

We should explore whether economic analysis facilitates agreement among nations of diverse cultural identities, or contaminates public debate with hypocrisy. After all, not discussing these conflicts does not make them go away, and may perpetuate a conflict or mask an unjust status quo. On the other hand, we do inhabit a small and fragile planet.

Here, I am less interested in answering these questions than in posing some unconventional queries for those who champion the use of economic analysis in international law.

## TREATIES, CUSTOM, RATIONAL CHOICE, AND PUBLIC CHOICE

by John K. Setear<sup>5</sup>

In this forum on explaining the sources and methods of international law, I'd like to examine the sources of international law—especially treaties and customary law—in light of the methods of international relations theory and of law and economics.

The basic question can be simply stated. Assume that, in attempting to effect international legal cooperation, national governments consciously choose between using treaties and using customary law as the form in which to embody their cooperative efforts. Which form of international law would we expect them to choose?

I analyze this question using two different methodological approaches, both of which are what one might call “rational-choice” methodologies in the sense that they assume that the relevant decision-makers rationally pursue known goals. The first approach, which I call the “iterative perspective,” focuses on minimizing transaction costs and implies that treaties are likely to be the method chosen by nation-states for effecting international legal cooperation. The second approach, which I call the “public choice” approach for present purposes, focuses on the interests of governmental sub-units and implies that custom is likely to be more prevalent. I then move from theory to practice and argue that, at least in the recent past, treaties rather than customary laws have been the favored embodiment of international legal cooperation. I thus conclude that the evidence is more consistent with the iterative perspective than with the public-choice explanation.

The essential assumption behind the iterative perspective is that parties to a transaction will seek to minimize the costs in a joint endeavor of formulating rules and monitoring compliance therewith. In law and economics, such an approach is broadly identified with “institutional economics”; in international relations theory, such an approach is identified with “regime theory” or “neo-liberal institutionalism.” I have elsewhere drawn upon these broader schools of thought and argued that such approaches imply a particular structure for successful cooperation between nation-states.<sup>1</sup> In a complex world in which there are broad gains from cooperation but significant incentives to cheat, nations should structure their interactions to allow cooperation to evolve over a number of clearly defined “iterations,” with clear definitions of what behavior constitutes cooperation along the way.

Treaties fit the iterative perspective's bill nicely. The law of treaties and the particular provisions of many treaties combine to set out both a highly structured series of interactions and a clear, centralized specification of the relevant standards of cooperation. Custom, with its decentralized specifications of the relevant rules and its much looser temporal structure, is less

Professor of Law and Cadell and Conwell Research Professor of Law, University of Virginia School of Law, Charlottesville, VA.

<sup>1</sup> See John K. Setear, *Ozone, Iteration, and International Law*, 40 VA. J. INT'L L. 193 (1999); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997); John K. Setear, *Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process To Define 'Iteration'*, 37 VA. J. INT'L L. 641 (1997); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L. J. 139 (1996).

desirable from this perspective. If national behavior is consistent with the iterative perspective, then treaties should be the prevalent form of international cooperation.

An alternative perspective examines closely the different incentives faced by particular parties, especially governmental sub-units, involved in the formulation of legal rules. In law and economics, such an approach is identified with "public choice theory"; in international relations theory, this general approach involves attention to "two-level games" or occurs in various ad hoc analyses lacking a particular rubric. The essential idea is that governmental entities consist of sub-units that pursue their particular objectives in competition with one another and without any necessary coincidence with the public interest.

A public-choice perspective implies that customary law will be the prevalent form of international legal cooperation, at least as far as the choices of the United States are concerned. The primary governmental sub-units for these purposes are the executive branch and the legislative branch. Given the constitutional allocation of powers and the practice of the twentieth century, the executive branch effectively has the ability to choose the form of international law with which to effect international cooperation. The executive branch also possesses relatively greater power with respect to the specification of customary law than with respect to treaty law, especially because using treaties to effect cooperation typically requires greater participation by the legislative branch than using customary law. In seeking to maximize its own discretion and influence, then, the executive branch should choose customary law as the form of international legal cooperation.

The iterative perspective thus predicts that treaties will be the prevalent form of international legal cooperation, while public choice theory predicts pre-eminence for customary law. Which form of international law in fact appears to be more commonly employed?

I would argue that treaty law is the predominant form of international legal cooperation, at least in the latter half of the twentieth century. In long-standing areas of cooperation, rules that were once customary have been superseded by rules codified in treaties, as with the Vienna Convention on Diplomatic Relations, the Law of the Sea, a variety of human-rights laws, and the law of treaties. (The United States, however, has not always chosen to be formally bound by such treaties.) Additionally, new areas of cooperation, such as international environmental law, typically involve rules set forth as treaty text rather than as evolutions or elaborations in customary law.

Viewed from within a framework that accepts the rationalistic assumptions of these theories, the argument set forth above implies the utility of international legal cooperation as a testing ground for competing implications of various theories of international relations or of law and economics.

Viewed from a more distant perspective, one may with some justification criticize the various theories as abstract and their assumptions as unrealistic, but one should note that application of these theories nonetheless leads to concrete predictions that encourage an examination of empirical realities.

One might also note that the discipline of international law is largely isolated from other scholarship in both law and political science. Rational-choice methodologies like those employed in the arguments above are a much more prevalent form of scholarly discourse in law than they were just a few decades ago. The same is true in international relations, although the transition has been more gradual in political science. If globalization is to blur the boundaries not only between nations but also between scholarly disciplines, then some attention by international legal scholars to international relations theory and to law and economics is wise.