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THE RULE OF LAW: INTERNATIONALIZATION AND PRIVATIZATION

4 Is there an emerging international rule of law?

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An international rule of law complementing modern states' domestic rule of law seems to be emerging. At least in the four issue areas of international law considered here – international trade, security, labour, and environmental law – empirical evidence suggests that relevant dispute settlement procedures have been judicialized and their use by complainants as well as their acceptance by defendants have increased in practice. Albeit still far from what we are used to from the domestic rule of law, the emergence of an international rule of law can be regarded as indicative of a fundamental transformation of modern states.

Introduction

Since the 17th century, the rule of law has emerged as the dominant legal principle *within* modern states, while *between* modern states sovereignty has become the central legal principle. The former principle reflects the domestic hierarchy of the state over its society, while the latter institutionalizes the anarchy within the international society of states. Legally, both principles are fundamental to modern states' identity. As principles, however, rule of law and sovereignty could hardly be more contradictory. While the rule of law requires that states respect domestic law, sovereignty gives states the justification to act arbitrarily at their discretion beyond international law. If, therefore, a substantial international rule of law were to emerge that complements the domestic rule of law, this would amount to a fundamental transformation of the modern state.

To trace this transformation, I will discuss whether issue-area-specific international judiciaries constitute, similar to domestic judiciaries, the institutional backbone of an emerging international rule of law. After all, internationally, there are more and more judicial procedures designed to adjudicate in disputes over breaches of international law.[11,18] The diplomatic dispute settlement procedures under GATT, for instance, have been replaced by a judicial dispute settlement mechanism under the WTO, which is authorized to convict, and if necessary punish, states that do not fulfil their commitments. Recently, an International Criminal Court was created to sentence war criminals, and the UN

Security Council now regularly criticizes those states threatening international peace and authorizes or mandates sanctions against them. The rulings of the European Court of Justice enjoy both direct effect and supremacy in domestic legal orders. International environmental regimes such as the ozone and the climate regime have various built-in, quasi-judicial procedures designed to cope with non-compliance, and an International Tribunal for the Law of the Sea has also been established.[26]

For many idealists, the judicialization of adjudication procedures leads almost automatically to better compliance with international law and also to a comparable treatment of breaches of international law. They consider the emergence of an international rule of law as mainly a matter of good – i.e. judicial rather than diplomatic – institutional design for adjudication procedures.[5] By contrast, for so-called realists it is not a matter of institutional design of adjudication procedures whether states comply with international law and whether comparable breaches of international law will be treated comparably. They assume that, due to the anarchical structures in international relations, powerful states in both judicial and traditional diplomatic adjudication procedures can and will act as they please, while less powerful states have to suffer what they must.[15]

However, the question whether – and if so where and when – judicialized adjudication procedures coincide with a corresponding practice of dispute settlement is an entirely empirical one, and cannot be answered with theoretical assumptions, idealist or realist. Idealist assumptions are clearly undermined by the fact that the existence of the International Court of Justice (ICJ), with a judicialized adjudication procedure, has hardly transformed international practices of dispute settlement. Since it has rarely been invoked and its rulings were often ignored, it could hardly institutionalize an international rule of law. But realist assumptions are also dampened, here by the fact that the European Court of Justice (ECJ), marked by a heavily judicialized process of adjudication, has transformed European dispute settlement. In contrast to the ICJ, the ECJ is regularly invoked and its rulings are usually followed, thereby establishing an international rule of law in Europe.[1]

The judicialization of adjudication procedures can be regarded as a first necessary condition for an emergent international rule of law. In contrast to traditional diplomatic adjudication, judicialized procedures offer at least the chance for a comparable treatment of comparable breaches of international law.[11,18] For a fully-fledged international rule of law, however, at least two further conditions have to be met. First, complainants should generally be prepared to make use of these adjudication procedures when others do not comply with their international commitments. Second, defendants should be prepared to accept these adjudication procedures when faced with complaints about their non-compliance with international commitments. Hence, the judicial dispute settlement system

within the GATT/WTO context only points to an emergent international rule of law on trade if settlement procedures are both generally used by complainants and accepted by defendants.

Preliminary evidence suggests that all the conditions for an international rule of law are met to a larger degree today than they were two decades ago. To substantiate this, three areas of international law that are structurally similar to three major areas of domestic law need to be scrutinized:

(1) **Private goods law**. In one area that is structurally similar to domestic private law, international law is designed to protect private goods of state or non-state actors. In this area, disputes usually imply that a state or non-state actor files a complaint with an international institution about another state or non-state actor's violation of international legal obligations. An example for this area of international law, to which almost all international regimes dealing with economic issues belong, is the World Trade Organization (WTO).

