# International Conflict Resolution

Edited by
STEFAN VOIGT, MAX ALBERT,
and DIETER SCHMIDTCHEN

*Conference on New Political Economy*
*23*

**Mohr Siebeck**

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# Editorial Note

Academia is probably one of the most globalized areas to date. The discourses take place on a worldwide scale, and the language used to communicate – at least in economics – is English. If a journal or a yearbook aims to publish the papers of leading academics, it should hence be published in English.

Recognizing this, the editors of the yearbook formerly known as the "*Jahrbuch für Neue Politische Ökonomie*" have decided to aim for a broad international audience and change the title to "*Conferences on New Political Economy*". Henceforth, all contributions will be in English.

We believe that the current volume is already a good example for the new policy: the topic *Analyzing International Conflict Resolution Mechanisms* is a globally relevant one, five of the ten papers have been authored by academics from the U.S. Organizing such conferences is not costless and German universities are notoriously underfunded. We thus thank the *Volkswagen-Stiftung* as well as the local supporters *Union-Stiftung Saarbrücken, Landesbank Saar Girozentrale, Saarland-Sporttoto GmbH, Handelskammer Hamburg* and the *Vereinigung der Freunde der Universität des Saarlandes* for making this conference possible.

With this volume of the *CNPE*, Manfred Holler, Hartmut Kliemt and Manfred E. Streit step down as editors. We thank them for their input and initiative as editors. Max Albert (Saarbrücken) and Stefan Voigt (Kassel) have been nominated as new editors.

Editors and Publishers

# Contents

# Introduction

by

STEFAN VOIGT

Increased international interdependence, often also discussed under headings such as globalization, has also increased the potential for international conflict. Increased levels of international trade as well as foreign direct investment are, however, not the only potential sources for international conflict. Others include border-crossing pollution, financial flows to support terrorist activities and so forth. The net gains from the increased level of international interdependence depend, *inter alia*, on the capacity to prevent conflicts from arising in the first place and, should they have arisen, from the quality of international conflict resolution mechanisms. International conflict resolution mechanisms include both formalized international courts as well as less formalized mediation and arbitration procedures. Observers have counted between 17 and 40 international courts (Romano 1999). The number of rather formalized courts is thus already quite high, and the procedures as well as the competences of the courts vary considerably.

The implementation of dicta issued by courts on the level of the nation state is rarely considered to be a problem: these courts are part of a nation state that claims to be endowed with the monopoly to use force – and implementation is most of the time taken for granted. On the international level, there is, however, no equivalent to the monopoly to use force. Implementation of dicta issued by international courts should thus be much more fragile.

Understanding the criteria that make international conflict resolution mechanisms successful promises to be highly relevant: if courts connected to international treaties have a low compliance rate, compliance with the rules agreed upon in the respective international treaty can be expected to be low, too. If, e.g., the dicta of the Dispute Settlement Body of the WTO were ignored most of the time, this would make compliance with the rules of the WTO less likely. This would, in turn, make it less likely that an international economic order aiming towards free trade could be sustained.

The last decade has witnessed at least three fundamental trends in the institutions of international conflict resolution. Some courts have *extended standing* to individuals and other actors such as NGOs. In line with the traditional concept of nation-state sovereignty, only (governments of) nation-states used to have standing in international courts and conflict resolution was thus confined to conflicts between nation-states. This has changed dramatically: In case citizens of the states who are members of the Council of Europe believe that their human rights guaranteed through the European Convention

of Human Rights have been violated, they have the option to take their case to the European Court of Human Rights. Similar developments can be observed in the Americas (with the Inter American Court of Human Rights) as well as in Africa (with the African Court on Human and People's Rights).

A second trend regarding international courts is the *increased* number of issues over which they have *jurisdiction*. In the last decade, a number of new courts were founded, e.g., the International Tribunal for the Law of the Sea, the International Criminal Court, but also various war tribunals. Representatives of at least some states are currently discussing possible advantages of an International Court for the Protection of the Environment.

A third trend is that conflict resolution has moved away from bargaining and *moved towards more court-like decision-making*. The Dispute Settlement Understanding reached within GATT/WTO is probably the best example: Before the DSU was reached, a contracting state had to consent to its own "conviction"; now, decisions can also be taken without the consent of the contracting state that has reneged upon the rules laid down in the GATT/WTO.

