongovernmental organizations and transnational networks, (2) internalization of international law, (3) domestic legal and political processes, and (4) “soft law” mechanisms. Our contention is that the international legal system is partly kept functioning by these actors and mechanisms, even though they technically fall outside the framework of the international legal system. **KEYWORDS:** international law, NGOs, soft law, norms, compliance.

Debates over the legality and legitimacy of the use of force in Iraq in 2003 are but one of the more recent examples in which the norms of international law and the system charged with implementing those norms seemed irreconcilable. This, in fact, reveals a more general problem in international law in which norms and the capacity to implement those norms may not be consonant. Until the international system provides adequate capacity, states and other actors will seek ad hoc and sometimes extrasystemic means to accomplish their ends. By doing so, they may foster more enduring, systemwide change.

Among the most visible changes in any legal system is the adoption of 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 Against Torture reflected the international community's consensus on outlawing certain human rights violations. Similarly, the global trade agreement emerging from the Doha Round of negotiations may include provisions to limit the use of national agricultural subsidies. The Kyoto Protocol sets limits for the emission of greenhouse gases. Each of these is a component of what we have referred to elsewhere as the "normative system,"² or the part of the international legal system that is quasi-legislative in character by mandating particular values and directing specific changes in state and other actors' behaviors. In effect, the normative system prescribes, and more often proscribes, certain behaviors for the subjects of international law.

The mere specification of behavioral norms does not guarantee that the normative system will function efficiently. It cannot ensure that those precepts will be observed even when the political will to do so exists. There must be the appropriate processes and structures in place to give effect to the norms. We refer to this as the "operating system." As an operating system, international law functions as a constitution does in a domestic legal system by setting out the consensus of its constituent actors (states) on distribution of authority, responsibilities in governing, and the units that will carry out specific functions; conventionally, these are classified under sources, actors, jurisdiction, and institutions. 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 often requires little conscious effort.

In the ideal conception, there is symmetry between the normative and operating systems: the latter is designed, and perfectly so, to serve the needs of the former. Indeed, this is largely H. L. A. Hart's conception in which secondary rules serve to give effect to primary rules.³ In practice, we argue that this is not always the case. Norms are often created in the legal system, but there are not always corresponding provisions in the operating system to give them full effect. For example, the genocide convention does not include provisions for universal jurisdiction, and until the creation of ad hoc tribunals and the International Criminal Court (ICC), there were no international courts to prosecute individuals accused of genocide. The new norm may be incompatible with the operating system or the norm may be de novo, leaving the

operating system incapable of ensuring its application. The imbalance goes beyond international law's centuries-old lack of centralized *enforcement* mechanisms. It also includes limitations with respect to actors' abilities to assert rights (e.g., individuals and international organizations), lawmaking procedures, and jurisdictional rules in the operating system. We have argued further that the operating system does not always adapt to changes in the normative system, leading to a suboptimal imbalance between the two systems.⁴

What happens when there is an imbalance between the operating system and the normative system? One obvious outcome is nothing; the imbalance remains, and the norms of the system are not given full effect. For example, human rights provisions abound but can be widely ignored in the absence of enforcement mechanisms. In this article, however, we identify several other possibilities. Our contention is that adaptations occur that compensate for, or at least mitigate, the effects of the operating-normative systems imbalance and may over time lead to operating system change. Specifically, we explore four kinds of extrasystemic⁵ adaptations: (1) actions by nongovernmental organizations (NGOs) and transnational networks, (2) internalization of international law, (3) domestic legal and political processes, and (4) "soft law" mechanisms. Our contention is that the international legal system is partly kept functioning by such adaptations, even though they technically fall outside the framework of the international legal system. In making this argument, we hope to shed light on the international legal process as well as add to the dialogue in the four areas noted.

The Operating-Normative System Imbalance

The development of a new legal norm (or the extensive modification of an existing one) may produce changes in the international operating system. Yet the latter is far from guaranteed. First, the extant operating system may be able to accommodate the new norm with no changes required. For example, a new global trade agreement may comport well with existing World Trade Organization mechanisms, including its forum for dispute resolution. In this way, new norms do not upset the equilibrium between normative and operating systems.

Of central concern to this analysis is a second scenario. A new norm may arise that necessitates a change in the operating system in order to give the former full effect, but such a change does not occur. In earlier work, we specified the conditions under which operating system change would follow from a normative change.⁶ We argued that the operating

system responds to normative changes only when a response is “necessary.” The operating system must be incompatible, ineffective, or insufficient to give the new norm effect. For example, holding individuals responsible for torture or other crimes (Convention Against Torture) created new norms but is incompatible with operational rules on sovereign immunity; the Spanish case against General Pinochet is indicative of this tension. Exceptions to foreign sovereign immunity may need to be created in order for the operating system to be consonant with these new agreements and the legal norms embedded in them.

Yet necessity is not a sufficient condition for operating system change. Operating system change must also be roughly coterminous with a dramatic change in the political environment (i.e., “political shock”). There is inherent inertia in any political system, and international law has been characterized as changing more glacially than other legal systems. Accordingly, we posit that some significant impetus must be present before the operating system adjusts to the normative change. That impetus must come from a significant political shock. Political shocks can be discrete events, such as world wars, acts of terrorism, natural disasters, pandemics, or horrific human rights abuses. Shocks might also appear as significant processes, such as global democratization or technological revolution, that extend over a period of time and have an impact only when a critical threshold is reached.

