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Judicialization in international security: A theoretical concept and some preliminary evidence

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Judicialization in International Security
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Judicialization in International Security

A Theoretical Concept and some Preliminary Evidence

ABSTRACT

Many claim a process of judicialization of international dispute settlement procedures is taking place. In order to capture this ongoing process we introduce an analytical framework to assess the degree of judicialization of international dispute settlement procedures. We then proceed to present preliminary results of applying this framework to the *procedure* and *practice* of dispute settlement in the United Nations Security Council.

In our concept, judicialization means that international dispute settlement procedures increasingly incorporate the normative principle of impartiality, i.e. the principle of a comparable treatment of comparable breaches of law. We use a graded scale ranging from purely diplomatic to predominantly judicial procedures to assess the degree of judicialization of any given dispute settlement procedure. From our institutionalist point of view, it is entirely an *empirical* question whether – and if so when – judicialized dispute settlement procedures lead to a corresponding practice of judicialized dispute settlement. For this reason we analyze in a second step the corresponding practice of dispute settlement. The degree of judicialization of the dispute settlement procedure within the framework of the United Nations Security Council remains low. Nonetheless, our comparison of the periods 1974-1983 and 1990-1999 suggests so far an increasing judicialization of the dispute settlement *practice* within the Security Council.

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INTRODUCTION[1]

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 reflects the domestic hierarchy of the state over its society, while the latter institutionalizes anarchy within the international society of states. As principles, however, the rule of law and sovereignty could hardly be more contradictory. While the rule of law requires states to respect domestic law, sovereignty gives states the justification to act arbitrarily at their own discretion beyond international law. Legally, both principles are fundamental to the identity of modern states. If, therefore, a substantial international rule of law were to emerge to complement the domestic rule of law and hollow out sovereignty, this would amount not to a minor modification, but to a fundamental transformation of the modern state.[2]

In order to establish whether this transformation is taking place, we will discuss whether issue area-specific international judiciaries, in a similar way to domestic judiciaries, constitute the institutional backbone of a potentially emergent international rule of law. After all, a process of judicialization of international procedures designed to settle disputes about breaches of international law is taking place (Romano 1999; Keohane et al. 2000). The diplomatic dispute settlement procedures of GATT, for instance, have been replaced by a judicial dispute settlement mechanism under the WTO that is authorized to convict, and if necessary punish, states that do not fulfill their commitments. The rulings of the European Court of Justice – and albeit to a lesser extent those of the European Court of Human Rights – have gradually established both

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[1] This article presents preliminary results of the research project ‘Judicialization of International Dispute Settlement’ which is part of the Research Center ‘Transformations of the State’ (TranState) funded by the German Research Foundation (DFG). The analytical framework presented here is an offspring of the research project as a whole, which also includes Achim Helmedach, Gerald Neubauer and Michael Zürn. For their helpful comments on an earlier version of this paper we would like to thank all participants of the Section on “Legalization and World Politics” of the Pan-European International Relations Conference organized by the Standing Group on International Relations (SGIR) of the European Consortium for Political Research (ECPR) 2004 in The Hague. We are especially grateful to Jonas Tallberg and Nicole Deitelhoff who discussed this paper at the said conference. Moreover, we would like to thank the two anonymous reviewers of the Research Centers’ working paper series for their written comments. Last but not least we thank Vicki May for her linguistic assistance.

[2] For helpful discussions on the international rule of law see Watts (1993, 2000), Tamanaha (2004), Brownlie (1998).

direct effect and supremacy in domestic legal orders. Newly established international environmental regimes such as the ozone and the climate regime have various built-in, quasi-judicial procedures designed to cope with non-compliance.

Many *idealists* that were engaged in the debates about international law of the 1950s and 1960s would have considered the gradual judicialization of international dispute settlement procedures to be final proof of an emergent international rule of law. For them the emergence of an international rule of law was mainly a matter of well-designed – i.e. judicial rather than diplomatic – institutional dispute settlement procedures (Clark/Sohn 1960). These idealists believed that the judicialization of dispute settlement leads almost automatically to improved compliance with international law and also to a comparable treatment of comparable breaches of international law. Others however, already argued in these debates of the 1950s and 1960s about international law that the judicialization of international dispute settlement procedures is hardly an indication of an emergent international rule of law. For these so-called *realists*, it never was a matter of institutional design of dispute settlement procedures whether states comply with international law or not, and whether comparable breaches of international law were treated comparably. Rather, they assumed – and still suppose – that due to the anarchical structure in international relations, powerful states can and will act as they please in both judicial and traditional diplomatic dispute settlement procedures, while less powerful states have to suffer what they must (Morgenthau 1948).

From our institutionalist point of view, however, it is entirely an *empirical* question whether – and if so where and when – judicialized dispute settlement procedures lead to a corresponding practice of judicialized dispute settlement. The appropiate question to ask is, if international dispute settlement procedures that institutionalize the principle to treat comparable breaches of international law alike, a principle fundamental to any order based on the rule of law, able to assure in fact like treatment of like cases. This empirical question cannot be answered with theoretical assumptions, be they idealist or realist. Idealist assumptions were clearly undermined by the fact that the International Court of Justice (ICJ), with its judicialized dispute settlement procedure, has hardly transformed international practices of dispute settlement. Since the ICJ has rarely been invoked and its rulings often ignored, it could hardly be said to have institutionalized an international rule of law. But realist assumptions were also weakened by the fact that the European Court of Justice (ECJ), marked by a heavily judicialized process of dispute settlement, has transformed European dispute settlement. In contrast to the ICJ, the ECJ has regularly been invoked and its rulings usually followed, thereby establishing an international rule of law in Europe (Alter 2001). Hence, in the context of today’s judicialization of international dispute settlement procedures it remains an

empirical question whether a corresponding practice of dispute settlement emerges in which like breaches of international law are increasingly treated alike.

Our research project, “*The Judicialization of International Dispute Settlement*” investigates whether the judicialization of international dispute settlement procedures coincides with a corresponding practice of judicialized dispute settlement among OECD countries. We employ a twofold comparison: firstly, we compare the dispute settlement procedures and their practical application within specified issues areas during the 1970s and 1980s with those of the 1990s and 2000s. This allows us to investigate transformations over time. Secondly, we analyze the procedures as well as the practice of dispute settlement across five issue areas, namely international trade (WTO), international security (UNSC), international labor standards (ILO), international human rights (CHR), and international environmental policies (CITES). This gives us the opportunity to compare transformations across issue areas.