The likelihood of conflict extending beyond the nation state has increased as a consequence of increased global interdependence. The three trends just pointed out seem to indicate that nation-state governments have been concerned with developing international conflict resolution mechanisms that can adequately deal with this increased potential for conflict.

Yet, a large number of questions dealing with these courts wait to be dealt with in detail. They include the following ones:

- What are adequate criteria to measure the effectiveness of international courts? What are adequate criteria to ascertain their legitimacy?
- What are the variables that help to explain the differential success of the different international courts?
- What are the variables that help explain the readiness of nation-state governments to ratify treaties establishing international courts – and often somewhat reducing nation-state sovereignty?

These are very broad questions. The papers in this volume contain first steps toward answering them. The papers were all written for a conference on New Political Economy which took place in October 2004 in Saarbrücken, Germany. All papers are accompanied by a comment that was also presented at the conference. Interdisciplinarity is realized here not only insofar as representatives of various disciplines contributed to the volume but also because an attempt was made to select commentators who do not belong to the same academic discipline as the paper presenter. We succeeded in most cases, but not in all.

## *The Desirability of Economic Analysis*

Hitherto, the mechanisms used in International Conflict Resolution have mainly been analyzed by experts in International Relations or by scholars of International Law. Traditionally, communication between representatives of these two schools has been rather scarce. This has, however, changed over the last number of years (see, e.g., the special issue of International Organization 2000). For a long time, most arguments advanced in this area were grouped according to the school of thought that its author belonged to, namely (neo-) realists on the one side and intergovernmentalists on the other. Some contributors (Mattli and Slaughter 1998) have, however, pointed out that these frontlines promise little hope for future progress and have called for turning away from this impasse. A fresh look at these issues seems thus warranted.

International conflict resolution mechanisms can be interpreted as based on institutions. In economics, institutions have been defined as commonly known rules that are to structure repetitive interaction situations that are endowed with the threat of a sanction in case of non-compliance with the rule. International courts themselves would, however, be classified as organizations. More generally, organizations are interpreted as the actors of a game in the New Institutional Economics (see, e.g., North 1990, 4ff.). The function of rules is to reduce uncertainty by separating legal from illegal behavior. The function of sanctions is to make illegal behavior costly and thus unattractive.

The New Institutional Economics can be considered as a very successful development within economics that has made a host of new insights possible. Although there has been some analysis of the institutions relevant for exchange beyond the nation-state, precious little is concerned with current problems. Avner Greif (1989, 1994, 1997) has analyzed the rise of the Maghribi traders in the 11$^{th}$ century and the reasons why they were outpaced by the Genoese and Venetian traders in the 14$^{th}$ century. Greif, Milgrom, and Weingast (1994) have proposed to re-interpret the Hanse as a trade-creating institution that formed a counterweight to the power of the rulers of trade centers that was necessary for the honoring of property rights by the rulers. Milgrom, North and Weingast (1990) describe the role that organized market places (Trade Fairs) and private judges played in the emergence of the so-called *Lex Mercatoria*, i.e. the law according to which merchants used to structure their interactions before the rise of the nation-state. This list could be prolonged. Yet, and oddly enough, the institutions currently used to structure interactions with an international dimension have not been extensively analyzed.

Using the toolkit of economics for the analysis of interactions that occurred during the middle ages has substantially increased our understanding of the institutional prerequisites that enabled an extensive trading network to

emerge. Our conjecture is that an economic analysis of the institutions currently used to resolve international conflicts could prove just as beneficial.

### *The Contributions to this Volume*

The distinction between positive and normative analysis is standard in economics. With regard to international conflict resolution mechanisms, positive analysis is concerned with the description and explanation of the differential success rates of different institutional arrangements as well as with the attempt to explain the emergence of the differences in the institutional arrangements themselves. Normative analysis is concerned with the identification of optimal solutions dealing with international conflict. This can include the optimal degree of international court competence, optimal decision rules within courts etc. Traditionally, economists have been interested in the efficiency of institutional solutions, narrowly defined. This has, however, been broadened to integrate aspects such as the fairness or justice of institutions. Both positive and normative analyses are represented in this volume with, however, a clear emphasis on positive issues as a thorough understanding of the achievements and shortcomings of the currently realized international conflict resolution mechanisms is a precondition for the identification of optimal solutions.