(2) **Public goods law I.** There are two other areas of international law, in both of which international public goods are legally protected. In the first of these areas – which can be regarded as the structural equivalent to domestic criminal law – disputes typically position international institutions against single state or non-state actors that allegedly violate their international obligations. Most international regimes concerning security issues are located in this area of international law. The regime of the UN Security Council (SC) is an example.

(3) **Public goods law II.** The second area in which international law is meant to protect public goods has some structural similarities to domestic public law. Here, disputes typically imply that non-state actors file a complaint – for example with an international institution – about state actors' violations of their international legal obligations. Various international environmental regimes (IERs) and the International Labour Organization (ILO), for example, belong to this area.

This essay investigates whether an international rule of law is emerging in each of these areas: First, I outline the *judicialization* of issue-area-specific adjudication procedures over the last two decades. Second, I present preliminary evidence that the procedures in these issue areas are generally *used* by complainants in order to defend their rights. Third, I give some evidence indicating that adjudication procedures in these issue areas are generally *accepted* by defendants. The paper concludes with an assessment on the emergence of an international rule of law.

Judicialization as a procedural precondition of an international rule of law

Although it is in practice an important dimension of the modern state, the rule of law is hard to define. Many different definitions have been given;[23] however, I conceive of an international rule of law as a legal order based on the principle that all actors are equal before the law and, hence, no actor is above the law. Within this order, all actors, no matter how powerful, are equally bound by legal rules and, regardless of their power position, violations of these legal rules by these actors are treated equally. In other words, within a legal order based on the rule of law like cases must be treated alike.

In most issue areas with traditional diplomatic adjudication procedures, the conditions for a comparable treatment of comparable cases do not hold;[15] more powerful states are more likely to get away with violations of their legal obligations, while less powerful states are more likely to have to face consequences when committing similar violations.[27] For example, although China and North Korea might have a similar human rights record, owing to the diplomatic procedures of the United Nations Human Rights Commission (UNHRC), China has much less cause to worry about United Nations resolutions condemning its human rights violations than North Korea.

With the establishment of judicial adjudication procedures in some issue areas of today's international relations, however, at least a procedural framework has been established for treating like cases alike. Under such procedures, based on independent courts, the likelihood of powerful actors having to face consequences when they violate their legal obligations should be similar to that of a less powerful actor committing a similar violation. For instance, before the European Court of Human Rights (ECHR), comparable human rights practices of, say, Germany and Luxembourg are likely to lead to comparable legal consequences.[a]

While it is true that neither diplomatic adjudication procedures, like those of the UNHRC, have become the exception, nor are judicial adjudication procedures, like those of ECHR, the rule,[14,18] over the last two decades many adjudication procedures in international relations have gradually become judicialized, i.e. they have departed from the negotiation and mediation mode and have become more court-like. The key developments in this respect are that adjudication procedures have become increasingly politically independent, rely increasingly on compulsory jurisdiction and have become more accessible.[11,24]

[a] However, even with respect to the European Court of Justice the degree to which power can affect rulings is a matter of debate, as can be gathered from the works of Garret[7] and Mattli and Slaughter.[13]

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Independence

The political independence of adjudication procedures is a crucial precondition for the equitable treatment of comparable violations of international legal rules.[11:459–462] Up until the early 1980s there were only a few independent international adjudication procedures for deciding whether or not legal rules have been violated. In most issue areas of international relations, adjudication systems, if they existed at all, were dominated by panels, bodies, committees or commissions like the UNHRC, made up of politically dependent state representatives. Today, however, there are more than 40, mostly independent international courts or court-like bodies, most of which were established during the 1990s.[14,18:723–728]

One prominent example is the GATT/WTO.[10:107–137] In the 1950s, decisions on disputes over alleged violations of GATT obligations were undertaken by so-called panels, composed of three legal experts acting in their individual capacities.[9] Their independence was compromised, however, by the fact that those states involved in a dispute themselves selected the panellists on a case-by-case basis. Frequently, representatives from neutral states rather than truly independent legal experts were selected as panellists.[17:66–91] However, in the late 1980s and early 1990s, especially after the WTO had replaced the old GATT, the adjudication procedure became more politically independent. While the composition of the panels did not change, a remarkably independent Appellate Body was established to revise panel reports in appeal cases. In contrast to the panels, the Appellate Body is composed of legal experts who are as independent as judges of ordinary courts. Rather than being selected by the states involved on a case-by-case basis, the seven members of the Appellate Body are now elected to deal with all disputes that might arise during their four-year term. This gives them a significant degree of political independence.[17:177–198]