In this paper, however, we will focus on dispute settlement within the United Nations security regime, thereby illustrating the conceptual framework by which we intend to investigate the transformation of international dispute settlement both over time as well as across issue-areas. The paper will proceed in two steps. In a first step we lay out our conceptual framework, elaborating on how we intend to “measure” transformations of dispute settlement. In a second step we present some preliminary evidence with respect to dispute settlement within the United Nations Security Council.

1. CONCEPT

In our view, the emergence of an international rule of law depends on two conditions. First, the availability of judicialized dispute settlement procedures to parties involved in disputes about breaches of international law. Judicialized dispute settlement procedures alone might not ensure that like cases are treated alike, but without judicialized dispute settlement procedures a comparable treatment of comparable cases, a fundamental principle of any order based on the rule of law, would seem almost inconceivable (Keohane et al. 2000, Romano 1999).[3] Second, judicialized dispute settlement procedures have to be put to practical application by states. One could hardly expect a comparable treatment of comparable cases if judicialized dispute settlement procedures were widely ignored. Hence, in our concept we only conceive of an international rule of law if both conditions are met: a formal judicialization of dispute settlement *procedures* as well as a *practical application* of such procedures (Zangl 2005 forthcoming).

[3] While it is not a sufficient condition of an international rule of law, the judicialization of dispute settlement procedures is certainly a necessary condition (Watts 1993).

1.1. Judicialization of Dispute Settlement Procedures

To carry out our investigation we first have to develop a concept that enables a comparison of the degree of judicialization of dispute settlement procedures both over time and across issue areas. In our concept, judicialization means that dispute settlement procedures, i.e. procedures designed to adjudicate in cases of disputes about breaches of international law, increasingly incorporate the normative principle of impartiality, i.e. the principle of a comparable treatment of comparable breaches of law.[4]

Impartiality is by no means institutionalized through traditional diplomatic dispute settlement procedures based on inter-state negotiation and mediation (Morgenthau 1948). Within the context of diplomatic dispute settlement procedures, 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 (Zangl and Zürn 2004a). For example, although China and North Korea might have a similar human rights record, due to the diplomatic procedures of the United Nations Commission on Human Rights (CHR), China has less cause to worry about United Nations resolutions condemning its human rights violations than North Korea. Because of the CHR's lack of political independence, China can easily use its political power to prevent any resolution condemning its human rights violations from being adopted.

Impartiality is certainly institutionalized to a far greater degree through judicial dispute settlement procedures (Keohane et al. 2000, Romano 1999). 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, infringements of comparable human rights practices by, say, Germany and Luxembourg are likely to lead to comparable legal consequences before the European Court of Human Rights (ECHR). The universal equal standing of all Europeans before the ECHR, its political

[4] We consider judicialization processes as being part of more encompassing processes of legalization. Without going into details, we use a concept of legalization that derives on the one hand from Hart's famous positivist concept of law as a system of primary and secondary rules, i.e. a system in which substantive rules are embedded in procedural rules that define legislation, adjudication and enforcement of substantive rules. Inspired on the other hand by Habermas' normative concept of law, however, we concede that not all procedures to legislate, adjudicate or enforce substantive rules indicate the same level of legalization. Accordingly, legalization depends on procedures meeting fundamental normative criteria such as democratic legislation, impartial adjudication and effective enforcement. Judicialization is considered to be legalization with respect to dispute settlement procedures, hence excluding legislation as well as enforcement procedures. For an overview of the discussion on so-called legalization in international politics see List/Zangl 2003 and Rustiala/Slaughter 2002.

independence from European governments, and its compulsory jurisdiction within Europe help ensure that power differentials between states like Germany and Luxembourg cannot affect the sentence.[5]

In our research project, however, we cannot only rely on the dichotomous distinction between traditional diplomatic procedures on the one hand and judicial procedures on the other. Such a distinction is too crude to enable small real-world differences between different dispute settlement procedures to be captured. Moreover, many dispute settlement procedures in international relations today are located somewhere between traditional diplomatic means and newly emerging judicial procedures (Keohane et al 2000; Merrills 1998). We therefore use a graded scale ranging from purely diplomatic to predominantly judicial procedures. Existing dispute settlement procedures can be situated on this scale and then be compared over time and across issue areas. This graded scale is based on five criteria all of which are considered institutional incarnations of the principle that like breaches of international law should be treated alike – regardless of an actor's power position.[6] Each grade as well as the overall scale can be considered to assess the institutional safeguards against political influence privileging legal reasoning. The comments on each criterion are arranged from diplomatic procedures to increasing judicialized procedures.

(1) *Political independence:* The political independence of the relevant dispute settlement procedures is a criterion of the utmost importance for an impartial treatment of breaches of international law (Keohane et al. 2000, 459-462, Helfer/Slaughter 1997, 353-355). If states are allowed to exert their influence on decision-making in international dispute settlement procedures, powerful states will be able to use this to their advantage and less powerful states will suffer disadvantages. Concentrating on the composition of dispute settlement bodies to asses their vulnerability to political influence, we distinguish four grades. The least independent bodies are those including the conflicting parties because they are extremely open to political meddling. An example for such a procedure is the original GATT dispute settlement procedure, in which so-called working parties were assigned the task of providing a platform for mediation and negotiation between disputing states. If third parties make a decision, the procedure is less vulnerable to political influence and therefore slightly more independent. The later GATT dispute settlement procedures, based on so-called panels, might illustrate that. Sufficiently independent bodies are those composed of experts, as

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[5] However, the degree to which power can affect court rulings is a matter of debate even with respect to the European Court of Justice (see for example Garrett 1995; Mattli and Slaughter 1995).

[6] For similar criteria to distinguish diplomatic and judicial dispute settlement procedures see Keohane et al. 2000, Zangl 2001, Yarbrough/Yarbrough 1997, McCall 2000, Zangl/Zürn 2004a.

in the WTO panels. Only a standing body of judges, however, can be considered as truly independent. The WTO Appellate Body is a case in point.