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

Even when necessity and political shocks are present, opposition from leading states and domestic political factors might serve to block or limit such operating system change. Change will likely not occur in the operating system, or it might be incomplete, when such an alteration threatens the self-interest of the dominant states and/or is actively opposed by one or more of those states. If this change occurs without the acquiescence of dominant states, it may prove to be sufficiently minimal and ineffective so as not to challenge their interests. This differs from normative system change that may proceed even if dominant states object. The necessity of consent from the dominant state(s) can, therefore, be seen as an obstacle that needs to be overcome prior to any

effective operating system change taking place. This limitation is not a component of the operating system per se, defined by international legal rules, but rather is an exogenous constraint reflective of power relationships in the international legal system.

The above summary illustrates that operating system change, although needed, may not occur. Even when alterations in the operating system take place, they may do so years after the need emerged from the original normative change. In either case, there is a significant imbalance between the operating and normative systems, with the net result being that certain norms will not have effect in the system; that is, they will not be implemented, observed, or enforced in an efficient manner. What is likely to happen as a result of this imbalance? Most obvious is nothing: the system remains out of equilibrium, and new international legal norms have limited or no effect on behavior. Yet, another possibility exists. In the following sections, we detail four different adaptations by which the operating-normative system imbalance is redressed—all outside the formal international legal system. Over time, such adaptations may also provide the mode for operating system change.

Extrasystemic Mechanisms for Adaptation

Impetuses for Adaptation

Although disequilibrium may persist, extrasystemic mechanisms may arise to address some or all of the gaps in the operating system. Unlike biological systems, which may be inherently adaptive, the international legal system requires some agency to achieve change. That is, actors outside (e.g., NGOs) or inside (e.g., states) the legal operating system must observe the imbalance and have incentives to redress it; such incentives may be strategic and self-interested or they may be altruistic. There are several broad reasons why agents may seek to provide solutions to the operating-normative system imbalance.

First, actors may want to include interested parties heretofore excluded from the operating system in a particular issue area. Most often, these interested parties are the ones who are willing to supply the monitoring or enforcement capabilities needed to ensure norm compliance. This is most evident in the human rights area in which private organizations, such as Human Rights Watch, carve out roles for themselves in reporting on human rights violations. Actors may involve such parties for a number of reasons. Actors may already have good working relationships with interested parties (e.g., certain NGOs) and thereby feel

more comfortable with those entities playing important roles in implementation rather than relying on traditional actors such as government or other public entities in the international legal operating system. Some actors (e.g., weaker states) may regard themselves as incapable (in terms of power, resources, or expertise) to fill in the gaps and thereby seek third parties who can fill the roles required. Interested parties may desire to participate for altruistic reasons because they believe that their efforts are superior to extant operating system procedures or just because such organizations want to enhance their roles; the latter is task expansion behavior characteristic of organizations of all varieties.

Second, the intervention of other actors may be to ensure that some issues that are not automatically part of the existing structures and processes are included. Actors may desire that issues concerning indigenous peoples, for example, be included as part of the monitoring of environmental accords. Extrasystemic mechanisms may ensure that such concerns are reflected in the implementation of the norm, something that would not occur under present operating system mechanisms.

Third, actors, especially individual states, may desire greater control over the implementation of norms. Accordingly, they create structures and processes outside the international legal operating system, perhaps even blocking efforts at operating system change. Regulation of norms may then be left to domestic legal systems or powerful actors, who then have some discretion (and national sovereignty) over the norm as it affects those actors. This is important in that it shows that actors are not always motivated by achieving greater compliance with international norms when they create mechanisms to supplement or replace international legal procedures.

Below we identify four different adaptations by which the operating-normative system imbalance is redressed. We should note that the outcomes of all these processes are not necessarily a fully functioning and effective system of norm implementation. Extrasystemic adaptations may still leave holes in the operating system unfilled, and even when gaps are addressed, the adaptations may be inefficient or ineffective. Still, most adaptations have the effect of improving norm implementation and the effect of the normative system. Several of these also have the effect of skirting the barriers imposed by opposition to the operating system change presented by the leading states in the international system.

NGOs and Transnational Networks

Traditionally, NGOs were involved only in the process of norm creation. Most notably, they raised the salience of global problems and helped

mold treaty language, albeit usually working through national delegations. The prominence of women's issues on the international agenda today and the adoption of treaties such as the landmines convention and the Statute of the International Criminal Court are examples of strategic NGO-state alliances that resulted from highly effective political lobbying.⁷ Increasingly, however, NGOs are also assisting with elements of the operating system, particularly with the monitoring and implementation of legal instruments.⁸ As treaties increasingly provide frameworks rather than static statements of norms, NGOs have a wider range of opportunities to influence the development of both the normative and operating systems.