By contrast, the independence of the Security Council is still limited. The SC has to be considered as an adjudication authority because its main task is to determine whether states' violations of international legal obligations constitute threats to international peace, breaches of international peace, or acts of aggression. Its independence, however, is compromised, because, as stipulated in the United Nations Charter of 1945, its decisions are made by 15 state representatives comprising representatives of the five permanent members – i.e. France, Great Britain, China, Russia and the US – and ten non-permanent members elected by the United Nations General Assembly. These representatives are committed to follow instructions they receive from the foreign ministries of their respective states. Decisions made by the Council can therefore hardly be conceived of as being free of political motivations.[12]

In numerous IERs, as well as in the ILO, it has been possible to enhance the independence of adjudication procedures.[2,21] Generally speaking, until the early 1980s hardly any IER contained provisions for independent authorities to adjudicate on violations of legal obligations. In the International Whaling Commission, states had to settle disputes over the violation of their legal obligations amongst themselves. By contrast, most IERs established since the 1980s do have adjudication procedures, albeit with a limited degree of political independence.[16] The international regime for the protection of the ozone layer was probably the first IER in which a committee of experts was given the task of adjudicating disputes over alleged breaches of international obligations. Since then, however, expert committees have to some extent become standard for most IERs. Most of these committees enjoy remarkable political independence, as the experts who act in their individual capacities, once elected, cannot be removed for their entire term. In most of today's IERs, the political independence of these committees is only compromised by the financial dependence of their experts on the states from which they come.[16]

Jurisdiction

Another, equally important, precondition for an international rule of law is that adjudication procedures can exercise compulsory jurisdiction.[15] Only when those allegedly in breach of their legal obligations have no means of preventing the procedure from being implemented does a comparable treatment of comparable offences seem viable.[27] Traditionally, in most international issue areas, adjudication procedures could not exercise compulsory jurisdiction. This is the case for the ICJ, whose jurisdiction largely depends on its recognition by the states involved in a legal dispute. Since the 1980s, however, adjudication procedures in a growing number of issue areas have been given the authority to give a ruling without the consent of the defending state.

The GATT/WTO is an example of an institution in which jurisdiction of adjudication procedures has become compulsory.[17:182] Throughout the 1970s and 1980s, jurisdiction of GATT panels was not obligatory.[9] The establishment of a panel, as well as the adoption of its report, required the decision of the GATT Council. These decisions, however, were dependent on the consensus of all states, which meant that even the defending state could always block the procedure.[17:66–91] This changed in the mid 1990s, when the WTO came into existence. Since then, neither the establishment of panels nor the adoption of panel reports requires a unanimous decision. On the contrary, the newly established Dispute Settlement Body can reject panel reports only by consensus.[10:107–137] The only possibility remaining for defending states now is to invoke the Appellate Body. Again, however, its reports can only be rejected by a unanimous decision of the Dispute

Settlement Body. Therefore, the defendant can no longer block the adoption of reports.[17:177–198]

The jurisdiction of the Security Council also seems to be compulsory: all states that threaten international peace are subject to SC resolutions. And since these resolutions can be passed with 9 out of 15 votes it would, at first glance, seem difficult for any state to prevent the SC from denouncing any threat to peace it might have committed. However, as permanent members, Great Britain, France, China, Russia and the US can use their veto power to block any SC resolution that is directed against them, and they can, moreover, protect their allies from censure by SC resolutions. Although less accepted since the end of the Cold War, this nevertheless substantially restricts the SC's compulsory jurisdiction.

By contrast, jurisdiction of adjudication procedures has become quasi-compulsory in many IERs as well as in the ILO. In most IERs, committees of experts are given the authority to decide independently whether information they receive on violations of environmental rules merits further investigation. Although, in most IERs, the reports of expert committees have to be approved by the relevant conference of states, in practice they are always adopted without further revision.[16] Similar to other expert committees within the ILO, the Committee on Freedom of Association has acquired quasi-compulsory jurisdiction. It may decide on complaints about violations of the freedom of association without the accused state having any chance of blocking the transfer of its report to the ILO Governing Body.[b]

Access

A further precondition for the comparable treatment of comparable violations of international legal rules is that adjudication procedures cannot only be invoked by states.[11:462–466,24:57] For reasons of diplomacy, states tend to refrain from complaining about other states violating international legal rules, which means that only some violations, those of less powerful states, lead to legal proceedings, while others, especially those of powerful states, do not. To rectify this, non-state actors should be given access to international adjudication procedures. Traditionally, however, international adjudication procedures can only be instigated by states, the ICJ being a typical example here. Adjudication procedures in which non-state actors had standing were traditionally rare, an early exception being the ECHR. However, today's international adjudication systems increasingly provide access for non-state actors such as individuals, private groups, and supranational agencies.