(2) *Legal mandate*: Even completely independent dispute settlement bodies cannot guarantee a like treatment of like cases. It is also important to assess what kind of mandate is assigned to a dispute settlement body. While a political mandate opens up the dispute settlement procedure to political interests, a judicial mandate ensures legal reasoning. Again, we distinguish four grades: We talk about a political mandate if the decision ensuing from the dispute settlement procedure is based on political considerations. The UN Security Council is a prominent example. The rulings of a somewhat more judicialized mandate draw on legal arguments without being legally binding for the conflicting parties. Typically, such procedures also lack strict procedural rules. Dispute settlement under CITES can be classed in this grade. If the mandate requires decisions to be based on legal grounds only and to be made in line with an institutionalized procedure, the mandate is largely judicialized even if the decisions are still not legally binding. ICJ advisory opinions belong in this category. Only procedures that feature binding rules of due process and are authorized to take legally binding decisions can be considered to have a fully judicialized mandate, as for instance is the case with the European Court of Human Rights.

(3) *Compulsory jurisdiction*: The compulsory jurisdiction of the relevant dispute settlement procedure is another, equally important criterion for a comparable treatment of comparable cases (Morgenthau 1948, McCall 2000: 139-140). If a dispute settlement procedure is not mandatory or if a mandatory procedure allows for ways to inhibit parts of the procedure, impartiality is not ensured. For example, if the disputing states themselves have the authority to decide whether they accept the jurisdiction of the relative dispute settlement body or not, powerful states can force less powerful states to accept the procedures while they are at liberty to block procedures if they are directed against them (Zangl/Zürn 2004a). Therefore, we grade jurisdiction as follows: the most restricted form of jurisdiction is when the states involved in a dispute can block both the initiation of the procedures as well as the adoption of the rulings made within these procedures. This was the case within the GATT dispute settlement procedures, for instance due to the GATT Council’s consensual decision-making procedure. Jurisdiction also remains quite restricted when disputing states can only block either the initiation of the relevant procedure or the respective ruling. The International Court of Justice’s jurisdiction, for instance, is severely compromised by the right of disputing states to dismiss its involvement. Where dispute settlement procedures can only be blocked by a collective of states, rather than by single states involved in a dispute, jurisdiction can be described as quasi-compulsory. Such quasi-compulsory jurisdiction can be identified within the ILO, whose Governing Body can approve reports of the

Committee on Freedom of Association by simple majority. True compulsory jurisdiction, however, requires that the relevant dispute settlement procedures and their respective rulings may not be blocked either by individual states or by a collective of states.

(4) *Authority to sanction:* The authority to decide on sanctions in cases in which states do not comply with rulings made within the dispute settlement procedures can be regarded as another relevant criterion for the comparable treatment of comparable cases (Morgenthau 1948, Zangl/Zürn 2004). If adverse rulings cannot be enforced under the relevant dispute settlement procedures, defendant states might feel the incentive to either ignore sanctions, and complainant states endeavor to enforce them single-handedly. The least judicialized procedures are therefore those that do not regulate sanctions at all, as in the case of the ILO, for example. Under certain dispute settlement procedures, states can be authorized to impose sanctions, but such authorizations can also be blocked by the defendant state. This, again, was a persistent problem under the old GATT regime. Under the more judicialized WTO regime, however, authorized sanctions may not be blocked by the parties involved, while at the same time states are not allowed to impose sanctions without WTO authorization. However, the WTO dispute settlement procedure cannot order complainant states to employ sanctions against defendants that ignore their rulings. A fully judicialized regulation on sanctions requires the authority to mandate sanctions. The Security Council's dispute settlement procedure is the most prominent example of a procedure that can mandate states to impose sanctions.

(5) *Access*: A further criterion for a comparable treatment of comparable cases concerns accessibility to dispute settlement procedures (Keohane et al. 2000: 462-466, Zangl 2001: 57). The wider the avenue to dispute settlement procedures are, the more likely that breaches of international law are reported and dealt with. The most common provision is also the most restrictive, allowing only states access to formal procedures. Access is somewhat more open where either international organizations or non-governmental organizations may initiate proceedings. For instance, under CITES the treaty organization’s secretariat can initiate dispute settlement procedures while at the ILO trade unions may do so. Of course, access widens if both international organizations and NGOs have that right. The highest degree of access allows individuals to address the dispute settlement procedure directly. The most prominent examples are some procedures within the UN human rights regimes as well as the European Court of Human Rights.

***Table 1**: A Gradual Scale Ranging from Diplomatic to Judicial Procedures*

Political Independence (Third party's composition)	*diplomatic procedure: politically dependent* ↕ ➢ Representatives of the parties involved ➢ Representatives of third parties ➢ Experts acting in their individual capacity ➢ Standing body of independent judges *judicial procedure: politically independent*
Legal Mandate (Third party's role)	*diplomatic procedure: political mandate* ↕ ➢ Procedure culminates in a political decision ➢ Non-binding procedure culminates in a legal decision ➢ Binding proceeding culminates in a judicial recommendation ➢ Binding proceeding culminates in a legal decision *judicial procedure: judicial mandate*
Compulsory Jurisdiction (Third party's decision-making authority)	*diplomatic procedure: case-by-case jurisdiction* ↕ ➢ Procedure and ruling can be blocked by parties involved ➢ Procedure or ruling can be blocked by parties involved ➢ Procedure and/or ruling can only be blocked by majority decision ➢ Neither procedure nor ruling can be blocked *judicial procedure: compulsory jurisdiction*
Authority to Sanction (Third party's authority to sanction)	*diplomatic procedure: limited authority to sanction* ↕ ➢ No regulation on sanctions ➢ Sanctions can be authorized, but also blocked by defendant ➢ Sanctions can be authorized ➢ Sanctions can be mandated *judicial procedure: authority to sanction*
Access (Third party procedure open to whom?)	*diplomatic procedure: limited access* ↕ ➢ Only states have access ➢ IOs or NGOs also have access ➢ Individuals also have access *judicial procedure: open access*

Based on the five criteria and their respective degrees we are able to situate each and every international dispute settlement procedure on a scale of dispute settlement procedures ranging from purely diplomatic to predominantly judicial. This should allow us to trace the judicialization of dispute settlement procedures over time and across issue areas.

1.2. Judicialization of Dispute Settlement

In our view, the judicialization of dispute settlement procedures by itself does not indicate the emergence of an international rule of law. Admittedly, through their judicialization international dispute settlement procedures increasingly institutionalize the prerequisites for a comparable treatment of comparable cases. But it nevertheless remains an open question whether judicialized dispute settlement systems have an effect on states' actual dispute settlement practices. To answer this question we need to know whether parties to international disputes actually make use of available dispute settlement procedures and if so, how.

