

## Coordination in the Absence of Sovereign Intervention

*Comment*

by

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In his article (PAULUS [2009]) Andreas Paulus argues that law and economics constitutes an important contribution to legal scholarship, which will complement but not substitute for doctrinal normative analysis. He criticises the law-and-economics approach in several respects. Although I fully agree with Paulus that law and economics can never replace normative legal analysis in public international law, I disagree with some of his criticisms, or at least doubt whether they really pose severe problems and limitations to the approach.

Paulus criticises the law-and-economics movement in public international law in four respects:

- (1) The law-and-economics approach does not acknowledge the value and specificity of law.
- (2) The domestic analogy between states and individuals is problematic: can states be treated like individuals?
- (3) Can we assume that there is such “a thing as interests of a State as a whole” (p. 173)? What about internal preference formation, and what about the role of nonstate actors?
- (4) The value placed on compliance and enforcement of law by political science and law and economics is misplaced.

These criticisms by Paulus are targeted towards law and economics as such, not towards any specific piece of research. In its generality, the criticism surely does not apply to all research done under the approach. It depends on the concrete research question and the concrete models used whether the critique is justified or not. However, the criticisms relate to assumptions that are often made in law-and-economics models. Subsequently, I comment on these four problems.

*(1) The law-and-economics approach does not acknowledge the value and specificity of law.* This claim seems somewhat unfair to me. In my perception law and economics just looks at a particular aspect of law production and law application, and it is therefore limited in its ability to make scientific statements about law. But this is true for every approach. Paulus delineates what law-and-economics approaches do undertake and what they cannot undertake. Usually law and economics pursues

one of two goals. First, it strives to explain (or to help understand) why and how law is created in the first place, or how it develops. In the international sphere this amounts to explaining international cooperation and treaty-making. Second, it tries to explain behaviour of individuals or other subjects of the law, given certain rules. In this respect law is perceived to work as a constraint on behaviour. In the international sphere, this amounts to explaining the effects of international law on states, organizations, and individuals. However, as a positively oriented discipline, law and economics has not the aim to analyse the value of norms or law as such. No positive approach can ever substitute for dogmatic analysis of law.

*(2) The “domestic analogy” between states and individuals is problematic: can states be treated like individuals? And what about nonstate actors?* Paulus argues that it causes certain problems if states are the basic unit of analysis. First, he claims, inequality among states is much greater than among individuals. Second, such an analysis cannot grasp the influence of nonstate actors, such as NGOs, businesses, or terrorists, on international-law formation. I would like to give a threefold response:

First, there has been a long methodological discussion in rational-choice theory (and law and economics belongs to this paradigm) over the value and the problems of using collective actors as units of analysis. It is true that collective actors are abstract entities and it is somewhat difficult to speak of preferences of the collective or, in this case, the state. The state cannot have preferences, and within it different and even conflicting preferences may be present.

However, at least in economics and political science, we are used to working with collective actors – the firm, the party, the church, and many others – in our theories. It is reasonable to assume that most of these actors have some specific interest they pursue: for example, to maximise profit, votes, or some collective good. In classical public-choice theory we find either the idea that there are “collective interests” (OLSON [1965]) or the idea that the representatives’ personal interests are tied to the organisations’ interest in a way so that the representative pursues what is in the interest of the collective (DOWNS [1957], NISKANEN [1971]). Some rational-choice theorists say that the rationality assumption might even hold better for collective actors than for individuals (ZINTL [1994]). However, there is in fact still a problem of the internal aggregation of preferences in every organisation – to which I turn below.

Second, there are surely inequalities between states in many respects. I cannot see, however, why these inequalities should be viewed as greater than those between individuals. How could we measure and compare such differences? Apart from that, I do not understand why inequalities pose a problem for analysis in a law-and-economics fashion. Rational-choice models can deal with inequalities among their actors. These asymmetries can explain different preferences of states and thus different goals in treaty bargaining. What is the problem of the approach?

Third, and similarly, why should it be impossible to analyse also nonstate actors in a law-and-economics fashion? Why should we be restricted to states? Whenever nonstate actors play a significant role in treaty preparation, we can incorporate

them into our models. Usually, in the preparation, conclusion, and enforcement of international treaties states play a major role. But in some phases other actors may also play a role, and this should and can be reflected in the analysis. Paulus is right in calling attention to these actors, which are often neglected for the sake of simplicity. They pose no principal obstacle for theory-building, however.

*(3) Can we assume that there is such a thing as "interests of a state as a whole"? What about internal preference formation?* Paulus's third point is related to the second. In international-relations analyses, looking at the preferences of states (or heads of states) and neglecting internal preference formation was long the state of the art. It might have been justified in times of high-politics diplomacy, when the world and the researchers looked only at the power relations of states and did not much care about global public goods, global responsibilities, and actors other than the state. The world has changed, however, and the focus of research as well. Nevertheless, taking governments' preferences or states' preferences as given is surely a useful simplification even in our times.

In the meantime the state has been disaggregated in international-relations theories, and there is no reason why this cannot also be done in law and economics. The process of disaggregation started with the theory of two-level games (PUTNAM [1988]) and has a prominent advocate in MORAVCSIK [1998], who developed a liberal rational-choice theory of preference aggregation within the state, as a part of his theory of European integration. It is open to dispute, however, whether this has really helped to understand negotiations at the EU level or whether it has just made the theory more complex. We do not need to go down to the smallest entity in order to model the world in a micro perspective. It is obvious that governments' preferences are a result of national processes (at least this is valid for democracies). However, do we really need to know how preferences are aggregated over all individuals or how preferences are formed within an individual (including genetics, social psychology, and neurobiology) if we want to understand how international law is created or how it governs states? In order to keep our models intelligible and our theories parsimonious, we have to cut off the causal chain somewhere.

*(4) The value placed on compliance and enforcement by political science is misplaced.* Paulus argues that legal obligation and compliance are not identical. It is obvious that the validity of a norm or legal obligation is different from compliance with this norm. Bad compliance records do not tell anything about the validity of the norm. Whatever theory one may have on how the validity of a norm is constructed, by the consensus of its subjects or by legitimate procedures, the norms' validity is independent of its enforcement and of compliance of the actors ruled by it. Noncompliance and violations of international law by states do not devalue the law.

But why should we not do research on enforcement of international law and compliance? This is an interesting question in itself, given that means of securing compliance and sanctioning infringements are still rare at the international level.

The extent to which not only literal sanctions but negative reputational effects of violations of international law are effective in securing compliance is a question that is also open to empirical investigation and theoretical reasoning. Reputation effects can easily be modelled in game theory – for example, in signalling games. It is more difficult to empirically attribute compliance with international law to either the threat of sanctions, the fear of loss of reputation, or an “intrinsic” motivation of “the state” to comply with a norm it is “convinced of.” Such a project needs a careful research design; however, finding an answer to such a question does not seem to be more difficult for states than in the criminology of individuals.

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