



■ JOHN SETEAR

Explaining the Game of International Law and Politics

JOHN SETEAR'S SCHOLARSHIP FOCUSES ON INTERNATIONAL LAW as a sub-set of politics. Some of his earlier work concerns itself purely with the operation of international law among nations, especially with the laws and policies relating to treaties. His more recent work, by contrast, examines the complex interplay among international law and the three branches of the federal government. Regardless of the context, however, Setear divides his efforts into the wholesale demolition of the long-standing theories of others and the brick-by-brick construction of a less ideological, more logically defensible, and more empirically grounded view of international legal rules.

Setear's first article in the field was "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law," 37 *Harv. Int'l L.J.* 139 (1996). There, he argued against the traditional view that treaties, and the legal process that creates them, rest on notions of consent or

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procedural or substantive legitimacy. These values, Setear argued, cannot explain a number of important features in either treaties or the process that leads to their creation.

Setear advanced an alternative, “iterative” perspective that proved to be both parsimonious and predictive. The iterative perspective builds upon the international-relations theory known as “institutionalism,” which in turn derives from an analysis of the classic “Prisoner’s Dilemma.” The Prisoner’s Dilemma is a metaphor used by game theorists to elucidate the incentives facing a set of parties who could all benefit from cooperation with one another, but who can each benefit even more by failing to cooperate so long as those around them blithely hew to the collective endeavor. Conversely, each party would be worse off if they alone cooperate while others defect. For a variety of logical (though not behaviorally unassailable) reasons, theorists in a variety of disciplines have assumed that parties facing a single round of the Prisoner’s Dilemma will *all* fail to cooperate, despite the tantalizing prospects of gains from collective action. Then-recent research had opened the possibility, however, that if parties face a series of interactions, then a stable pattern of cooperation may evolve. In this view, such iterations—along with the ability to identify and remember other participants and their previous decisions—are a necessary (though not sufficient) condition for cooperation in the face of a Prisoner’s Dilemma.

Setear’s iterative perspective on treaties emphasizes the contingent nature of cooperation, the benefits of allowing nations to choose from among multiple and sequential levels of participation in the treaty process, and the particular legal contours of the rules on casting off treaty obligations already undertaken. Setear’s close analysis of both the histories and the texts of a variety of particular treaties showed an impressive consistency between the predictions of the iterative perspective and the realities of international practice.

In 1997, Setear was still at UCLA, but two periodicals here at the Law School were hospitable enough to accept his submissions. Presumably, the pieces won the award for the longest pair of titles by a single author

that year: “Response 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) and “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).

The focus of “Responses to Breach” is on the degree of predictive fit between a variety of rational-choice theories drawn from a variety of disciplines and the international legal rules governing the responses that one nation-state may legally take when another party breaches its obligations under a treaty initially binding them both. Setear divides the relevant rules into two broad categories. What he calls the “rules of release” govern whether an initially compliant party may legally cease its own performance under an agreement breached by another party, while what he dubs the “rules of remediation” govern the degree of harm that the victim of a breach may inflict upon the breaching party.

The rules of release are moderately complex. For bilateral treaties, any breach of a “material” provision releases the other party from its obligations. For multilateral treaties, the breach of a “material” provision releases *any* party “specially affected” by the breach or releases *all* parties if the breach has a “radical effect” upon them all.

At a broad level, these rules are sensible from a rational-choice perspective. As described earlier, the incentives facing potentially cooperative parties in international politics often resemble an iterated Prisoner’s Dilemma. Simulation-oriented research implies that the optimal strategy for a party in such a situation is to mirror the behavior of an opposing party, but with a one-period time lag—to cooperate currently if the other party cooperated in the previous time period, and to defect currently if the other party defected in the previous round. The law of treaties in fact implicitly imposes this strategy on treaty parties. If one party defects by breaching, then, under the rules of release, the other party may defect in rough equality by eschewing its own obligations under the agreement. If, in contrast, one party has cooperated by hewing to its obligations in the

previous period, then the general law of treaties requires the other party to cooperate in the current round by continuing to obey its own treaty obligations.