So far, however, most research focuses on the procedures rather than the practice of dispute settlement (Keohane/Moravcsik/Slaughter 2001, Romano 1999). Moreover, research on the impact of procedures on the practice of dispute settlement focuses only on a sample of disputes that are dealt with in the context of the pertinent dispute settlement procedures while neglecting all disputes that are dealt with outside these dispute settlement procedures (Bush/Reinhardt 2002, 2003). While this kind of research is important, it clearly relies on samples with a selection bias. Disputes that are dealt with through dispute settlement procedures can hardly be regarded as representative for all disputes that might end up in the respective dispute settlement procedures. They might be especially hard or especially easy to deal with, but they are by no means representative. What is more, by drawing a sample that focuses only on disputes that are brought to the attention of the relevant dispute settlement procedures, such studies have two further shortcomings. First, it does not acknowledge that an increasing use of the relevant dispute settlement procedures might reflect an increasing total number of disputes that are dealt with outside the relevant procedures rather than a growing propensity of states to use the available dispute settlement procedures. We therefore argue that increasing numbers of cases dealt with through dispute settlement procedures should not be seen as direct evidence of an emergent international rule of law. Second, such studies cannot take into consideration that in the light of effective dispute settlement procedures the number of bilateral settlements "out of court" might increase, without any change in the quantity of settlements through relevant dispute settlement procedures. Therefore, even decreasing numbers of cases within dispute settlement procedures should not be interpreted as clear evidence against the emergence of an international rule of law.

We seek to remedy these shortcomings by working with a more representative sample that includes disputes irrespective of whether the relevant dispute settlement procedures were involved or not. In order to identify disputes we first selected specific legal obligations or bundles of legal obligations in each issue area under consideration. We then systematically searched for complaints about violations thereof. For each issue

area we collected complaints about violations within two time periods, one within the 1970s and 1980s and another one within the 1990s and early 2000s. The reason for our focus on OECD countries is that these countries have integrated international law and treaties into their own legislation to a greater degree than non-OECD countries, and they also exercise the greatest influence on the formulation of international law and treaties. By comparing the dispute settlement practice over two distinct time periods we expect to obtain an accurate picture of potential changes in the practice of dispute settlement – both across time and across issue areas.

The chief advantage of our sample is that we are able to identify whether conflicting parties actually use the available dispute settlement procedures to deal with breaches of international law. In order to assess the dispute settlement practice we will produce a brief, structured description – or case-study – for each dispute, outlining the behavior of each party during the dispute in question. Generally, a party behaves either consistently with the relevant dispute settlement procedure, or inconsistently with it. In order to demonstrate that judicialized practices of international dispute settlement are emerging we have to establish whether the percentage of behavior consistent with the relevant procedures has increased while at the same time the percentage of the disputes which were handled adverse to the procedures has decreased . For a more accurate assessment of each party's behavior, it is helpful to further distinguish their behavior into the following categories:

(1) *Following procedures:* A party may conform to the procedure. This entails the party’s willingness to settle the dispute as envisaged by the relevant dispute settlement procedure. For instance, when Iraq invaded Kuwait in 1990, the United States turned to the UN Security Council. The subsequent sanctions and eventual US-led military operation were authorized by the Council.

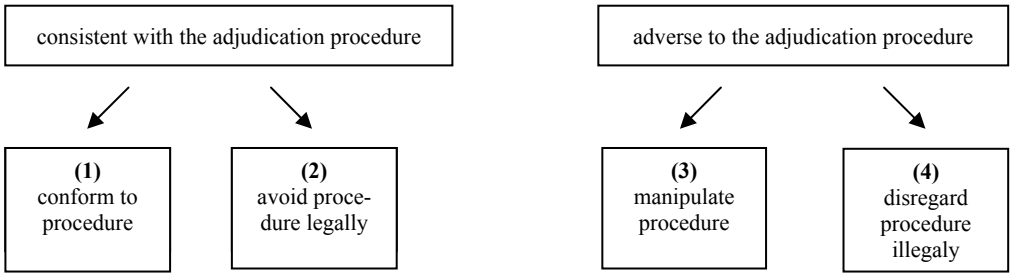
(2) *Avoiding procedures:* A party may seek a settlement outside of the relevant procedure. While avoiding the relevant dispute settlement procedure, a settlement may be reached by drawing on the respective legal norms. In many dispute settlement procedures the disputing parties are free or even encouraged to settle a dispute by lawful means. As the Security Council would not foster a settlement between Guatemala and Belize, both states entered bilateral negotiations. Such a settlement is, one might say, placed in the shadow of the law.

(3) *Manipulating procedures:* A party may choose to use the relevant dispute settlement procedure but at the same time seek to manipulate its orderly operation. Such behavior is clearly inconsistent with the procedure, but still

indicates that the party attributes some importance to it – otherwise the party would simply disregard it completely. In the run-up to the US war on Iraq that began in 2003, the United States tried to present their case before the Security Council. However, they not only presented manipulated evidence but also tried to buy the votes of some Security Council members.

(4) *Disregarding procedures*: A party may choose to disregard the relevant dispute settlement procedure completely. In such a case, the party would either not seek a settlement through the procedure, or even ignore a ruling – i.e. the party is unwilling to accept any restraints on its course of action. When the Security Council could not agree on the Kosovo crisis in 1999, NATO went ahead with its proposed air strikes anyway.

***Illustration 1**: Possible behavior of disputing parties*



When categorizing the behavior of the parties in the course of the relevant procedures we have to take into account the fact that during a dispute conflicting parties typically might switch back and forth between behavior categories. We will therefore divide each dispute into four analytical phases and assess the behavior of each party for each phase individually.[7]

- First, a *complaints phase*, in which one party publicly accuses another party of allegedly violating international legal obligations;
- Second, an *adjudication phase*, in which at least one of the conflicting parties seeks a ruling through the relevant dispute settlement procedure;
- Third, an *implementation phase*, in which the conflicting parties have to implement the ruling made under the dispute settlement procedure;

[7] In addition, by distinguishing different phases of a dispute and analyzing dispute settlements in each and every phase we also increase the number of cases we can rely on. Despite the fact that the dispute settlement practice in an earlier phase might have some impact on dispute settlement in later phases the increase in the number of cases should add some extra reliability to our results (King/Keohane/Verba 1994: 221-223).

- fourth, an *enforcement phase*, in which sanctions might be employed because one of the conflicting parties refuses to respect the ruling.