The papers dealing with positive analyses are grouped into two different sections: in the first section, international conflict resolution mechanisms are assumed to be exogenously given, and the analysis focuses on comparing the different effects that are caused by the different attributes that various international conflict resolution mechanisms have. Compliance with their dicta is one endogenous variable of primary interest. In the second section of the contributions dealing with the positive analysis of international conflict resolution mechanisms, these will be endogenized, i.e. analyzed as the result of choices made by various actors.

We now turn to the papers in which the international conflict resolution mechanisms are assumed to be given and their consequences are inquired into.

Many scholars of international law celebrate the creation of the International Criminal Court (ICC) as a milestone in the development of International Law. According to them, making dictators accountable is not only expected to increase fairness and justice, but should also reduce the likelihood of similar atrocities being committed in the future. Some economists have been much more critical with regard to this likely effect. It has, e.g., been argued that there is a problem of time-inconsistency in the treatment of dictators: before they come to power, the threat of severe sanctions could refrain some would-be dictators from seizing power. Once they have seized

power and the question is how to get rid off them, the likelihood can be increased if the legal system can credibly promise to the dictators that they will *not* be sued. The deterrence function of the International Criminal Court can thus be debated. As empirical evidence regarding the ICC is not available yet, Daniel Sutter deals with the expected effectiveness of the ICC theoretically and concludes that the Court is unlikely to have a major deterrent effect.

It has been mentioned above that one of the trends of the last decade with regard to international courts has been to grant standing to individuals, but also to international organizations, national courts and non-governmental organizations. Published court decisions have public good qualities: they are not only relevant for the individual case at hand but for similar future cases as well. Taking a case to court therefore amounts to a voluntary contribution to the provision of a public good. Potential gains (from winning a case) cannot be completely internalized whereas potential losses (from losing a case) are completely internalized. An individual has thus systematically less incentives to take a case to court than an organization representing a large number of potential beneficiaries of a court decision. Anne van Aaken's contribution to this volume analyzes the differential incentives that different complaint mechanisms provide for individuals and NGOs to use international human rights law. She concludes that underenforcement is likely under the currently given mechanisms.

Eric Neumayer's paper is closely connected with the one by van Aaken. He deals with the question whether ratification of Human Rights treaties changes the human rights practice of the ratifying states in a significant way. Hathaway (2002) recently dealt with this issue and found that ratification has little effect, at the margin even negative effects. Neumayer is not quite as pessimistic because he finds that ratification is often associated with an improvement in the human rights record of the states that have ratified international human rights treaties.

In a number of papers, Eric Posner (and various co-authors) has been very critical with the emerging orthodoxy in international law. He has, e.g., argued that the consequences of judicial independence crucially depend on the institutional environment in which it occurs. According to him, international courts are little successful, one reason being that their judges are too independent (Posner and Yoo 2005). In the paper featured here, Posner analyzes the development of the International Court of Justice in a little more detail. He discusses two potential approaches to explain what he terms "the decline of the ICJ".

It is well-known that the judiciary does not only decide cases on the basis of exogenously given law but that by making decisions it also makes new law. In the domestic realm, there are a number of institutional arrangements that constrain the law-making power of judges: if the law made by judges is too far

away from the preferences of the legislature, the legislature could pass explicit "fresh" legislation in order to correct the law made by judges. Passing fresh legislation on the international level is, however, a lot more difficult ("more costly") than on the national one. In his contribution, Tom Ginsburg identifies a number of informal mechanisms that are used by nation-state governments in order to constrain the international judiciary in its law-making capacity.

The monetary costs of international courts and tribunals have rarely – if ever – been explicitly compared. This is what Cesare Romano does in his contribution to this volume. He systematically connects three aspects, namely the size of the budget, the sources of the budget and the output that is produced with the respective budget. All in all, Romano compares eleven tribunals comprising international courts, regional courts as well as courts and tribunals dealing with criminal issues.

Larry Helfer picks up a recent and controversial paper by Posner and Yoo (2005) in which these authors claim that international courts are by and large a failure and the reason for this failure would be that they were too independent. If that were the case, Helfer asks, why is it that the number of international courts is rising rapidly? Why would nation state governments continue to found new courts? His hypothesis is that international courts are never independent in an unqualified way but that they only enjoy "constrained" independence.

Whereas most contributions either deal with international courts in general or focus on specific international ones, George Tridimas analyzes the institutional structure of the best-known regional supranational court, namely the European Court of Justice. After noticing that implementation of the Draft EU Constitution would mean substantial changes for both the legislature and the executive of the EU, but not for its judiciary, Tridimas inquires into the reasons for the observed stability of the institutional foundations of the ECJ. He argues that establishing a court and endowing it with the power of judicial review can be completely rational from the point of view of states that are member to a Union and that aim at maximizing their expected net benefit from membership in such a union.

