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Erga Omnes Norms and the Enforcement of International Law

Comment

by

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1 Introduction

Under traditional “two-party” norms of international law, an aggression by state X against state Y only gives state Y the right to retaliate. If, however, a matter of international law is governed by “erga omnes” norms, all states are entitled to engage in countermeasures. This raises the question why some international legal norms have the status of erga omnes while others do not.

POSNER [2009] argues that erga omnes rules are likely to emerge in areas where, on average, externalities due to the original aggression are high, motives for taking norm violation as a pretext for engaging in predatory behaviour are weak, and incentives for free-riding are strong. Moreover, he predicts that erga omnes rules will reduce free-riding and hence increase the probability of enforcement.

We shall argue herein that erga omnes rules can actually have the opposite effect of increasing free-riding and reducing the probability of enforcement. This might explain why genocide in Dafour is ongoing despite (or even because) being governed by an erga omnes norm.

←**Au.:**
“Dafur” is
now
“Dafour”.
O.K.?

2 Posner’s Analysis

The basic tenet of Posner’s analysis is that, under perfect information, international norms emerge as equilibrium behaviour of states.¹ Consequently, violations only arise as the result of miscalculations, endgames and exogenous shocks on parties’ payoffs.

Following this concept he argues that, absent externalities, erga omnes rules cannot arise in international law as they will never emerge as states’ equilibrium behaviour. Consider the obligation to respect the border of neighbours and assume that state X violates this norm and attacks state Y . If state Z subsequently attacks state X the question arises whether state Z can credibly claim that it only retaliates against the original aggression. The answer is no, as Z was not affected by the aggression. Therefore, X must conclude that Z ’s action was purely predatory and thus constitutes a second

¹This view is provocative in itself as many scholars of international law consider “*opinio iuris*”, i.e. the view held by states that they follow a norm out of *legal obligation*, to be an essential feature of law (see e.g. ROBERTS [2001]).

unrelated aggression. Yet, this means that state X would have to retaliate, in order to preserve its reputation. Hence, the obligation to respect the border of neighbors cannot be an *erga omnes* norm.

However, in the presence of externalities, this conclusion might no longer hold. Balance of power arguments (e.g. Britain's 19th century foreign policy) and moral externalities (e.g. US invasion of Somalia) can make it credible that an attack by Z on X is actually a *reaction* to the original aggression by X .

This leads Posner to conclude that *erga omnes* rules emerge in areas where, on average, externalities due to the original aggression are high, motives for predation are weak and free-riding is pervasive. In such a situation, states could credibly claim, that attacking an aggressor is a retaliatory measure rather than an independent act of predation. A case in point would be instances of war crimes or genocide in Dafour as opposed to discrimination against women in the oil-rich Gulf region.

Yet, this still leaves open the question why international law matters given that, under perfect information, it is supposed to be a mere description of states' equilibrium behaviour. Posner presents the following informal argument: If states are imperfectly informed about other states' payoffs, the law might serve a signalling function. The idea is that states interpret international law as describing *average* equilibrium behaviour. By deviating from a norm, a state therefore signals that it has a non-standard type. As this might impede its chance to engage in fruitful future cooperation with other states, a state concerns itself with obeying international law. Specifically, an *erga omnes* rule makes intervening less costly for third parties such that more states would be willing to enforce a norm than under a two-party rule.

Arguing that the probability of enforcement increases in the number of potential enforcers, Posner concludes that *erga omnes* norms increase levels of enforcement. As we shall see in the next section this argument does not generally hold.²

3 *Reduced Enforcement Due to Erga Omnes*

3.1 *Model*

Assume that X engages in an act of aggression against Y . Following this attack, both Y and a third party Z can simultaneously invest in mobilisation. If the mobilisation is successful each state will automatically proceed to retaliation against X . Subsequently, payoffs are realized.

Both parties derive a benefit of 50 if the aggression of state X is met with retaliation. If a state engages in countermeasures, it bears a direct cost of 40 and an indirect reputational cost of 20 provided its act is considered a violation of international law.

Investment in mobilisation increases the probability, p , that retaliation will be successful at a decreasing rate. In order to derive a closed form solution, we assume the

²The result that the probability of enforcement actually decreases in the number of potential enforcers is a standard result in civic duty games (see e.g. RASMUSEN [1997, pp. 77ff.]).

following functional form:

$$(1) \quad p(\cdot) = 1 - e^{-10c} \in [0, 1], \quad p'(\cdot) = 10e^{-10c}.$$

3.2 Two-Party Norms

Under a two-party regime, any act of retaliation by a third party would be considered a violation of international law. Consequently, state Z derives a payoff of -10 ($50 - 40 - 20$) if it engages in countermeasures and will therefore never invest in equilibrium. State Y , however, is entitled to countermeasures and therefore derives a positive payoff of 10 ($50 - 40$) from choosing retaliation. Accordingly, his expected payoff is:

$$\Pi_Y = 10p(c) - c,$$

where c is Y 's investment in mobilisation. We can derive the following first-order condition for state Y 's optimal mobilisation:

$$10p'(c^*) - 1 = 0 \implies p'(c^*) = 1/10.$$

Using the explicit functional form for $p(c)$ (1) we get an enforcement probability of

$$(2) \quad \pi = p(c^*) = 99\%.$$

3.3 Erga Omnes Norms

Under an erga omnes regime, *both* states are allowed to engage in countermeasures. Hence, if Z retaliates, it does not have to fear any reputational loss and therefore derives a payoff of 10 . If only Y retaliates Z can free-ride and receives a payoff of 50 . If neither party retaliates both parties end up with 0 . Z 's expected payoff is therefore:

$$\Pi_Z = 10p(k) + 50[1 - p(k)]p(c) - k,$$

where c and k are the mobilisation investments of state Y and Z , respectively. Similarly state Y 's expected payoff is given by

$$\Pi_Y = 10p(c) + 50[1 - p(c)]p(k) - c.$$

Differentiating and solving for a symmetric Nash equilibrium ($\hat{c} = \hat{k}$), we get the following first-order condition for state Y 's optimal mobilisation decision:

$$\frac{\partial}{\partial c} \Pi_Y = 10p'(\hat{c}) - 50p'(\hat{c})p(c) - 1 = 0.$$

Making use of the explicit functional form of $p(\cdot)$, we get a probability of retaliation of 19.8% for Y and Z . Assuming independence, the probability of enforcement is therefore

$$(3) \quad \hat{\pi} = 1 - (1 - 0.198)^2 = 35\%,$$

which is less than under the two-party regime (see expression (2)).

We therefore conclude that erga omnes rules can reduce the enforcement probability by increasing the free-riding problem. Intuitively, if a state derives a positive payoff from retaliation and is the only one allowed to do so, it will be more likely to retaliate than given the opportunity to free-ride. It might therefore be better to only allow neighbours to intervene in cases such as genocide. By eliminating the prospect of free-riding on the world community, an anticipated refugee crisis from a neighbouring country may well be motivation enough for taking decisive action.

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