[b] The political independence of other ILO committees remains limited, however.[20:290]

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Table 1. Judicialization of international adjudication procedures

	GATT/WTO	*SC*	*ILO/IER*
Degree of independence	high (independent court)	low (political body)	medium (committee of experts)
Degree of compulsory jurisdiction	high (compulsory)	medium (limited)	medium (quasi compulsory)
Degree of accessibility	low (states only)	low (states only)	high (also private actors)
Overall degree of judicialization	high (increasing)	low (almost unaltered)	medium (increasing)

Nevertheless, the adjudication procedure within the trade regime of the WTO still only provides access for states, and, as in the GATT, only states may call for a panel. Beyond the access already given to them under the GATT, private actors can only 'participate' in the WTO dispute settlement proceedings by means of so-called *amicus briefs* in which they provide information that should be taken into consideration by the Appellate Body.[22]

Similarly, access to the adjudication procedures of the SC is largely limited to states. Although the Secretary General of the UN can bring to the attention of the SC any matter that may threaten international peace, he cannot bring in draft resolutions to force the Council to decide on such matters. The SC is free to use or ignore information brought to its attention by the Secretary General. Ultimately, only states can bring in draft resolutions the Council can be forced to vote on, and thus only states have standing before the SC.

Access to the adjudication procedures of IERs, in contrast, has increasingly been opened up to include complaints from non-state actors. In most of today's IERs, such as the regime for the protection of the ozone layer and the regime to combat climate change, adjudication procedures can be initiated 'ex officio'.[16] Expert committees entrusted with adjudication can act upon information on potential violations they either acquired themselves or received from the regime's secretariat. This indirectly gives environmental groups such as Greenpeace access to the adjudication procedures. Although formally, such groups' complaints do not have to be heard, IERs' committees of experts have so far never refused to act upon credible information about potential violations of legal obligations by states. Moreover, in accordance with its principle of tripartism, the ILO provides access for labour unions as well as employers' organizations to its adjudication procedures (Table 1).[20:284–300]

Overall, in terms of their changing accessibility as well as their growing political independence and increasing compulsory jurisdiction, adjudication

procedures have become more judicial than they used to be. This certainly holds true for the WTO, but also, albeit to a lesser extent, for most IERs and the ILO; only the SC is lagging behind. A greater degree of judicialization, however, does not lead to uniform adjudication procedures but, depending on the issue area in question, it does give rise to adjudication procedures with a specific profile. The adjudication procedures of the WTO, for instance, are more judicialized in terms of their political independence and their compulsory jurisdiction, but not with respect to their accessibility. By contrast, most IERs and the ILO are more judicialized in terms of access to the relevant adjudication procedures, but their political independence and their compulsory jurisdiction are still compromised. Judicialization of the SC is not only less advanced, but also quite contained in terms of its jurisdiction, since its independence as well as its accessibility are still restricted.

What is, however, the driving force behind this process of judicialization? It seems at least plausible that it is to some degree a consequence of accelerated processes of globalization in certain issue areas during the 1970s and 1980s, which would also explain why judicialization is far more advanced within the GATT/WTO than within the SC. By the same token, the medium level of globalization in the field of environment politics might explain why the judicialization of adjudication in IERs is less advanced than in the GATT/WTO but more so than in the SC.

Globalization has become the driving force behind judicialization because states have had to respond to its challenges with new international rules. Since, in the context of globalization, national borders are increasingly penetrated, states have increasingly agreed on behind-the-border rules, which are particularly difficult to implement. In contrast to at-the-border rules they not only regulate how states have to act towards other states, but also how they should regulate their own societies, as in the case of WTO rules on consumer safety, SC rules on terrorism and ILO rules on child labour, for example. In response to the complexities of globalization, the rules themselves have become increasingly complex, and their application particularly difficult, requiring the weighing of conflicting legal principles. For example, the application of many WTO rules rests on balancing free trade against consumer safety. These 'new' rules encouraged states gradually to accept judicialized adjudication, as it became apparent that judicial adjudication is better suited to the reliable implementation and application of such rules than diplomatic adjudication.