Furthermore, the theory of public goods, which dovetails with theories emphasizing the Prisoner's Dilemma as a metaphor for collective action, holds that a cooperative agreement becomes more difficult to reach and enforce as the number of parties involved increases. Consistent with this view, the rules of release excuse a party from a *bilateral* treaty simply upon a showing of material breach, while those rules require additional conditions to release a party from a *multilateral* agreement. Setear's analysis thereby tends to show that the rules of release are consistent with rational-choice theory at a relatively high level of abstraction.

At a greater level of precision, however, the rules of release are, according to Setear, difficult to reconcile with traditional rational-choice theories. As the rules of release are traditionally interpreted, for example, the magnitude of the breach is irrelevant so long as the breached *provision* is "essential" to achieving the "object and purpose" of the treaty. From a rational-choice perspective, however, the magnitude of the benefits foregone as a result of the breach should be the central concern. Furthermore, the abandonment of a multilateral treaty involving three parties is, under the existing rules of release, no easier to obtain than release from a treaty obliging a hundred and three parties, whereas public-goods theory would impose a difficulty of release that varied (in rough proportion) with the number of parties involved.

The article similarly concluded that the rules of remediation are at best imperfectly consistent with theories of rational choice. These rules lead on average to the infliction of *less* harm on the breaching party than that suffered by the victim of the breach. But in the international political context, breaches are often possible to conceal and well-tailored punishments may not be readily at hand. Theories of rational choice would therefore argue that, in order to counter-balance the situations where the breaching party suffers nothing because of the breach, the rules of remediation should typically inflict a *greater* harm on the breaching party than the victim suffered.

Setear's other 1997 piece, "Law in the Service of Politics," builds upon "An Iterative Perspective on Treaties" to argue that Institutionalism is a promising theory but, as currently formulated by political scientists, importantly incomplete. Institutionalism shows promise because it explicitly provides a framework for examining international cooperation, in contrast to the dominant, anti-legal, "Realist" theory of international relations, which asserts that nations must focus all their attentions on a zero-sum struggle for their very existences. Nonetheless, as Setear shows, the actual specification of Institutionalism by political scientists is howlingly incomplete.

Recall that Institutionalism emphasizes the potential importance of iteration to international cooperation. As Setear pointed out, however, Institutionalists had made no real effort to define what counts as an "iteration," nor did they identify when iterations actually occur – e.g., after the passage of a fixed interval of time; at the end of each of a series of summit meetings; each time a war ends? As Setear showed with a variety of concrete examples, the particular definition of "iteration" actually adopted is of more than abstract interest: different definitions of "iteration" can yield very different conclusions about international political events. Institutional theorist also took for granted that one party could easily tell when another participant has in fact acted cooperatively rather than uncooperatively, yet the real world of international relations is notoriously full of ambiguities resulting from linguistic barriers, cultural differences, and diplomatic double-talk. In short, the political scientists' theory of iteration, while potentially useful, remained at an unhelpfully high level of abstraction.

As Setear went on to explain, however, these gaps in theory can be filled by studying international law, especially the ways in which treaties are created. The treaty process, with its various gradations of legal obligations unspooling over time—negotiation, initial consent via signature, final consent via ratification, and the potential for reducing national obligations *via* termination—provides a ready, objective set of iterations. The formality of some, though not all, of these stages also provides a rough but

ready indication of whether a party has in fact decided in that iteration to participate in a given treaty's cooperative scheme (by consenting to its obligations). With literally thousands of treaties in existence, including those governing almost all prominent examples of multilateral cooperation, the treaty process is a potentially rich source of data to mine for those interested in the validity and refinement of Institutionalism.