Contemporary circumstances have created opportunities for NGOs to play more roles as a supplement or substitute to the international law operating system. This stems, in part, from international law's shift in focus from concerns of the state to those of the individual. Also, the technical character of many issues now facing policymakers continues to make them, as they have been for decades, receptive to expert information. "New technology and the increasingly complex and technical nature of issues of global concern not only increase decision makers uncertainty about their policy environment but also contribute to the diffusion of power, information, and values among states, thereby creating a hospitable environment for epistemic communities."⁹ Technology has also "broken governments' monopoly on the collection and management of large amounts of information."¹⁰ Events leading up to the signing of the convention to ban the use of antipersonnel landmines (Ottawa convention, 1997) provided an example of the new power that individuals linked by technology, organized into a political network, and working in alliance with governments can wield.¹¹ Thus, some NGOs are well positioned to assume roles in the implementation of norms, especially in those areas in which specialized expertise is required.¹²

Beyond expertise, NGOs have been directly called up to perform operating system functions heretofore carried out by other actors. Inter-governmental organizations (IGOs) have specifically contributed to the prominence of NGOs as they have sought to circumvent governments. As governments seem less able or willing to meet the financial needs of norm monitoring and compliance, IGOs have tapped the vast private wealth available through the intermediation of NGOs. Thus, as national governments have been less willing to carry out the duties of the operating system or support international institutions that will perform those functions, NGOs have been called upon to fill the gap, often as "sub-contractors" to broader IGO efforts. Perhaps most famously, the International Committee of the Red Cross (ICRC) is charged with monitoring

compliance with international humanitarian law as it relates to prisoners of war. NGOs can also supplement government and IGO capacity in helping to keep abreast of specific issue areas. This is important where even the best-staffed government agencies can rarely dedicate full-time staffs to the many issues that now constitute international affairs.

NGOs have been especially instrumental in filling operating system gaps in human rights and the environment, issue areas in which states needed political support and capacity "on the ground." Private organizations have an advantage in that they can pursue these activities within countries where foreign governments could not. Furthermore, the political power and experience gained in promoting various norms continued beyond the enactment of specific obligations to monitoring their ongoing development and implementation. Given their familiarity with the issues and the players, NGOs may in fact be more expert at monitoring and overseeing development of norms than the formal organizations created to do so on an official basis. Robert Keohane and Joseph Nye observed that in addition to the formal governance provided by states and the intergovernmental organizations that they created, governance now also takes place through networks of agents that can be both public and private and that derive credibility from their flexibility and dynamism to address new issues with fewer start-up costs.¹³

This bottom-up approach runs counter to the classical image of international law as the product of an international conference of diplomats. Yet, it has evolved as an important source of international law as more private activity from trade to child custody moves across international borders. This approach is not grassroots but relies on networks of practitioners whose practice and behavior affect the content and form of certain rules because they are the very individuals who are key to that particular practice. This is similar to the kind of transgovernmental network to which Anne-Marie Slaughter refers.¹⁴ The structure of an influential group can be informal, but the group wields influence because it is cohesive and recognized by those who are key to the work in a specific area. The bottom-up approach recognizes that such informal arrangements can exist outside the government sphere and can also have important regulatory or normative effect because the behavior will be consistent among all who are in the network.

One example of such nongovernmental lawmaking can be found in the letter of credit practices used by commercial banks called the Uniform Customs and Practice for Documentary Credits. Though not law, US courts and courts elsewhere have used this standard to resolve letter of credit disputes. Another example is in the area of export credit insurance where the International Union of Credit and Investment Insurers

adopted standards that ultimately found their way into more formal international agreement. These are narrow and technical areas, but if we think back to the origins of much of the UN specialized agency system we have today, perhaps we can appreciate the importance and potential power of such privately generated best practices and standards.¹⁵

Another example is when civil society groups ally with intergovernmental organizations to set standards and pursue initiatives that subsequently are embraced by national governments but are first pursued or articulated by private groups. This is increasingly occurring, and private organizations remain active in the implementation of an international convention:

- *Framework Convention on Tobacco Control*: two NGO alliances are closely identified with efforts to prepare and adopt the Framework Convention Alliance, with more than 200 NGOs in ninety-one countries, and the tobacco transnationals, made up of seventy-five groups in fifty countries.

- *Landmines convention*: Jodie Williams, winner of the Nobel Peace Prize, organized a network that was instrumental in the ratification of the landmines convention.

- *The Statute of the International Criminal Court*: the two-year run-up to the 1998 Rome intergovernmental conference on the ICC provided NGOs the opportunity to organize and build relationships with UN secretariat staff and other key players in the drafting such that NGOs were accepted by governments and the UN as resources and worthy advocates.¹⁶

- *Global moratorium on driftnet fishing*: although mandated only by UN General Assembly resolutions, the global moratorium has worked in part through the monitoring efforts of various environmental non-governmental organizations like Greenpeace.¹⁷

- *Corporate social responsibility standards employing techniques of international standard setting and litigation through domestic channels*: for example, when suits are brought by private litigants in U.S. courts under the terms of the U.S. Alien Tort Claims Act as occurred against UNOCAL for its operations in Myanmar and against Shell for operations in Nigeria.¹⁸ Such steps indicate movement away from voluntary standards of corporate social responsibility to international obligations that carry legal liability and accountability.¹⁹

The drawback to the bottom-up approach is that it assumes a developed legal and political system that is adequately mature and specialized to participate in the global network in a particular area. It further

assumes that resources are available to move toward common objectives. The bottom-up approach puts a premium on participation. As such, it can disadvantage national legal systems that are not part of existing networks. The bottom-up approach at the international level, however, may be advanced by the decentralization and privatization of public services, such as health, and a global economy that can outpace national governments' abilities to regulate.