The use of procedures by complainants

For an international rule of law, judicialization is, however, just one requirement; if adjudication procedures are judicialized, but hardly used in practice, one cannot, at least not meaningfully, speak of an international rule of law. It is, of course,

a common feature of all legal orders that complainants seek settlement out of court. Consequently, complainants do not have to invoke the relevant adjudication procedures in each and every instance of a breach of international law. However, for the rule of law within a legal order to be effective, complainants must not take the law into their own hands. Hence, for the emergence of an international rule of law it seems to be imperative that complainants use the relevant adjudication procedures.

There are, in fact, a number of indications that international adjudication procedures are increasingly being used. One indicator is that they are invoked more frequently today than they were two decades ago.The dispute settlement proceedings of the GATT/WTO are an interesting case in point. After an impressive start in the 1950s, when GATT dispute settlement proceedings were invoked in 53 instances, the use of the dispute settlement system dropped to about seven instances in the 1960s, but rose again in the 1970s and the 1980s, to 32 and 115 cases respectively.[9:287] But after the introduction of judicialized dispute settlement proceedings under the WTO, figures jumped in the 1990s to 311 cases in less than a decade (http://www.wto.org).[c] Furthermore, not only small, and therefore less powerful, but also large and powerful states became targets of WTO dispute settlement proceedings. Indeed, the US and the EU – the most powerful members – have been the targets of almost half of all complaints registered with the WTO. Even less powerful states regularly invoke WTO dispute settlement proceedings against US and EU trade policies.[d] Moreover, not only small and therefore less powerful states, but also large, and powerful states, which could easily take the law into their own hands, rely on the WTO dispute settlement procedures. Taken together, the US and the EU are indeed responsible for about half the complaints submitted to the WTO since the mid-1990s. And they invoke the WTO dispute settlement procedures even when they complain about violations of less powerful states.[e]

The Security Council developed in a similar fashion. In the 1950s the SC passed only 54 resolutions. Since then, its use has increased to more than 140 resolutions in the 1960s and over 180 in the 1970s and 1980s, but in the 1990s it increased dramatically to 700 resolutions over that decade (http://www.un.org). Notably, the majority of SC resolutions concern alleged violations of fundamental legal

[c] Although this is partly due to intensified trade relations as well as a growth in internationally agreed trade rules and the rising number of member states of the GATT/WTO,[3,4] the frequent use of the dispute settlement proceedings remains quite remarkable. Some even suspect that the judicialization of the dispute settlement procedures has exacerbated GATT/WTO dispute settlement.[1]

[d] From 1995 to 2003, developing countries initiated more than 20 dispute settlement proceedings against the EU and more than 30 against the US (see http://www.wto.org). However, more than half the developing country members of the WTO have never participated in dispute settlement proceedings.

[e] From 1995 to 2003 the US and the EU each invoked WTO dispute settlement proceedings against developing countries in around 30 cases respectively (see http://www.wto.org).

rules by less powerful states such as Somalia, Haiti, Rwanda, Yugoslavia etc. Due to their power of veto, it is impossible to enforce resolutions against the most powerful states such as the US. But other powerful states such as India and Pakistan, which have no power of veto, have also seldom been the subject of SC resolutions. Nowadays, however, even the most powerful states tend to invoke the SC to deal with situations they conceive of as threats to peace, as in the case of the US in the 1990s, for example, with respect to the civil wars in Somalia, Bosnia, Haiti and Kosovo.[25:224–245] Moreover, the US not only engaged the Council in 1991 before the first Iraq war, but also in 2003 before the second Iraq war, and in both cases the Council ascertained that Iraq was in violation of its international commitments. The problem of the SC is not so much that powerful actors are not prepared to use it, but rather that without being invoked by powerful states the SC remains inactive. The SC can only be activated if powerful states such as the US are affected, as in the cases of Haiti or Bosnia, but if no powerful state is interested, as was the case with respect to Sudan or Nigeria, the SC cannot act.

The use of the ILO adjudication system is quite remarkable. Since its introduction in the 1950s, proceedings of the Committee on Freedom of Association were invoked in more than 2,300 instances (http://www.ilo.org). In particular, trade unions use that procedure to protest about states' interventions in their right to freedom of association. Since the mid-1970s, an increasing number of unions have also taken the opportunity to add critical comments to their governments' annual reports.[20:288] Other procedures under the ILO, such as the Representation Procedure and the Complaints Procedure, are invoked less often, but their use has also increased. The Representation Procedure, for instance, was initiated in 45 instances in the 1980s and early 1990s, as compared to only 14 instances from the 1940s to the 1970s.[19] Moreover, the committees of experts in numerous IERs are quite frequently invoked. Environmental organizations, such as Greenpeace, regularly report violations of international environmental obligations to the relevant secretariats and expert committees, which then initiate investigations. For example, within the Convention on the International Trade in Endangered Species (CITES), TRAFFIC – an organization set up by environmental groups – is the main source of information on potential violations for the secretariat and the standing committee. TRAFFIC's complaints are not only directed against small and relatively powerless states, but also against powerful states such as Russia, China, Japan, Great Britain, France and Germany. Similarly, the committee of experts for the protection of the ozone layer investigated alleged violations of rules concerning the reduction of CFCs by Russia.

