

INTRODUCTION

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THIS conference brought together a group of legal scholars and political scientists interested in the relationship between rational choice, international law (IL), and international relations (IR). Rational choice methodologies have played an important role in IR scholarship and in legal scholarship for many years. But IR scholarship has until recently neglected IL.¹ And while law and economics and related rational choice approaches have flourished in legal scholarship, lawyers have not until recently applied these methodologies to IL.² The purpose of this conference is to stimulate scholarship in this area.

International relations scholarship has always had a strand of thinking that is consonant with rational choice. Called “realism,” it assumes that nations are motivated mainly by a desire to enhance the power of the state, whether for the purpose of expansion or for the purpose of protection from expansionist tendencies of other states.³ Realism resembles rational choice approaches in its methodological individualism—though the individual is the state rather than the person or household—and in the emphasis on “self-interest” as opposed to moral commitments.

But realism has a strong empirical content that is not entailed by rational choice. First, realism’s assumption that the state is the unit of rational maximization does not follow from rational choice premises. Second, realists tend to be pessimistic about international cooperation because they believe that international anarchy is too dangerous an environment for states to risk becoming enmeshed with one another. And the realists’ hard-nosed insistence on the role of power in IR leads them to dismiss IL as rhetorical dressing

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¹ The growing “legalization” literature in IR is filling this gap. See Special Issue: Legalization and World Politics, 54 *Int’l Org.* (Judith Goldstein *et al.* eds., Summer 2000).

² See Jeffrey L. Dunhoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 *Yale J. Int’l L.* 1, 2 (1999) (noting that “the law and economics revolution has, with few exceptions, bypassed international law”). Dunhoff and Trachtman offer an excellent introduction to the promise of economic analysis of IL.

³ For a recent comprehensive statement, see John Mearsheimer, *The Tragedy of Great Power Politics* (2001).

for the power-induced equilibrium, useful at best for deceiving credulous publics.⁴

Neither of these last two conclusions—pessimism about international cooperation and skepticism about the efficacy of IL—necessarily follow from rational choice premises. In the 1980s, a group of political scientists—since labeled “neoliberal institutionalists” by label-happy IR scholars—began to reach quite different conclusions on the basis of rational choice models of IR.⁵ They were called institutionalists because they argued that much international order is constituted and preserved by institutions (like NATO or the World Bank). Like the realists, the institutionalists assumed that states were basically rational interest or power maximizers. But the institutionalists were more optimistic about the ability of states to cooperate in anarchy, their optimism driven to a significant extent by innovations in game theory on which they relied.

Although they emphasize the importance of institutions, only recently have IR institutionalists actually examined the specific roles that institutions play in promoting cooperation. As they began to consider the range of formal and informal international institutional arrangements, a natural move was to consider IL more generally. Nevertheless, political science work on IL has been somewhat abstract and limited to one form of IL (treaties) to the exclusion of the other (customary IL).

The use of rational choice models to analyze domestic law has a longer history than rational choice in IR. One can trace its roots to the 1960s and even before; it took off and became an established subfield of law in the early to mid-1970s.⁶ Rational choice ideas have since then made contributions to nearly every area of domestic legal scholarship. But with a few important exceptions, rational choice has not had much influence on IL. And the little rational choice work there has been has not attracted the attention of scholars working in the law and economics field generally.⁷

It is not clear why this is so, but one can speculate. International law differs from every area of domestic law because there is no central power that announces and enforces the law. Economic analysis of domestic law nearly always assumes just such a power—the U.S. or state governments, of course—and focuses on how the law, as enforced, affects behavior or how

⁴ See Stephen Krasner, *Sovereignty: Organized Hypocrisy* (2000); E. H. Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (1946); compare Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (6th ed. 1985).

⁵ The seminal publications were *International Regimes* (Stephen Krasner ed. 1983); Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984); and Duncan Snidal, *Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 *Am. Pol. Sci. Rev.* 923 (1985).

⁶ See Richard A. Posner, *Economic Analysis of Law* 25–26 (5th ed. 1998).

⁷ See Dunhoff & Trachtman, *supra* note 2.

it should be brought in line with efficiency and related normative concepts. The habits of mind and the methodological tools that developed in connection with economic analysis of domestic law are not suitable for analysis of IL. The assumption of enforcement, so common when analyzing domestic law, is more complex in IL and pushes one toward modeling the enforcement side of the analysis. This difference may be why law and economics scholars have not focused on IL.

Another puzzle is why IL scholars have not followed their colleagues in political science to use the tools of rational choice to understand IL. The explanation probably has to do with the culture of IL scholarship. As David Kennedy notes, “Law professors who teach international law are understood to favor its development, to believe in its efficacy, to see their pedagogic practice as persuasion and defense of international public order.”⁸ International law scholarship thus tends to focus on policy prescriptions that reflect author preferences or criticisms of practices deemed to violate IL.⁹ As the papers in this conference demonstrate, rational choice methodologies tend to be employed in positive rather than normative analysis, at least in the first instance. Perhaps this is why they are disfavored by traditional IL scholars.

A related reason for international lawyers’ failure to use rational choice tools might be belief that rational choice explanations denigrate the significance of IL and support the possibility—much dreaded by international lawyers—that IL is not really “law.” It is true that IL scholarship tends to focus on legal sources as explanatory variables, while rational choice explanations tend to include power and many other nonlegal influences on nations’ purposive behavior. As the papers in the conference show, however, rational choice is agnostic about the “law”-ness of IL, whatever that might mean. Rational choice explanations can treat IL as either endogenous or exogenous, depending on the problem under consideration.

This last point suggests a more general lesson of this symposium, namely, the flexibility of rational choice methodologies. Rational choice is the general label for a variety of related methodological approaches to the study of goal-directed behavior under constraints of scarcity. As the symposium papers demonstrate, rational choice includes many different subfields with various emphases, including price theory, game theory, transaction cost economics, and public choice. In addition, rational choice by itself makes no assumption about the actors who rationally maximize their goals. The papers that follow apply rational choice techniques to a range of actors—states, leaders, other

⁸ David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 *Transnat’l L. & Contemp. Probs.* 329, 335 (1994).

⁹ See Dunhoff & Trachtman, *supra* note 2, at 3; W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in *International Incidents: The Law That Counts in World Politics* 3, 7 (W. Michael Reisman & Andrew R. Willard eds. 1988).

governmental actors, domestic actors, and transactional actors—in examining and explaining IL.¹⁰

The symposium makes clear the power of rational choice to elucidate many issues in IL. Some of the papers also address the limitations of rational choice. Rational choice does not, and does not purport to, explain every aspect of behavior. Many of the papers focus on the edges of rational choice explanation, including the role played by values, norms, and ideas.

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¹⁰ A few of the papers were solicited after the conference and therefore are not discussed in the concluding comments.