In "Ozone, Iteration, and International Law," 40 *Va. J. Int'l L.* 193 (1999), Setear took up the implicit challenge of "Law in the Service of Politics" and closely examined the series of treaties regulating the anthropogenic production of ozone-depleting substances. The resulting series of iterations within iterations—a sequence of progressively more stringent documents, each with its own set of phases for negotiation, signature, ratification, and potential termination—provided many bushels of easily measurable grist for the analytical mill. Setear was able to use the treaty process both to give more precise content to such previously fuzzy variables such as "iteration" and "cooperation," and to offer empirical support for the iterative perspective. As he concluded, the ozone treaties, consistent with the iterative perspective, set up a self-reinforcing process that measurably led to extensive and ever-deepening cooperation.

Four of Setear's more recent pieces retain his interest in constructing a consistent, defensible theory and empirics of international legal phenomena, but they emphasize the interface between international law and the U.S. Constitution rather than the operation of treaties in the purely international realm.

The first such piece was "The President's Rational Choice of a Treaty's Pre-Ratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?," 31 *J. Legal Studs.* 85 (2002). Article II of the U.S. Constitution states that the President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided that two thirds of the Senators present and voting concur." Despite the clarity of the prescribed pathway, however, presidents sometimes avoid Senate ratification by submitting the texts to a simple-majority vote of both houses of Congress or by avoiding Congress altogether with an

Executive Agreement. As Setear points out, the Supreme Court, despite a number of opportunities, has never overturned the President's choice of a pre-ratification pathway.

The President thus appears to face an entirely discretionary choice as to the relevant pathway. Yet presidents have still chosen the pathways involving legislative participation even when—as occurred most notoriously when UVA law alumnus Woodrow Wilson submitted the Treaty of Versailles to the Senate—the result is a rejection of presidential wishes and a concomitant inability to bind the U.S. internationally to the treaty in question. Why, Setear asks, would a president take such a risk?

Setear's answer is that the president can choose how to ratify a treaty but not how to implement it. Many treaties, especially important ones, require implementing legislation from Congress. A well-informed foreign audience that cared about actual implementation of a treaty would therefore be suspicious of a president who ratified a treaty with no sign that Congress was inclined towards implementing legislation. A successful presidential effort to obtain legislative approval *before* ratification provides the necessary, credible signals from the president that he has staked himself to the tenets of the treaty and that it will be implemented. Setear undertook a detailed comparison of the relevant characteristics of particular treaties and their typical pre-ratification pathways, and concluded that the underlying presidential choices were generally consistent with a signaling-oriented theory. For example, trade treaties are both especially likely to require conventional legislation for their eventual implementation and especially likely to see the president submit such treaties to both houses of Congress before their initial ratification.

Setear again explored the relationship between presidential discretion and the instruments of international law in "Treaties, Custom, Iteration, and Public Choice," 5 *Chi. J. Int'l L.* 715 (2005). There, he concluded that, at least since World War II, the President has appeared to favor treaty law, rather than customary international law, as the method of instantiating international cooperative efforts. Given that treaty law is the more precise way to set out legal rules as well as to express national consent,

but that customary law is much easier for the President to control, Setear concluded that the executive branch seems inclined to favor expressive efficiency over the narrow promotion of its own power.

Setear's next article addressed not only the interaction between international and domestic U.S. law but also, as in his earlier articles, both the purely international realm and the theories of political scientists interested in international cooperation. In "Can Legalization Last?: Whaling and the Durability of National (Executive) Discretion," 44 *Va. J. Int'l L.* 711 (2004), Setear both applied and exploded a "legalization" framework set out in a series of articles by political scientists and legal academics focusing on the European Union and the World Trade Organization. These academics argue that international law and international institutions have become more centralized, formal, and legalistic. As Setear pointed out, however, the articles identifying this apparent trend commit the cardinal social-scientific sin of "selection bias," i.e., the examined case studies reflect only a particular, unrepresentative slice of reality. Importantly, the omitted case studies represent the largest and longest-standing swath of international institutions.