Overall, comparing the 1970s and 1980s with the 1990s and 2000s, our concept for the assessment of states' dispute settlement behavior, in conjunction with our gradual scale of different dispute settlement procedures, should allow an adequate analysis as to whether international dispute settlement in the five issue areas selected for investigation has been judicialized. In the next section of this paper we will utilize the concept portrayed here to study the judicialization of international dispute settlement in the issue area of international security.

2. THE CASE OF THE UN SECURITY COUNCIL

To study the judicialization of dispute settlement in the issue area of international security we focus on international disputes that have been deemed to threaten international peace. As the UN Security Council (SC) is stipulated to have the primary responsibility for the maintenance of international peace and security, it is the obvious dispute settlement procedure to study.

2.1. Judicialization of Procedures

The United Nations Charter places states under the obligation to settle their disputes peacefully. If the states involved in a dispute that might endanger international peace are unable or unwilling to reach a settlement, they are called upon to refer the matter to the United Nations Security Council. At the same time, the SC may in its own right investigate any dispute that threatens international peace and make recommendations at any time. Additionally, any state – be it a member state or not – may draw the attention of the SC to any situation endangering peace. The Council is then supposed to take action with a view to settling the dispute, for instance by making recommendations or even mandating appropriate measures. The Security Council thus functions as an international dispute settlement body. Looking at its dispute settlement procedures, no process of judicialization has taken place. Its procedures are rather political than judicial.

(1) *Political independence*: The SC can hardly be considered a politically independent body. Delegates to the SC are state representatives, who are primarily duty-bound to serve given state interests, and much less to upholding norms of international law. The cultural, economic and political diversity of the five permanent and ten non-permanent SC member states ensures some diversity of interests, however. Moreover, all decisions require nine affirmative votes and no negative vote by any of the five permanent members granted the power of veto. While this makes it hard for a single state to push through singular interests, it tends to reinforce interest-based bargaining rather than advancing impartial legal reasoning. This is even truer when delegates have

to decide on disputes in which their states are either involved or have vested interests. The Council's decision-making can therefore hardly be conceived of as being free of political motivations (Koskenniemi 1998).

(2) *Legal mandate*: The mandate of the SC has always been a political mandate. While the Council is supposed to settle all disputes relating to international peace and security, there is no clear-cut obligation on the part of the SC to do so. It has considerable leeway in deciding whether to take on a matter or not. When dealing with a matter, the Council is supposed to make political decisions. Decisions have to conform to international law, but are not grounded in legal reasoning only. Nor is there a fixed formal procedure on how to arrive at a ruling. Nevertheless, SC resolutions passed under Chapter VII of the Charter are legally binding on all member states.[8]

(3) *Compulsory jurisdiction*: The jurisdiction of the SC seems to be compulsory. The United Nations Charter gives the SC the authority to exercise jurisdiction over all disputes endangering international peace. So any disputing party could be subjected to SC decisions. Because of the required majority of nine affirmative votes it would at first glance appear hard for any state to prevent the SC from denouncing any threat to peace it might have committed. However, while it is difficult for a single state to keep a matter off the agenda, in some circumstances the adoption of rulings can be blocked. The permanent members can veto any decision, and are therefore not subject to the compulsory jurisdiction of the SC. No provision inhibits permanent members from using their veto to protect allied or friendly countries or blocking decisions on certain types of conflict. For example, the United States frequently protects Israel from harsh critique relating to Israel's conduct in the Occupied Territories. Although less commonly used since the end of the Cold War, the veto still substantially limits the compulsory jurisdiction of the SC. However, other than by veto, only a coalition of states can block a decision. Seven negative votes are needed for a blocking minority. As long as the allegation is not directed against a veto power, the procedure cannot be inhibited by an individual state.

(4) *Authority to sanction*: After having determined that a situation constitutes a threat to peace, a breach of the peace or an act of aggression, the SC may impose enforcement measures. It may mandate all UN member states to apply non-military enforcement measures, such as economic embargos. The SC has in the past also authorized member states to use military enforcement measures. Although the UN Charter provides for military forces to be placed at the disposal of the SC, these special agreements have

[8] There is, however, some debate as to whether SC recommendations are also legally binding with the same force or are more of a guideline for states. For the purposes of this study, this point is negligible, however, because we are exclusively concerned dealing with Chapter VII decisions.

never been signed. For this reason the SC has contented itself with the authorization of the use of “all necessary means” and does not actually order member states to engage in military enforcement operations. While it is questionable whether the SC may mandate military enforcement measures, no official objections have been raised against its practice of authorizing the use of force (Blokker 2000: 568). In sum, the SC has an unusually high degree of authority to enforce its rulings through sanctions, even though it remains highly dependent on the willingness of member states to actually enforce its resolutions.

(5) *Access* to the dispute settlement procedures of the SC is restricted to states only. Although the UN Secretary-General can bring any matter which may threaten international peace to the attention of the SC, he cannot formally force the Council to decide on these matters. The fact that only states have access puts secession movements at a disadvantage, for instance, which are involved in conflicts with their respective governments. For example, in the late 1990s the Kosovo Albanians could not bring their dispute with Serbia before the SC themselves. Such parties to a conflict must find a recognized state to represent their concern.

***Table 2**: The Judicialization of SC Procedures*

Political Independence	Legal Mandate	Compulsory Jurisdiction	Authority to Sanction	Access
very low (political body composed of state representatives)	*low* (political decisions, but binding on member states)	*high* (resolutions can only be blocked by qualified majority or by one of the veto- powers)	*very high* (sanctions can be authorized and/or mandated; only qualified majority or veto-powers can block sanctions)	*very low* (only states can refer matters to the SC)

Overall, no judicialization of the dispute settlement procedures of the SC has taken place. The degree of judicialization of its procedures remains rather low. Although the Council’s procedures score very high in terms of authority to sanction and their compulsory jurisdiction, their score is low with respect to their legal mandate and particularly low with regard to their political independence and accessibility.

2.2. Judicialization of Dispute Settlement

We now turn to the practice of dispute settlement within the United Nations Security Council procedure. As there has been no change in the Council’s dispute settlement procedures, it becomes even more important to study the practice of dispute settlement in order to identify a possible judicialization in this issue area. To do so, we will carry out a systematic comparison of SC involvement as well as non-involvement in disputes that were deemed to have threatened international peace in the 1970s and 1980s with its involvement and/or non-involvement in comparable disputes in the 1990s. So far, most

of the research done on the Council's involvement in these disputes focuses only on a sample of disputes in which the SC actually became involved and eventually authorized military or non-military enforcement measures, while largely ignoring all those disputes in which the SC was not involved.[9] Our research, by contrast, will focus on a less biased and more representative sample of disputes in which the Security Council *could* have become involved.