The increasing use of international adjudication procedures is not only indicated by their increasing invocation, but also by the increasing propensity of complainants to stick to the procedures if defendants do not respond constructively.

The GATT/WTO trade regime provides a useful example here. In contrast to the GATT, the WTO dispute settlement system provides complainants with effective means to deal with defendants who are not prepared to comply with WTO rulings. Today therefore, complainants rarely take the law into their own hands, but rather abide by the rules of procedure for dispute settlement. This can be illustrated by comparing how the US reacted when the EU violated rulings of the old GATT and the WTO respectively. For example, in the hormones dispute between 1985 and 1994, the US employed non-authorized sanctions because the EU did not comply with a GATT panel report criticizing its ban on beef treated with certain growth hormones.[9] By contrast, when the same dispute arose again in the WTO between 1995 and 2003, the US refrained from taking unauthorized sanctions. Although the EU did not comply with the WTO ruling, criticizing again its ban on hormone-treated beef, the US applied sanctions only after having been authorized to do so. At least within the WTO context the propensity to take the law into one's own hands has clearly changed.

The same can be said with respect to the SC. A comparison of the 1980s and the 1990s indicates that the propensity of the US to ask the SC for approval before using military force against states threatening international peace has grown. The US intervened, for instance, in Grenada in 1983 and in Panama in 1989 without any prior involvement of the SC. In the 1990s, by contrast, in almost every case the US not only sought SC resolutions that criticized the states in question, but also resolutions that approved military interventions in those states. This certainly holds true for the interventions authorized by the UN in Somalia in 1992, Haiti in 1994 and Bosnia in 1995. One can even argue that these interventions would not have taken place without SC authorization. But this also holds true for the interventions in Kosovo in 1999 and Iraq in 2003, when the SC could not agree on authorizing resolutions. Admittedly, when Russia and France blocked these resolutions the US nevertheless took the law into its own hands, which only underlines that the use of SC procedures remains precarious. But the fact that the US had at least sought the authorization of the SC sets these interventions clearly apart from earlier, similar measures in Panama and Grenada, and demonstrates that the use of the SC procedures has been transformed.[25:275–277]

With respect to the ILO and IERs, incentives for complainants to single-handedly take sanctions against states that do not respect their international commitments are almost non-existent. Therefore, even when violators ignore the 'rulings' of the relevant expert committees within the ILO or IERs, complaining states hardly ever take the law into their own hands, but prefer to use the relevant procedures in order to persuade others to join authorized sanctions. It should be pointed out, however, that in most IERs, as well as the ILO, the scope for imposing sanctions is limited,[16] so it is hard to say whether complainants' reluctance to take the law into their own hands has changed.

The acceptance of procedures by defendants

Within the issue areas analysed here, the propensity of states to use relevant adjudication procedures against non-compliant states has increased. For the emergence of an international rule of law, however, not only the use but also the acceptance of judicialized adjudication procedures by those accused of violating their legal obligations must be considered imperative. It goes without saying that it is a common feature of legal orders under any rule of law that defendants seek to avoid being tried and convicted in court. Consequently, the unconditional acceptance by defendants of the rulings of international adjudication committees cannot be considered a criterion for an international rule of law. In a legal order based on the rule of law, however, defendants must not put themselves above the law by preventing, with single-handed measures, relevant adjudication procedures dealing with their alleged violations. For the emergence of an international rule of law it seems to be imperative that defendants generally accept the adjudication procedures as well as their rulings.

Indeed, evidence suggests that states allegedly in breach of legal obligations are increasingly willing to accept international adjudication rulings, and one indicator of this is that fewer states today try to prevent adjudication procedures from being initiated.