In addition to NGOs, we see that voluntary, transnational networks have demonstrated their power to contribute to the operating system, especially to influence states in the monitoring of state conduct in the treatment of their own citizens. "Principled issue networks," as agents for change in state behavior and even in international standards, have emerged from the increased level of private transnational activity. Made possible through resources provided by foundations, spurred on by the commitment of individuals, and held together by new technologies, these transnationally linked organizations have had some notable achievements, particularly in the protection of human rights.²⁰ Even decades ago, the kind of "people power" generated by Helsinki Watch, Charter 77, Solidarity, and other groups eventually created pressures for human rights and an end to the Cold War from within the Warsaw Pact countries themselves. Yet, while it seems clear that the public sector can no longer function effectively without the cooperation and participation of the private sector and the involvement of individual citizens, it remains true that the private sector cannot solve all problems without the infrastructure and coordination that states and international institutions provide.

The importance of NGOs and private transnational networks functioning as part of civil society caused UN Secretary-General Annan to note: "We must also adapt international institutions, through which states govern together, to the realities of the new era. We must form coalitions for change, often with partners well beyond the precincts of officialdom."²¹ As Mary Kaldor observes, the elements of civil society—voluntary associations, movements, parties, and unions, for example—enable individuals "to act publicly."²²

We note that some transnational networks are built not exclusively between private actors, but are actually bridges connecting officials in different governments. Such official, albeit informal, networks can play key roles in ensuring the effectiveness of international standards. A prominent current example is in the global effort to fight terrorism. Slaughter notes that "public attention has focused on military cooperation, but the networks of financial regulators working to identify and freeze terrorist assets, of law enforcement officials sharing vital information on terrorist

suspects, and of intelligence operatives working to preempt the next attack have been equally important. Networked threats require a networked response.”²³ One might expect such networks to become even more prominent as globalized problems proliferate and traditional mechanisms prove inadequate for regulating behavior.

Yet there are concerns about whether the international legal operating system can rely on these informal arrangements. First, the ad hoc and selective character of these partnerships has caused concern about the effectiveness and reliability of such arrangements as durable pillars of global governance. Second is an exaggerated perception of the ability of NGOs and transnational networks to carry out a wide range of operating system activities. The potential fragmentation in information, resources, and decisionmaking may, in the long run, be a serious threat to the order and authority that are requisite to civil society.

Despite these concerns, most scholars acknowledge the positive influence NGOs and transnational networks have had on contemporary international law in areas such as the well-being of individuals, human rights, gender and race equality, environmental protection, sustainable development, indigenous rights, nonviolent conflict resolution, participatory democracy, social diversity, and social and economic justice.²⁴ In the broadest sense, we may be moving toward the point where effective and sustained attention to these issues requires the political and financial mobilization of resources at all levels, from local to global. This is where the voluntary, local, and issue-specific character of NGOs and transnational networks make them a useful link between the subnational community and national and international communities and institutions. By providing a link, NGOs supplement the human and financial resources of governments and intergovernmental organizations.

Legal Internalization

Traditional conceptions of the international legal operating system rely on international institutions and processes to supervise norms. Yet, one of the adaptations to inadequacies in this system is to rely on domestic legal mechanisms to pick up the slack. This is described well by the third component of Harold Koh’s view of transnational legal process: internalization: “Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three. . . . Judicial internalization can occur when domestic litigation provokes judicial incorporation of human rights norms either implicitly, by construing existing statutes consistently with international human

rights norms, or explicitly, through what I have elsewhere called 'trans-national public law litigation'."²⁵

Some internalization is provided for within the confines of the international legal operating system. When a treaty explicitly requires national executing legislation to give norms effect domestically (e.g., rules on endangered species), then this can be considered an element of the operating system. Still, unique features of national legal systems leave much of the incorporation of international law to domestic legal rules and processes, thus technically placing such adaptations outside the rules of the international operating system. Furthermore, in other stances, internalization happens independently of treaty provisions and is stimulated by domestic political actors.

Legal internalization redresses problems with implementation or enforcement in which some states are unwilling to follow the international norm. The problem may take place for a variety of legal, political, social, or economic reasons. One response is legislative internalization, when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law that officials of a noncomplying government must then obey as part of the domestic legal fabric. Local actors then attain standing to press claims and seek redress in domestic courts.

More recently, with the case of *Osbald Torres v. the State of Oklahoma* before the Oklahoma Court of Criminal Appeals, we see the effort of domestic legal institutions to give effect to the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals*.²⁶ In its decision, one of the Oklahoma court's judges acknowledged that the United States was bound by treaties,²⁷ in this case, the Statute of the International Court of Justice and the Vienna Convention on Consular Relations, and that the court was therefore bound to abide by the opinion in the Avena case.²⁸

The European Union (EU) represents a special case and one in which internalization has gradually become more systematic. Anne-Marie Slaughter and Walter Mattli described the process whereby European states have incorporated EU law into their own legal system: "Until 1963 the enforcement of the Rome treaty [the constituent treaty of the European Union], 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 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."²⁹