The starting point of our research are complaints about threats to peace and alleged acts of aggression. These complaints will form the sample of disputes based on which we will analyze SC involvement more closely. As we are interested in a sample that includes disputes irrespective of whether the due dispute settlement procedure has been applied or not, it was necessary to find a source other than the SC agenda. Eventually we decided to work with letters from states, addressed to either the UN Security Council or the UN Secretary-General, containing formal complaints about another state allegedly threatening international peace or having committed acts of aggression. Even though these letters already indicate the complaining state's willingness to involve the SC, they say nothing about the willingness on the part of the other party to the dispute. Such complaints, moreover, are no guarantee for actual SC engagement. Thus, while this source cannot be considered to be completely independent of the SC procedure, its link to the Council does not amount to a formal initiation of a dispute settlement process.

The sample of disputes drawn up on the basis of letters to the Security Council or the Secretary-General should enable us to detect whether there are any changes in the usage of the SC dispute settlement procedures. To facilitate the investigation of the Council's involvement in disputes we have limited our search to complaints filed either *by* an OECD member state or *against* an OECD member state.[10] We also narrowed our search to complaints filed within two time periods. The first period covers the years 1974 to 1983, the second one runs from 1990 to 1999. This search strategy produced about 250 complaints, which amount to 43 disputes when sorted according to conflict issues.[11] There are 21 cases in the first period, 22 cases in the second one.

A superficial survey of these letters containing allegations of threats to peace, breaches of peace and acts of aggression soon reveals that states make frequent use of

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9 The debate clearly focuses on the issue of humanitarian intervention. See for example Abiew 1998, Garrett 1999, Murphy 1996, Ramsbotham/Woodhouse 1996, Wheeler 2000.

10 We included all current OECD member states in the search over the entire period regardless of the actual date that an individual state joined.

11 The number of cases is so much lower because usually all parties to a dispute will refer the matter to the SC several times.

this instrument to draw the attention of the UN Security Council or the UN Secretary-General to a wide range of disputes. This validates these letters as a reliable source for drawing a sample of disputes over alleged threats to international peace. Moreover, it becomes quite clear that the choice of wording in these letters is very cautious. Although many disputes are discussed, only few are actually labeled as 'threats to peace'. States seem to be very mindful of the severity of such allegations because of their potentially grave consequences. Alleged acts of aggression are almost as common as alleged threats to peace, but these mostly refer to isolated incidents and not to a conflict situation as a whole.

The first period includes some allegations deriving from the struggle against colonialism (Congo against Portugal, Comoros against France as well as Somalia against France, Western Sahara and Belize), protests against wars conducted by apartheid regimes (Southern Rhodesia and South Africa), military interventions (Turkey in Cyprus, Indonesia in East Timor, Soviet Union in Afghanistan, United States in Grenada), a dispute over fishing rights (Iceland against United Kingdom), the Sino-Vietnamese border dispute, the Teheran hostage crisis, the Israeli attack on an Iraqi nuclear reactor, the Falkland war, covert operations in Nicaragua, the situation in Lebanon, also Libya charging the United states on several counts, the possible deployment of neutron bombs in South Korea, and the singular event of Mexico challenging Spain’s membership of the UN.

***Table 3**: Identified disputes 1974-1983*

Issue	Complaining State	Defendant State
Portuguese Aggression against Congo	Congo	Portugal
Turkish Intervention in Northern Cyprus	Greece	Turkey
Spain’s membership of UN	Mexico	Spain
Status of Western Sahara	Spain	Morocco
Indonesian Intervention in East Timor	Portugal	Indonesia
Cod War (fishing rights)	Iceland	United Kingdom
Independence of Comoros	Uganda	France
Incident at border between colonial French Territory and Somalia	Somalia	France
Southern Rhodesian Aggression against Mozambique	Portugal	Southern Rhodesia
China-Vietnam Border Dispute	Warsaw Pact members and NATO members	PR China
Teheran Hostage Crisis	United States	Iran
Soviet Intervention in Afghanistan	53 Western and non-aligned states	Soviet Union
United States Aggression against Libya	Libya	United States
South African Aggression against Angola	Spain	South Africa
Israeli attack on Iraqi nuclear reactor	Japan, Spain, Poland, Hungary	Israel

***Table 3**: Identified disputes 1974-1983 (continued)*

Issue	Complaining State	Defendant State
US support for counter-revolutionary insurgents in Nicaragua	Nicaragua	United States, Honduras
Status of Belize	Guatemala	United Kingdom
Falkland War	United Kingdom, EC	Argentina
deployment of neutron bombs in South Korea	North Korea	United States
US intervention in Grenada	Nicaragua	United States
situation in Lebanon (complaint by Syria)	Syria	United States

The second period comprises the United States intervention in Panama, tensions between Cuba and the United States, Iraq's attack on Kuwait, the repression of civilian population in Iraq and the resulting no-fly zones in Iraq, Iranian complaints against United States shipping inspections in the Persian Gulf, ongoing tensions between Libya and the United States, the wars in Yugoslavia and Kosovo, the nuclear issue of North Korea, a North Korean missile test, the Nagorno-Karabakh conflict, the Rwandan genocide, a protest against a UN-authorized military operation in Haiti, internal unrest in Afghanistan, the Aegean border dispute between Greece and Turkey, the Cyprus question, Turkish military operations in Northern Iraq, nuclear bomb tests in South Asia, and the United States bombing of a chemical plant in Sudan.