One such institution is the regulation of international whaling. The organizational structure of that decades-long effort at international cooperation shows that the highly legalistic and significantly centralized systems of the European Union and the World Trade Organization are rare and recent developments. More common are the less legalized and less centralized forms of organization typified by the whaling treaties, which in turn show no tendency towards a more legalized institution even after more than fifty years of existence. Setear also argued that, within national governments, a less formal and centralized international structure favors the executive branch. A particularized examination of the history of the whaling treaties showed the persistence of its relatively non-legalized, executive-friendly form of cooperation despite huge changes in other aspects of the international regulation of whaling. In the United States, the Supreme Court itself thwarted Congress' effort to cabin executive discretion in the levying of trade sanctions against nations violating the whaling treaties.

Setear's two most recent articles on international law, excerpted below, each reflect an important part of Setear's wide-ranging interests. In the big-picture "Room for Law: Realism, Evolutionary Biology, and the Promise(s) of International Law," 23 *Berkeley J. Int'l L.* 1 (2005), Setear undertakes a detailed comparison between nature as viewed by the evolutionary biologist, on the one hand, and the supposed similarities of the international political system as viewed by the prominent, anti-legal, "Realist" school of international relations theory. Setear demonstrates that the latter's arguments rest on a mixture of dubious, specious, and flatly incorrect analogies between selection pressures in nature and in international politics, and that there is thus ample room for law in international politics.

In the ground-level, domestically oriented "A Forest with No Trees: The Supreme Court and International Law in the 2003 Term," 91 *Va. L. Rev.* 579 (2005), Setear undertakes painstakingly detailed readings of a set of Supreme Court cases from a single Term to assess the degree to which the Court relied on international law in its decisions. Despite the attention this issue has generated, and the alarm it has caused some, Setear concluded that the nation's highest court was hardly in a rush to use international law in its decisions even when such rules were plainly at issue.

At bottom, Setear's work seeks to explain why international law and international institutions look and operate the way that they do. Rather than rely on well-worn abstract principles and general theories, Setear is constantly searching for theories that are consistent with the way the parties involved in shaping international law and institutions actually behave. He brings this same level of curiosity and creativity to his courses, which year after year draw rave reviews from students who are delighted to have the opportunity to examine how the games of international politics and international law are played. In both his scholarship and his teaching, Setear remains guided by what ought to guide all who consider themselves academics: a search for the truth. ☞

EXCERPTS

A Forest With No Trees: The Supreme Court And International Law In The 2003 Term

91 *Va. L. Rev.* 579

... SOME OBSERVERS ... MUST HAVE BEEN CONCERNED, WHILE others must have been excited, that the Court's docket during the 2003 Term included full arguments in seven cases directly presenting questions of international law. Three—*F. Hoffman-La Roche v. Empagran*, *Olympic Airways v. Husain*, and *Republic of Austria v. Altmann*—focused on essentially commercial matters. *Empagran* addressed the scope of the Foreign Trade Antitrust Improvements Act (“FTIA”) and the Sherman Act; *Olympic Airways* decided the liability of an airline for the death of a passenger under the Warsaw Convention; and *Altmann* raised issues of the international law of expropriation, the immunity of a foreign sovereign from suit, and the degree of deference owed to the executive branch's determinations about the effect of litigation on U.S. foreign policy. Four other cases—*Rumsfeld v. Padilla*, *Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *Sosa v. Alvarez-Machain*—involved issues of human rights. *Padilla*, *Hamdi*, and *Rasul* all concerned the status of individuals taken prisoner in the course of the war on terror; they thereby raised important issues of national security, deference to executive conduct in the war on terror, and the treatment of prisoners of war under the Geneva Convention. *Sosa* concerned a statute authorizing suits to redress “a tort ... committed in violation of the law of nations”—about as explicit an incorporation of international law into U.S. law as one could imagine. The stakes were high and the international components of the cases far more salient than in the cases from previous Terms referring to international law.