Under the terms of the old GATT, defendants often used their right to block the establishment of dispute settlement panels. In the hormones dispute with the US, for example, the EU prevented a GATT panel from being established.[9:225–226,229–230] Additionally, as with the US in its dispute with the EU about Domestic International Sales Corporations, defendants sometimes threatened to file counter-complaints if complainants asked for the establishment of a GATT panel. Today, however, under the dispute settlement system of the WTO, defendants are no longer able to prevent panels from being established. Consequently, there has been an increase in attempts to prevent complainants from requesting WTO panels with threats of counter-complaints. The US threat to file a counter-complaint against European tax systems in its dispute with the EU about Foreign Sales Corporations is one example. However, defendants now strictly refrain from threatening with illegal counter-measures to block the establishment of panels.

The same cannot be said of the Security Council. What is remarkable though, is the sharp drop in the use of veto. On average, from the 1950s to the late 1980s, France, Great Britain, Russia, China and the US vetoed more than 50 resolutions per decade. Within the context of the Cold War they either blocked resolutions criticizing their own use of force or protected their allies from being criticized by the SC. By contrast, during the 1990s, fewer than ten resolutions were vetoed (http://www.un.org). While the five permanent members continue to protect themselves from SC resolutions, their propensity to protect their allies has decreased. Instances like the repeated veto by the US in order to prevent Israel

from being denounced for its use of force in the Middle East, have become less frequent. This even holds true despite the fact that today the threat of a permanent SC member using its veto – such as Russia's threat in 1999 to veto a resolution authorizing the use of force against Yugoslavia – often leads to the withdrawal of the respective resolution by its sponsors.

Within most IERs and the ILO, defendants are increasingly prepared to accept that potential violations of international legal obligations are subject to investigations of relevant expert committees, and by and large they refrain from attempting to block such investigations. In fact, in many IERs, expert committees have through customary practice acquired the right to conduct these investigations.[16] The CITES standing committee entrusted with investigating violations of restrictions on the trade in endangered species is a case in point. However, also in regimes where this task was formally introduced, defendants usually desist from obstructing relevant expert committees from becoming involved. This even holds for investigations of child labour by the relevant ILO committee. Instead of criticizing its investigations for interfering into their domestic affairs, most states collaborate with the ILO in order to curb child labour. Moreover, the sustained willingness of most states to submit annual reports, despite the fact that these often lead to criticisms about the unsatisfactory implementation of social standards, seems to indicate a widespread acceptance of ILO procedures.[20:288]

Another indication of the growing acceptance of international adjudication procedures by states accused of violating international legal obligations is that the states generally comply with rulings. For instance, the compliance record of the WTO, although far from perfect, is more satisfactory than that of the GATT, and complaints about violations of WTO rulings are comparatively rare. In particular, small and therefore less powerful states tend to comply.[4] Also, the compliance records of large and powerful states have at least improved.[4] A comparison between transatlantic disputes from the early 1960s to the mid-1990s under the old GATT and in the late 1990s and early 2000s under the WTO reveals increasing rates of compliance by the US and the EU. When convicted under the GATT, these states complied fully in only 21 out of 53 disputes, but under the WTO they complied fully in 21 out of 32 disputes. The non-compliance rate also dropped from 18 out of 53 to 8 out of 32 [3] disputes.[f] More remarkably, these powerful states not only comply when WTO rulings are backed by equally powerful states, but also when less powerful states complain about their trade practices. The US, for example, complied with a ruling that was the result of a complaint filed by Costa Rica. The fact that a small state like Costa Rica was able to win a dispute under the WTO against a state like the US and induce its compliance with the ruling shows the remarkable acceptance the WTO dispute settlement system enjoys.

[f] The compliance record of powerful states deteriorates when stakes become higher, however. In high-stakes disputes between the US and the EU under the WTO, the losing party made full concessions in only two out of seven disputes.[3]

Security Council resolutions are frequently ignored, however. In the 1990s, for instance, Libya, Sudan and Afghanistan were found responsible for backing terrorist organizations and the SC resolved that they should renounce their support for terrorists. As they did not respond constructively, the Council imposed sanctions. However, only Sudan – and later also Libya – gave up supporting terrorists, while Afghanistan persisted in giving support to terrorist organizations throughout the early 2000s.[6:107–134] More prominently, although hard hit by SC sanctions, Iraq under the leadership of Saddam Hussein ignored numerous SC resolutions throughout the 1990s. Moreover, in almost every civil war of the 1990s, the SC passed resolutions requiring the warring parties to refrain from force, but many of the resolutions, dealing for instance with Bosnia, Somalia and Kosovo, were ignored. In some instances, however, the SC was able to authorize sanctions that forced the warring parties to respect at least parts of its resolutions. For example, the sanctions against the Khmer Rouge in Cambodia proved to be an important factor leading to its dissolution.[6:135–145]