***Table 4**: Identified disputes 1990-1999*

Issue	Complaining State	Defendant State
US intervention in Panama	Nicaragua	United States
Forced inspection of Cuban vessel	Cuba	United States
Iraqi attack on Kuwait	Italy (EC), United States, and others	Iraq
blockade of ships in the Persian Gulf	Libya, Iraq	United States, United Kingdom, Australia
Iraqi repression of civilian population	Turkey, France, Germany, United Kingdom, United States	Iraq
no-fly zones in Northern and Southern Iraq	Iraq	United Kingdom, United States, France
harassment of Iranian vessels and air planes	Iran	United States
US military cooperation with Israel; US pressure for regime change in Libya	Libya	United States
deteriorating situation in Yugoslavia (Croatia's war of secession)	Canada, Hungary	
War in Bosnia and Herzegovina	Canada, EC, Turkey	
deteriorating situation in Kosovo	United Kingdom	FRY (Serbia and Montenegro)
North Korean nuclear issue	North Korea	United States
North Korean missile test	Japan	North Korea
Nagorno-Karabakh conflict	Turkey	Armenia

***Table 4**: Identified disputes 1990-1999 (continued)*

Issue	Complaining State	Defendant State
Situation in Rwanda (genocide)	France	
Threat of intervention in Haiti	Libya	United States
persistent unrest in Afghanistan	France (EU)	
Aegean boundary line	Greece	Turkey
construction of military fortifications along the Green Line	Cyprus	Turkey
Turkish military operations in Northern Iraq	Iraq, Libya	Turkey
nuclear bomb tests by India and Pakistan	Australia, Canada, New Zealand and others	India, Pakistan
US bombing of chemical factory in Sudan	Sudan, League of Arab States	United States

As we are presenting ongoing research we clearly cannot discuss the final results at this stage. Currently we are in the process of drawing up the structured descriptions of each dispute determining the behavior of each state involved in the respective dispute. By using some tentative indicators for the SC involvement in these disputes we can, nevertheless, present some preliminary findings. For each of the four phases a dispute might pass through we employ a different indicator for SC involvement.

Complaints phase: In the complaints phase we use formal SC meetings as an indicator for its involvement in attempts to settle the disputes included in our sample. If there has been a formal meeting over the dispute in question we consider this to be an indication of SC involvement.[12] If no meeting took place this can be regarded as an indication that the SC was, if at all, hardly involved. During the first time period (1974-1983), 15 out of 21 cases were on the agenda of at least one formal SC meeting. During the second period (1990-1999), only 12 out of 22 cases were formally discussed within the SC. Thus, in the first period 71% of the complaints were dealt with in conformity with procedure in the complaints phase as compared to 55% in the second period. Contrary to the widespread assumption that the SC has been addressed more often since the end of the Cold War, it has in fact responded to less concerns aired by UN members in the 1990s than in the 1970s and 1980s.

Adjudication phase: As an indicator for the involvement of the SC in attempts to settle the disputes included in our sample during the adjudication phase we employ the resolutions adopted by the SC. These resolutions can be regarded as equivalent to a court’s rulings on alleged violations of international law. It seems justifiable to regard

[12] The provisional agenda for a Security Council meeting is prepared by the Secretary-General and then approved by the President of the Security Council. Nevertheless, the agenda has to be adopted at each meeting by nine affirmative votes. The adoption of the agenda cannot be blocked by a veto.

resolutions passed by the SC as an indication for its involvement in attempts to settle disputes during the adjudication phase, while cases in which no resolution was adopted might be seen as an indication that the SC was hardly – or at least not successfully – involved in attempts to settle the dispute in question. In the first time period under consideration, resolutions were adopted in nine out of the 15 disputes in which a SC meeting took place. The nature of the SC resolutions varies greatly, however. In some instances, the SC merely expresses its concern about a state's conduct; in other instances it condemns particular acts or demands specific actions. In four instances a draft resolution was vetoed, twice by the United States and once by the Soviet Union and France respectively. No draft resolution was introduced in the remaining two disputes (French-Somali border incident and the Cod War). In the second time period, resolutions were adopted in ten out of twelve disputes. One draft resolution was vetoed (by the United States) whereas in the remaining case (inspection of a Cuban vessel) no draft resolution was put to vote. A comparison of the two periods thus shows that the SC clearly adopted more resolutions in response to alleged threats to peace during the 1990s (83%) than during the 1970s/1980s (60%). As the procedure explicitly allows a veto by the permanent members, a veto cannot be interpreted as behavior adverse to the dispute settlement procedure. In terms of the SC procedure, however, these instances amount to an acquittal of the allegations and reveal the flaws of the procedure. If one includes the vetoes in the number of rulings, then the number of judgements passed by the SC rises to 92% of all disputes debated during the 1990s, and during the earlier period to 87% of all disputes debated.

Implementation phase: With respect to the implementation phase we must rely on an admittedly somewhat rough indicator for SC involvement in attempts to settle the disputes in our sample. We use iterated resolutions on the same dispute as an indication for the SC's involvement in dispute settlement. If there are more than one resolution on the same dispute we can reasonably assume that there were difficulties in implementing of the first resolution. In most instances, the subsequent resolutions eventually reaffirm all relevant previous ones, while occasionally adding new demands. An increase of iterated resolutions might be seen as an indication of decreasing willingness to comply with SC resolutions. However, iterated resolutions also show the SC is still concerned with the dispute in question and urges the implementation of its prior resolutions. Assuming that state compliance with SC resolutions did not change dramatically over time, we therefore regard iterated resolutions as an indication of an effort on the part of the SC to counter non-compliance in the implementation phase. To increase the leverage we only include disputes in this count if there have been more than two follow-up resolutions. In the 1990s seven out of ten SC resolutions were repeated, while in the 1970s/1980s only two out of nine resolutions were reaffirmed. The SC iterated its

resolutions in only 29% of the cases in the earlier time period compared to 70% in the later one. Again, supposing a stable (but low) compliance rate this development indicates states are more likely to get caught in instances of non-compliance during the 1990s. In turn, this points to an increased judicialization of the dispute settlement in practice because of the greater emphasis on actual implementation.

Enforcement phase: SC resolutions authorizing or mandating sanctions against states that do not comply with its rulings can be used as an indicator for its involvement in dispute settlement in the enforcement phase. In general it is assumed that the SC was much more hesitant to employ enforcement measures during the Cold War than after it. Indeed, the number of instances in which it mandated non-military enforcement measures has increased and its authorization of military enforcement measures is entirely new. Yet when turning from absolute numbers to relative numbers, as in our sample, the increasing involvement of the SC does not appear that striking. Between 1974 and 1983 the SC repeated resolutions in only two cases out of our sample, thereby indicating that the disputing parties had not complied with its prior resolutions. But only in one of these instances did the SC impose economic sanctions (against Southern Rhodesia) whereas the other instance (Turkish military intervention in Cyprus) was not responded to with enforcement measures. In the 1990s the SC repeated seven resolutions – thereby indicating a lack of compliance – and decided in four of these instances to employ enforcement measures. Hence the percentage has not changed dramatically. In all these cases the SC eventually authorized not only non-military but also military enforcement measures.