The pioneering work in the development of a regional human rights system that the jurisprudence of the European Court of Human Rights represents is a further important example of the interactions between extranational and national systems of law. One of the more sweeping recent examples is that of the British incorporation of the European Convention on Human Rights into its domestic law that "marks a dramatic shift in how individual rights are conceptualized under British law. . . . The Human Rights Act, which puts courts and other public authorities under a positive duty to 'give effect' to the rights enumerated in the European Convention in their day-to-day activities, marks a shift in the perception of civil liberties from residual freedoms to positive rights."³⁰

The incorporation of international norms into domestic legal processes has several advantages. Among the most notable is that the monitoring and enforcement of the law is invested in national legal operating systems, all or most of which are more developed and better resourced than the international system. This means that norms violations are more likely to be detected, and most importantly there are established mechanisms for dealing with such violations. Although there has been a significant increase over the last decade in the creation of international tribunals, the international court system is still quite weak and structurally limited when compared to its domestic counterparts. Indeed, one might argue that legal internalization may, in some cases, be superior to international operating system equivalents.

Legal internalization, however, is not without its flaws or limitations. First, internalization is probably most effective in monist legal systems in which national and international law are part of the same system. In addition, the adaptation is strongest in systems in which some international laws may supercede national laws (e.g., Germany) as opposed to those in which the national and international law are considered coequals (e.g., United States). Second, legal internalization as an adaptation to operating system inadequacy is likely to be incomplete when viewed from a global perspective. For internalization to be effective fully, it must take place in almost 200 different states. This is unlikely, as some states will resist such actions and there is no assurance that such internalizations will be consistent with the objects and purposes of the international norms.

Even if it were to occur universally, the lack of democratic processes and legal mechanisms in many states will prevent international norms from influencing the behavior of government officials. Authoritarian states may be characterized by the lack of independent interest groups to press for norm compliance or the ability of state officials to subvert the legal process in order to avoid being held accountable for norm violations. There are instances, however, of states allowing access to their national courts to hear claims that may have occurred outside the boundaries of that state. Belgium has enacted universal jurisdiction provisions that might allow it to prosecute Israeli prime minister Ariel Sharon for actions during the 1982 invasion of Lebanon, although Belgium has recently limited its application. Furthermore, foreign plaintiffs have relied on a 200-year-old US law, the Alien Tort Claims Act, to make claims for actions that did not occur in the United States and did not involve any US citizens.³¹ Thus, there are even adaptations for other failed adaptations to inadequacies in the international operating system. Third, legal internalization may be ill-suited or irrelevant for international norms that deal exclusively with the interactions between states, absent an internal component. Thus, while in some sense these adaptations are the ideal response to operating system failures, in practice they are likely to be only a partial solution or a step to more permanent operating system change.

Domestic Legal and Political Processes

National safeguards are not a substitute for international regulation or legal internalization, but when the latter fail or prove inadequate, regulation can and does move to the national level. National safeguards further come in two forms: the formal and the informal. Formal safeguards are found in constitutions and national institutions such as legislatures, courts, and budgets.³² These institutions and their underlying processes may provide disincentives or prohibitions against norm violation that are independent of international influences but nevertheless effective. For example, prohibitions against certain human rights violations may be embedded in national law, and these may have been present even before the development of a concomitant international norm.

Informal safeguards operate through political culture and public opinion.³³ The effectiveness of these safeguards varies widely depending on the strength of the domestic political system, including whether it is democratic and how open it is to public debate. To the extent that international norms are shared by domestic audiences and/or are encased in national cultures, there will be informal, but powerful, constraints on

government officials to adhere to those norms. This may occur even if national legal constraints are absent. Domestic constituencies may play a critical role in the willingness of governments to comply with international agreements.³⁴ Governments will be especially responsive to such influences when those constituencies can exercise electoral leverage on leading political officials (e.g., they are significant parts of the government's political coalition) and/or they can provide extensive information about their own state's compliance. European state compliance with the Long-Range Transboundary Air Pollution convention can largely be attributed to these elements.³⁵

National political and legal processes may also take on more prominent roles in cases when international law appears inadequate to address particular circumstances. When existing international standards and structures are under stress, national debate and political process may help fill the gap and set the criteria for action as well as the limits for such operations.³⁶ For example, the closer the use of military force gets to war, the more national systems play a role in the decision to take part in such operations and to oversee them. This process, in turn, contributes to shaping both the practice and scope of international action. As the Panel on UN Peace Operations concluded in 2001, "The United Nations does not wage war. Where enforcement action is required, it has consistently been entrusted to coalitions of willing States, with the authorization of the Security Council acting under Chapter VII of the Charter."³⁷

The interactions of international and domestic decisionmaking processes have been well recognized by international organization scholars like Richard Cox and Harold Jacobson, who concluded in their classic study of decisionmaking, *The Anatomy of Influence*, that the significance of international organizations is better judged "not as how independent they are of states, but how far they involve the effective policy-making process of governments."³⁸ What debates over the 2003 war in Iraq now tell us is that involving the effective policymaking processes of national governments is no longer adequate in all cases. National decisionmaking processes require certain levels of legitimacy that may now include appropriate international authorization and standards.