Moreover, compliance records with expert committees' rulings made in IERs as well as the ILO seem to be satisfactory. The ILO expert committee, for example, reported in 1994 that in at least 2034 cases it had investigated during the previous 30 years, progress towards compliance had been made.[20:288] More specifically, the ILO Committee on Freedom of Association documented that in the 180 cases it had to deal with between 1971 and 2000, progress towards compliance had been made, with a rapid improvement in compliance rates in the 1990s.[8] For 1996 alone, the Committee registered more cases of progress towards compliance than in the period between 1971 and 1977. Similarly, most IER expert committees are able to elicit respect for their deliberations. For example, an expert committee of the international regime for the protection of the ozone layer managed to bring Eastern European countries back in line with their obligations to reduce CFCs.

The rule of law in international relations

All in all, at least in the issue areas analysed here, the three preconditions for an international rule of law seem to be emerging gradually. International adjudication procedures have not only become more judicialized, but their use and acceptance by states has increased as well (Table 2). The three preconditions are not uniformly fulfilled across issue areas; however, the rule of law is considerably well-advanced with regard to trade issues (GATT/WTO), on a remarkable, albeit lower level with respect to environmental and labour issues (IERs, ILO) and on a much lower level as regards security issues (SC).[g]

[g] Moreover, the use of adjudication procedures is more advanced than their acceptance. Under the WTO as well as within the SC, the propensity of defendants to comply with adverse rulings does not match the complainants' propensity to invoke the relevant adjudication procedures. In the long run this imbalance could endanger the whole project of an international rule of law.

Table 2. Transformation of international dispute settlement procedures

	GATT/WTO	*SC*	*ILO/IER*
Judicialization of procedures	high (increasing)	low (unaltered)	medium (increasing)
Use of procedures	high (increasing)	medium (increasing)	medium (increasing)
Acceptance of procedures	medium (increasing)	low (unaltered)	medium (increasing)
Overall	high	low	medium

The judicial nature of adjudication procedures seems to be at least one of the driving forces behind their generally increasing use and acceptance. The reasons why the judicialization of adjudication procedures has strengthened their use and acceptance are twofold:

(1) Their judicialization gives adjudication procedures stronger teeth as instruments for coping with violations of international law. Judicialized procedures are stronger because it is more difficult to prevent their invocation and their rulings. Complainants therefore know in advance that using the procedures might help them to protect their rights, and defendants are aware that not respecting the procedures might have consequences. As the example of the WTO demonstrates, this gives complainants additional incentives to use these procedures while also creating additional incentives for defendants to accept them.

(2) In addition, the judicialization of adjudication procedures has strengthened their use and acceptance because they convey more dignity. Therefore, both complainants and defendants know in advance that not using these procedures and not accepting their rulings is more difficult to justify in public. And this in turn, as the case of the WTO has shown, supports the propensity of complainants to use these procedures while at the same time supporting defendants' propensity to accept them.

However, the emergence of an international rule of law is not a one-way street to progress; there are certainly pitfalls along the way, among which the continuing US hegemony might be the deepest. Although in many issue areas the emergence of an international rule of law took place in tandem with a growing US hegemony, there are indications now that US hegemony might endanger the international rule of law. Notably, the judicialization of procedures as well as their use and

acceptance have come under severe pressure in areas where US dominance is particularly strong. This is particularly obvious in the Security Council, where the US has repeatedly flouted the pertinent adjudication procedures. By contrast, in issue areas in which US dominance is not as pronounced, the judicialization of adjudication procedures, their use and their acceptance continues uninterrupted. This holds true in the WTO, for instance, where the US generally respects the relevant adjudication procedures.

However, even in these issue areas, the emergent rule of law is still far from what we are used to from the domestic rule of law of modern states in the OECD world in terms of the adjudication procedures, their use and their acceptance. It does not seem likely that within the foreseeable future the international rule of law will be as binding on states as the domestic rule of law, not even in the OECD world. Moreover, in contrast to the domestic rule of law, the emergent international rule of law is not integrated. There is not one rule of law which extends across all issue areas, but rather a variety of rules of law differing from one issue area to the next. And so far there are no indications that such an integrated rule of law might come about. The international rule of law remains issue-area-specific and, therefore, of a different kind than the domestic rule of law.

Nevertheless, the emergent international rule of law certainly indicates a fundamental transformation of the sovereignty of modern states. It significantly limits states' discretion to arbitrarily act outside of international law and, given that sovereignty was one of the characteristics that have defined modern states for centuries, the emergence of an international rule of law must be considered as one of the most fundamental transformations of modern states within the last century.

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