***Table 5**: The Practice of SC Dispute Settlement*

Phase *Indicator*	**SC-Action**		**No SC-Action**		**Direction of Change**
	1974-1983	1990-1999	1974-1983	1990-1999	
Complaints Phase *Formal SC meeting*	15 (21)	12 (22)	6 (21)	10 (22)	moderate decrease ↓
Adjudication Phase *SC resolution*	9 (15)	10 (12)	6 (15)	2 (12)	significant increase ↑
Implementation Phase *repeated resolution*	2 (9)	7 (10)	7 (9)	3 (10)	significant increase ↑
Enforcement Phase *enforcement measure*	1 (2)	4 (7)	1 (2)	3 (7)	moderate increase ↑

Note: Numbers in brackets specify the total number of disputes included in the preceding phase.

In sum, although no judicialization of the SC's procedures has taken place, the *practice of dispute settlement* – i.e. the SC's involvement in attempts to settle disputes that might threaten international peace – has been judicialized. While this is not the case with regard to the complaints phase, this process of judicialization holds particularly true for

the adjudication and implementation phases and can also be regarded – albeit to a lesser extent – as a reality for the enforcement phase.

3. CONCLUSION

Is an international rule of law in the issue area of international security emerging? As we posit that this question cannot be satisfactorily answered by theoretical assumptions, we undertook an empirical study of international dispute settlement in the issue area of security. As we claim, moreover, that this question can only be answered by looking not only at the relevant dispute settlement procedures, but also at the corresponding practice of dispute settlement, we proceeded to analyze both the judicialization of the procedures as well as the practices of dispute settlement in the issue area of international security.

The empirical study demonstrates that no judicialization of the relevant dispute settlement *procedure* has taken place. The degree of judicialization of the dispute settlement procedure within the framework of the United Nations Security Council remains low. In particular, its procedures show a low degree of judicialization in terms of political independence, legal mandate, and access, while they score somewhat higher in terms of jurisdiction and authority to sanction. Nonetheless, our comparison of the periods 1974-1983 and 1990-1999 points to the judicialization of dispute settlement *practice* within the SC. In our sample of 43 disputes we observed – with the exception of the initial complaints phase – an increasing involvement of the SC. Overall, we tend to interpret these results as an indication for a moderate process of judicialization of international dispute settlement. If existing procedures – no matter how low their degree of judicialization might be – are increasingly used and accepted, this can be seen as an indication – albeit moderate – of an emerging international rule of law in the issue area of international security.

Whether this process of the 1990s continues into the 2000s, or whether – in retrospect – the decade after the end of the Cold War has to be considered the Golden Age of the Security Council, remains to be seen. In any case the experience from the 1990s seems to indicate that an international rule of law is not just a utopian vision but a real possibility, even in the issue area of international security.

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ANNEX : HANDLING OF DISPUTES WITHIN THE SC DISPUTE SETTLEMENT PROCEDURE

***Table A**: Disputes from 1974 to 1983*

Phase / **Issue**	**Complaints** *SC Meeting*	**Adjudication** *Resolution*	**Implementation** *Repeated Resolutions*	**Enforcement** *Mandated/Authorized Sanctions*
Portuguese Aggression against Congo	N	N	N	N
Turkish Intervention in Northern Cyprus	Y	Y	Y (many)	N
Spain’s membership of UN	N	N	N	N
Status of Western Sahara	Y	Y	(just 2)	N
Indonesian Intervention in East Timor	Y	Y	(just 1)	N
Cod War (fishing rights)	Y	N	N	N
Independence Comoros	Y	N	N	N
Incident at border between colonial French Territory and Somalia	Y	N	N	N
Southern Rhodesian Aggression against Mozambique	Y	Y	Y	Y
China-Vietnam Border Dispute	Y	N	N	N
Teheran Hostage Crisis	Y	Y	(just 1)	N
Soviet Intervention in Afghanistan	Y	Y	N	N
United States Aggression against Libya	N	N	N	N
South African Aggression against Angola	Y	N	N	N
Israeli attack on Iraqi nuclear reactor	Y	Y	N	N
US support for counter-revolutionary insurgents in Nicaragua	Y	Y	N	N
Status of Belize	N	N	N	N
Falkland War	Y	Y	(just 1)	N
deployment of neutron bombs in South Korea	N	N	N	N
US intervention in Grenada	Y	N	N	N
situation in Lebanon (complaint by Syria)	N	N	N	N
21 cases (Y:N)	15:6 71%	9:6 60%	2:7 29%	1:1 50%

***Table B**: Disputes from 1990 to 1999*

Phase / Issue	**Complaints** *SC Meeting*	**Adjudication** *Resolution*	**Implementation** *Repeated Resolutions*	**Enforcement** *Mandated/Authorized Sanctions*
US intervention in Panama	Y	N	N	N
forced inspection of Cuban vessel	Y	N	N	N
Iraqi attack on Kuwait	Y	Y	Y (many)	Y
Blockade of ships in Persian Gulf	N	N	N	N
Iraqi repression of civilian population	Y	Y	N	N
no-fly zones in Northern and Southern Iraq	N	N	N	N
harassment of Iranian vessels and air planes	N	N	N	N
US military cooperation with Israel; US pressure for regime change in Libya	N	N	N	N
deteriorating situation in Yugoslavia (Croatia’s war of secession)	Y	Y	Y (many)	Y
War in Bosnia and Herzegovina	Y	Y	Y (many)	Y
deteriorating situation in Kosovo	Y	Y	Y	N
North Korean nuclear issue	Y	Y	N	N
North Korean missile test	N	N	N	N
Nagorno-Karabakh conflict	Y	Y	Y (many)	N
situation in Rwanda (genocide)	Y	Y	Y (many)	Y
threat of intervention in Haiti	N	N	N	N
persistent unrest in Afghanistan	N	N	N	N
Aegean boundary line	N	N	N	N
construction of military fortifications along the Green Line	Y	Y	Y (many)	N
Turkish military operations in Northern Iraq	N	N	N	N
nuclear bomb tests by India and Pakistan	Y	Y	N	N
US bombing of chemical factory in Sudan	N	N	N	N
22 cases (Y:N)	12:10 55%	10:2 83%	7:3 70%	4:3 57%

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