As with other adaptations to international operating system gaps, reliance on domestic political and legal processes is far from foolproof. Similar to internalization, there will be considerable variance across states with respect to national laws that serve to monitor and protect international norms. In addition, we recognize that domestic audiences and culture may not always be supportive of international norms; note the divergence between international norms on the status of women and

cultural views on female genital mutilation. Furthermore, government officials may choose to ignore or circumvent domestic law or public opinion in foreign policy. The rule of national law and the ability of domestic audiences to sanction violators (at election time) is much greater in democracies than in states that lack an independent judiciary and mechanisms for public input into policy formulation.

Despite its limitations, relying on domestic legal and political processes as substitutes for the international operating system has some very attractive features. Most notably is that if international norms are already protected in national legal systems and well embedded in national culture and attitudes, international law may be almost self-enforcing. Whether it has been providing the definitive interpretations of humanitarian intervention or preemptive action, the UN Charter system dealing with the use of force has come under increasing stress since the end of the Cold War in 1989.³⁹ Yet if the current structure of international institutions does not effectively address these questions, does this necessarily mean the return to a self-judging and unregulated international security system? Implicit in that question is the assumption that without international regulation by international institutions, state behavior is essentially unregulated. Such a conclusion would overlook the considerable number of national safeguards that can exist at the state level to protect against the wanton loss of lives and resources through military operations that do not serve a state's interests. In some cases, there may be little need for international operating system provisions, and therefore little concern if such mechanisms are absent or deficient. Perhaps one of the most serious inadequacies of the present international operating system is in the area of the use of force.

"Soft Law" Mechanisms

Finally, but far from least important, are so-called soft law mechanisms for ensuring norm compliance. Christine Chinkin points out that the term *soft law* encompasses a wide range, but also that it is an increasingly used tool:

There is a wide diversity in the instruments of so-called soft law which makes the generic term a misleading simplification. Even a cursory examination of these diverse instruments inevitably exposes their many variables in form, language, subject matter, participants, addressees, purposes, follow up and monitoring procedures. These variables, coupled with the inherent contradictions in any concept of soft law, highlight the challenges presented to the structure and substance of the traditional legal order by the increasing use of soft law forms.⁴⁰

Despite the ambiguity, soft law mechanisms are broadly those that do not involve a formal legal obligation or legal processes, but nevertheless represent a shared understanding or consensus about procedure or behavior among the parties. In the context of the operating system, informal or soft mechanisms for resolving jurisdictional disagreements (e.g., how to resolve disputes when overlapping jurisdiction is present) or disputes over substance (e.g., what diplomatic solutions are legitimized) represent soft law adaptations to inadequacies in "hard law" provisions. A growing body of empirical work shows that such informal mechanisms influence behavior.⁴¹

As noted above, soft law mechanisms have multiple forms and purposes and we cannot describe all those variations here. Nevertheless, for illustration purposes, we describe a few of the ways in which soft law fills the gaps left by its hard law counterparts. Soft law may provide for both norms and their implementation when formal agreements are not possible or involve issues that are heretofore considered domestic concerns. For example, commodity agreements or the marketing of specific products, such as breast milk substitutes, provide a way to monitor and regulate behavior of international concern without resort to a treaty.⁴² Similarly, soft law is a vehicle to link international law to private entities regulated principally by domestic law, such as individuals and transnational corporations.⁴³ Soft law may also function as a supplement or follow-up to traditional operating system mechanisms. Indeed, as in the case of international environmental law, a treaty may provide for a framework convention that can be followed by protocols that generate soft law or practice to supplement the original text. Dinah Shelton explained that "typically, the framework convention establishes a structure for further co-operation between the parties through monitoring and implementation procedures, exchanging data, and facilitating regulation."⁴⁴

Soft law fills in some gaps left by the formal operating system, but why would actors choose to rely on the former, which are sometimes ambiguous and may create multiple regimes? Kenneth Abbott and Duncan Snidal identify a number of advantages of soft law.⁴⁵ These include lower contracting or negotiating costs, especially in comparison to long and detailed legal agreements such as those concerning trade negotiated under the auspices of the World Trade Organization. Soft law also entails fewer sovereignty costs, something that states may reluctantly bear when signing hard legal agreements. States may also adopt soft law provisions for norms in relatively new areas of international law (e.g., forest principles), whose implementation effects cannot be easily foreseen or for which rapid changes might be on the horizon (e.g., areas of environmental law). Soft law provides greater flexibility because

states do not risk creating operating system institutions that may be difficult to adapt or eliminate over time.⁴⁶ Finally, soft law institutions and processes may be the product of compromises when states desire a particular international norm but are reluctant to create the necessary operating system mechanisms that ensure its effect.

Despite the challenges, Chinkin observed that soft law is also a phenomenon that is here to stay because international affairs have outpaced the ability of the traditional lawmaking machinery “through international organizations, specialized agencies, programmes, and private bodies that do not fit the paradigm of Article 38(1) of the Statute of the ICJ.”⁴⁷ We may also find that over time, soft law may harden through practice or through implementation by international or national institutions.

Conclusion

In this article, we began with a classification of the international legal system into two component parts: normative systems and operating systems. The former refers to the often issue-specific prescriptions for behavior in international law (e.g., good neighbor principle in environmental law). The latter includes the mechanisms (e.g., jurisdiction rules, courts) designed to ensure that the norms are implemented and observed. We noted that a problem occurs when the operating system is unable to promote (or is inefficient in promoting) the efficacy of certain norms. The international legal system may persist in a state of suboptimality. The major portion of this article was dedicated to identifying extrasystemic adaptations that have emerged to respond to the operating-normative system imbalance.