The Supreme Court's resolution of these seven cases should be deeply disappointing to anyone who hoped that the Court would embrace international law. The “principle” of international law endorsed in *Empagran* is so vague that even the least inventive U.S. courts should feel utterly unconstrained by it. *Olympic Airways* ignored the decisions of foreign courts with sufficient flagrancy to annoy even Justice Scalia, who has elsewhere advanced the arguably inconsistent principle that “the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.” The Court resolved *Altmann* by treating it as a case about statutory interpretation and, in particular, about the retroactive application of statutes. As to the human-rights cases, the Court in *Sosa* sandwiched its crabbed interpretation of a substantive international legal question between an extensive journey of statutory interpretation (and historiography) and a laundry list of the various issues that the Court did not decide at all. The Court resolved *Padilla* and *Rasul* as purely procedural cases about the allocation within the federal system of jurisdiction over habeas corpus cases, although doing so in *Rasul* did involve the Court's interpretation of a treaty rather than only domestic law. The Court split so badly in *Hamdi* that the implications of the holding for courts below are difficult to divine, but all of the Court's opinions viewed the case as about statutory authority and executive discretion. No Justice saw *Hamdi* as raising an issue of international law that the Court needed to resolve. The Geneva Convention, so potentially important given the facts of *Hamdi* and *Rasul*, and perhaps even *Padilla*, proved to be far from decisive in the Court's actual resolution of those cases.

Only *Sosa* and *Rasul*, therefore, deployed international law as a meaningful component of the Court's opinions; even then, *Sosa* took a repeatedly narrowing approach to international law, and *Rasul* implemented a traditional conception of sovereignty. One looks in vain for any expansionist approach to international law in any of the seven cases, but one may find repeated examples of the Court's cramping, ignoring, or defanging international law.

The Court's actual resolution of the cases was highly traditional and domestically oriented. Every case except *Olympic Airways* struck the Court as presenting an important issue of domestic statutory interpretation; *Olympic Airways* was to the Court a straightforward reading of its own precedent. *Altmann* and the four human-rights cases each had an important jurisdictional element, which the Court resolved by reference to various doctrines of habeas jurisdiction and immunity; these cases all involved a potential conflict between the judiciary and the Executive, which the Court resolved (in favor of the judiciary in four of the five cases) by discussing traditional balancing of areas of expertise. Even when the Court was ineluctably confronted with an issue of international law, as it was in *Sosa* and *Olympic Airways*, the Court favored a common-law methodology over prospective rule-making—a choice that favors older, customary-law methodologies of making international law over the new, more threatening system of treaties and international courts. The Court was also more comfortable with old-fashioned issues about sovereignty than it was with new-fangled issues of international human rights.

The Court in these seven cases thereby stayed on familiar, domestic legal ground. It interpreted statutes, assessed jurisdiction, chastised the executive branch, and plumbed the minds of the Founders. The Court did not rush to incorporate international law into its jurisprudence despite the fact that, in contrast to the cases from the 2002 and 2003 Terms that had garnered so much attention, international law was often directly at issue. International law in the Court's most recent Term proved to be an ignorable elephant in the room even if it may also have been a dog that didn't bark. ❧

Room for Law: Realism, Evolutionary Biology, and the Promise(s) of International Law

23 *Berkeley J. Int'l. L.* 1

I ARGUE IN THIS ARTICLE THAT THE INTERNATIONAL SYSTEM ... HAS ample room for law. I first elaborate upon a crucial, though sometimes implicit, assertion of the Realists that I call the "Selection Axiom:" strong selection pressure in world politics forces states either to practice a law-free *realpolitik* or to perish. I then draw upon the selection-oriented theory of evolutionary biology to argue, in the main portion of the Article, that the Realists' Selection Axiom is supported neither by logic nor facts. I conclude by arguing that the invalidity of the Selection Axiom leaves substantial room for international law in world politics.