We see at least four different adaptations or governance mechanisms, formally outside the international legal system, that supplement or substitute for the operating component of that system: (1) NGOs and transnational networks, (2) internalization of international law, (3) domestic legal and political processes, and (4) soft law mechanisms. An implicit assumption in some analyses is that such adaptations, while valuable or even essential, are less desirable than a fully functioning operating system composed of purely international structures and processes. There is some truth to that assumption, but it is too simplistic.

Extrasystemic adaptations do not fill all the gaps of the operating system and cannot always substitute for effective international operating system components. Our analysis indicates that none of the four adaptations alone is sufficient to ensure that international norms are adopted and actors continue to adhere to their prescriptions. Even in

combination, a number of holes remain. Furthermore, because some of the adaptations are ad hoc, there is a tendency for periods of imbalance to persist until actors react. In addition, such ad hoc measures are not well suited for addressing new concerns or sudden changes in the international legal system. Finally, adaptations tend to be unevenly distributed across state members of the international legal system. Rarely will certain adaptations (i.e., internalization) spread to all 190-plus states in the world, leaving more of a patchwork of international norm compliance than blanket coverage. One might presume that legal systems in developed and democratic countries are more amenable to some adaptations than poorer and authoritarian governments. Still, it may not be necessary for the operating system or the extrasystemic adaptations to function perfectly; indeed, it is probably unrealistic to expect this. It may be enough to achieve "acceptable" levels of compliance⁴⁸ in order to achieve most of the goals of the normative system.

Despite their limitations, we also concluded that such adaptations may be superior to operating system mechanisms in a number of instances. For example, soft law mechanisms offered flexibility and greater acceptability advantages for states, and this may make normative provisions more likely to be adopted in the first place. Furthermore, reliance on domestic legal and political institutions that are stronger and more developed than international structures allows greater access for a range of actors and more effective compliance mechanisms to ensure implementation of the norms. In areas in which international agreement is of a framework or guiding principle character or in which the shape of an international legal obligation is still in formation, such extralegal mechanisms may be useful precursors to more specific international standards and obligations.

Slaughter concluded that the international governance model of a multipurpose international institution like the United Nations had at its center built-in limits because "it requires a centralized rule-making authority, a hierarchy of institutions, and universal membership."⁴⁹ In place of this, she observes that governance has moved into a transgovernmental order of "courts, regulatory agencies, executives, and even legislatures . . . networking with their counterparts abroad, creating a dense web of relations."⁵⁰ Drawing on examples from various sectors in her book *A New World Order*, Slaughter argues that a transgovernmental order can provide a much more expandable and flexible system of governance than is available through the classic system of states and intergovernmental organizations.⁵¹ Our analysis of the international legal operating and normative systems suggests something quite similar. To understand fully how international law functions today, one must

look beyond traditional state-to-state or government-to-government legal institutions, processes, and mechanisms. ☉

Notes

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1. In this article, we use the terms *norms* and *rules* interchangeably to signify the existence of a binding international legal obligation.

2. Charlotte Ku and Paul F. Diehl, *International Law* (Boulder: Lynne Rienner, 2003), pp. 1–19.

3. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994).

4. Paul F. Diehl, Charlotte Ku, and Daniel Zamora, "The Dynamics of International Law: The Interaction of Normative and Operating Systems," *International Organization* 57, no. 1 (winter 2003): 43–75.

5. By extrasystemic, we refer to mechanisms outside of the traditional, state-centric *international* legal system as defined by extant treaty and customary law. Extrasystemic adaptations would include, for example, actions by non-governmental organizations (NGOs) in lobbying governments or organizations as well as changes in *national* law that have an international effect. Extrasystemic adaptations, however, would *not* include NGO activity authorized within the system, such as the role of the International Committee of the Red Cross specified in the Geneva Conventions.

6. Diehl, Ku, and Zamora, "The Dynamics of International Law."

7. Charlotte Ku and John K. Gamble, "International Law—New Actors and New Technologies: Center Stage for NGOs?" *Law and Policy in International Business* 32, no. 2 (2000): 221–262.

8. See Cynthia Price Cohen, "The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child," *Human Rights Quarterly* 12, no. 1 (1990): 137–147.

9. Emanuel Adler and Peter M. Haas, "Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program," *International Organization* 46 (1992): 367, 387.

10. Jessica T. Mathews, "Power Shift," *Foreign Affairs* 76, no. 1 (January–February 1997).

11. See Stephen Greene, "A Campaign to Sweep Away Danger," *Chronicle of Philanthropy* 60 (October 1997). See also Richard Price, "Transnational Civil Society Targets Land Mines," *International Organization* 52 (1998): 613–644.

12. See, for example, Janet Koven Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments," *Yale Journal of International Law* 30 (winter 2005): 125–209.

13. Robert Keohane and Joseph F. Nye Jr., "Introduction," in Joseph F. Nye Jr. and John D. Donohue, eds., *Governance in a Globalizing World* (Washington, D.C.: Brookings Institution Press, 2000), pp. 18–20.

14. Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

15. See Levit, "A Bottom-Up Approach to International Lawmaking."

16. See Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance* 5, no. 1 (1999): 1–38.

17. See Donald R. Rothwell, "The General Assembly Ban on Driftnet Fishing," in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), pp. 121–146.

18. See *John De, et al. v. Unocal Corporation*, 2002 WL 31063976 (U.S. Court of Appeals for the Ninth Circuit, 2002) and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d88 (U.S. Court of Appeals for the Second Circuit, 2000).

19. See Isabella Bunn, "Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community," *American University International Law Review* 19, no. 6 (2004): 1292–1293.

20. Kathryn A. Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America," *International Organization* 47, no. 3 (1993): 411–441.

21. UN Secretary-General Kofi A. Annan's report, "*We the Peoples*": *The Role of the United Nations in the 21st Century* (3 April 2000).

22. Mary Kaldor, "The Idea of Global Civil Society," *International Affairs* 79, no. 3 (2003): 585.

23. Slaughter, *A New World Order*.

24. See, for example, Dianne Otto, "Nongovernmental Organizations in the United Nations Systems: The Emerging Role of International Civil Society," *Human Rights Quarterly* 18, no. 1 (1996): 140–141.

25. Harold H. Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1997): 2649, 1397.

26. International Court of Justice, Judgment, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, No. 128 (31 March 2004).

27. Oklahoma Court of Criminal Appeals: *Osbaldo Torres v. the State of Oklahoma*, No. PCD-04-442 (13 May 2004). See also Lori Damrosch, Brief of International Law Experts and Former Diplomats as *Amici Curiae* in Support of Petitioner, Appeal from the District Court of Oklahoma, County, State of Oklahoma Case No. CF-1993-4302 (30 April 2004).

28. See also Carlos Manuel Vazquez, "*Breard* and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures," *American Journal of International Law* 92 (October 1998): 683–691.

29. Anne-Marie Burley (Slaughter) and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," *International Organization* 47, no.1 (winter 1993): 42.

30. Douglas Vick, "The Human Rights Act and the British Constitution," *Texas International Law Journal* 37 (2002): 330.

31. Anne-Marie Slaughter and David Bosco, "Plaintiff's Diplomacy," *Foreign Affairs* 79, no. 5 (2002): 102–117.

32. For examples of constitutional restraints, see Lori Damrosch, "The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative

Powers," in Charlotte Ku and Harold K. Jacobson, eds., *Democratic Accountability and the Use of Force in International Law* (Cambridge: Cambridge University Press 2003), pp. 39–60.

33. For examples of such political factors, see Karen Mingst, "Domestic Political Factors and Decisions to Use Military Forces," in Ku and Jacobson, *Democratic Accountability and the Use of Force in International Law*, pp. 61–80.

34. Xinyuan Dai, "Why Comply? The Domestic Constituency Mechanism," *International Organization* 59, no. 2 (2005): 363.

35. *Ibid.*

36. See Adam Roberts, "NATO's 'Humanitarian War'," *Survival* 3 (1999): 107.

37. UN Report of the Panel on United Nations Peace Operations A/55/305 (21 August 2000).

38. Richard W. Cox and Harold K. Jacobson, *The Anatomy of Influence: Decision Making in International Organizations* (New Haven: Yale University Press, 1973), p. 428.

39. Boutros Boutros-Ghali, *An Agenda for Peace 1995* (New York: United Nations, 1995).

40. Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *International and Comparative Law Quarterly* 38 (1989): 850.

41. See Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (New York: Oxford University Press, 2000); Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1996); Edith Brown Weiss and Harold K. Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: MIT Press, 1998). See also Duane Windwor and Kathleen A. Getz, "Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values," *Cornell International Law Journal* 33, no. 3 (2000); Alhaji B. M. Marong, "Toward a Normative Consensus Against Corruption: Legal Effects of the Principles to Combat Corruption in Africa," *Denver Journal of International Law and Policy* 30, no. 2 (spring 2002): 99–129; Andreanna M. Truelove, "Oil, Diamonds, and Sunlight: Fostering Human Rights Through Transparency in Revenues from Natural Resources," *Georgetown Journal of International Law* 35 (spring 2004): 207; Alfred C. Aman Jr., "Ceding Public Power to Private Actions: Globalization, Democracy, and the Need for a New Administrative Law," *UCLA Law Review* 49 (August 2002); Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law," *Virginia Journal of International Law* 43 (fall 2002): 1–92; Daniel L. Feldman, "Conflict Diamonds, International Trade Regulations, and the Nature of Law," *University of Pennsylvania Journal of International Economic Law* 24, no. 4 (winter 2003): 835–874.

42. Chinkin, "The Challenge of Soft Law: Development and Change in International Law."

43. *Ibid.*

44. Christine Chinkin, "Normative Development in the International Legal System," in Shelton, *Commitment and Compliance*, p. 27.

45. Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421–456.

46. See also Charles Lipson, "Why Are Some International Agreements Informal?" *International Organization* 45, no. 4 (1991): 495.

47. Chinkin, "Normative Development in the International Legal System."

48. Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization* 47, no. 2 (spring 1993): 175.

49. Anne-Marie Slaughter, "The Real New World Order," *Foreign Affairs* 76 (September–October 1997): 183.

50. *Ibid.*, p. 184.

51. See Slaughter, *A New World Order*.

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