My argument against the Selection Axiom has five parts. First, the Realists' inference that low state extinction rates in the present are the result of high selection pressure on states in the past is fallacious. Low state extinction rates are at least as consistent with an international environment reflecting little or no selection pressure as they are with the Realist view. In fact, high state extinction rates would more conclusively demonstrate the existence of high selection pressure in the international system.

Second, an examination of relevant empirical evidence concerning state survival rates suggests that, contrary to the assertion of the Selection Axiom, selection pressure on states is in fact low. Births of states in the modern era far outnumber deaths—the antithesis of the Malthusian situation that one would expect in an environment of high selection pressure. Indeed, since 1945, state death has virtually ceased while state births have skyrocketed, and thus whatever selection pressures might once have existed would appear to have vanished.

Third, evolutionary biology teaches us that evolution towards higher adaptive fitness reliably occurs only in a population with a large number

of individuals. The international environment, in contrast, involves an almost vanishingly small number of individuals (i.e., states) compared to natural populations. In small natural populations, random “genetic drift” is likely to be a powerful factor; analogously, the tiny population of states is one in which any number of factors besides a ruthless concern for state survival may be important.

Fourth, the vast majority of state deaths in the modern era occurred during one of two waves of “mass extinctions” in Europe, with a very low rate of state extinction at other times and in other places. Such a pattern—long periods of stasis interrupted by temporally and geographically intense flux—suggests what evolutionary biologists call a “punctuated equilibrium.” Natural extinctions that occur within the context of a punctuated equilibrium are typically more a matter of chance than of classical fitness. Similarly, the existence of a punctuated equilibrium in international politics implies that the demise of a particular state stems more from bad luck than from a state’s unwillingness or inability to conduct a foreign policy of law-free *realpolitik*.

Fifth, evolutionary biologists have concluded that sexual reproduction is a more adaptive mechanism than asexual reproduction when—but only when—environmental change is rapid and complex. If the relevant analogies between biology and international relations hold true—analogs that are admittedly somewhat difficult to draw with respect to reproduction—then high selective pressure in an international environment where change is rapid and complex should result in a method of state reproduction closer to sexual than to asexual reproduction. While state “reproduction” almost certainly occurs in an international environment of rapid and complex change, the most common method of state “reproduction” in fact appears much more closely akin to asexual reproduction. Evidence from the international environment is thus inconsistent with the expectation under the Selection Axiom that selection pressures would have pushed the relevant population (in other words, the set of nation-states) towards the fitter mode of reproduction (in other words, “sexual” reproduction).

From these multiple analyses of Realism as illuminated by evolutionary biology, I conclude that the Realists’ Selection Axiom rests on ground so unstable as to risk intellectual liquefaction. The Realist contention that low state extinction rates indicate high selection pressures is fallacious. Many more states have been born than have died. Analogies in the international system to the phenomena of genetic drift and punctuated equilibrium imply that fate—not fitness—is the most prominent determinant of survival in the state system. The less fit mode of reproduction actually dominates the international system. In light of all these arguments taken together, the Selection Axiom is untenable.

If the international system places minimal selective pressure upon modern states, then states may conduct their foreign policy free from the Realist shackles of a narrowly conceived national self-interest focused exclusively on power and survival. Of particular importance for those interested in international law, the irrelevance of the Selection Axiom makes room for a foreign policy that treats international law as a useful and significant constraint upon state behavior in international politics. Cooperation offers the promise of significant rewards, especially if measured in absolute terms, rather than the ultimate punishment of state extinction. States may make choices in foreign policy resulting from domestic politics, including the creation by rule-of-law democracies of “zones of law” in which international legal cooperation is a familiar, well-followed approach to international relations. Cooperation through international law, even if practiced only among relatively small groups of states, can lead to prosperity for its practitioners. The refutation of the Selection Axiom leaves a great deal of freedom for these ideas, all of which imply that states may employ and respect international law without hazard to their health. ❧

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