The two remaining papers deal with the issue of international conflicts from a normative perspective. It is well known that the so-called "effects doctrine", according to which most sovereign nation-states claim jurisdiction over mergers as long as the planned merger is expected to have some effect within their own jurisdiction (i.e., even if it is formally concluded elsewhere) entails a high potential for conflict between nation-state governments (Kleinert/Klodt 2000). At the same time, no formally established forum for conflict resolution in this area has yet emerged. The paper by Justus Haucap, together with his two co-authors Florian Müller and Christian Wey, critically discusses whether an international competition court should be created. They conclude that a global competition policy presupposes a wide ranging harmonization of

national competition policies. Since they deem this to be unlikely, they also believe that a global competition policy is unlikely in the years to come.

The paper by Wilfried Hinsch and Markus Stepanians deals with a very basic question: if rights are granted to individuals, there must be at least one other person that is allocated the duty of providing those rights. Specifying rights would thus always include the necessity of specifying those who are to provide the benefits of the rights. If a right not to suffer from poverty is solemnly declared, there must be someone who is given the duty to ensure that the right is factually provided. The two authors call this the problem of duty allocation.

The ten papers in this volume thus cover a broad range of issues and diverse methods. We hope that the volume will stimulate more exchange between scholars of international law with scholars of law and economics as well as with public choice scholars but still more that it will stimulate more research into these questions that promise to become ever more relevant in the process of globalization.

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# The Deterrent Effects of the International Criminal Court

by

DANIEL SUTTER*

*Abstract*

The International Criminal Court came into existence in 2002. The stated goal of the Court is to punish and deter genocide, war crimes and crimes against humanity by the leaders of nations. I examine the potential for deterrence of such crimes using the framework of the economics of crime. The crucial factor in the effectiveness of prosecution by the court I argue is the probability that the Court's punishments will actually be imposed on current regime leaders. Since the Rome Statutes establishing the Court have few effective measures to allow punishments to be imposed, I conclude that the Court is unlikely to have a major deterrent effect. I also argue that punishment of regime leaders guilty of crimes against humanity is not always beneficial, since the prospect of punishment provides a disincentive for regime leaders to step down from power.

## *1 Introduction*

Governments killed over 169 million people during the 20th Century (Rummel [1994]). Although the Century featured two destructive world wars, the majority of these deaths by government were inflicted on a country's own or conquered civilian populations. The United Nations has recognized from its inception the need to punish leaders who commit such crimes. The international community held tribunals after World War II to punish leaders of Germany and Japan for war crimes, and the United Nations organized ad hoc tribunals for the former Yugoslavia and Rwanda in the 1990s. In 1998 the United Nations (U.N.) convened an Assembly of States in Rome to draft statutes for an International Criminal Court to try those guilty of war crimes, genocide and crimes against humanity. In 2002 the Court, located in The Hague, The Netherlands, came into existence after sixty countries had ratified the Statutes.

The International Criminal Court (ICC) was created with the express purpose of punishing serious crimes like genocide and crimes against humanity as opposed to ordinary crimes. The Preamble of the Rome Statutes states this intention clearly: "Determined to put an end to impunity for the

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perpetrators of these crimes ..." In addition to punishing perpetrators, the U.N. hopes that a permanent court to try tyrants will help deter these crimes in the future.

"A permanent court with a mandate to bring to justice individuals responsible for the world's most serious crimes, atrocities and mass murderers will be more effective and efficient. It will be able to take action quickly, and possibly limit the extent or duration of violence; by nature of its very existence, it will provide a much stronger deterrent. Potential war criminals might reconsider carrying out their plans when they know that they may be held accountable – as an individual – even if they are a head of State." (United Nations [2002])

While the goal of preventing atrocities and genocide is a noble one, merely stating that the ICC will deter such crimes does not achieve the goal. I examine the ICC and the prospects that its existence will have a significant deterrent effect on would-be tyrants.

In evaluating the deterrent effect of the ICC, I will focus on the deterrent effect on regime leaders for acts of violence against a country's own people, what I will call repression for shorthand. Crimes committed by regime leaders differ in one important respect from ordinary crimes and misdemeanors – the regime is often in charge of and can prevent its own prosecution. The ability to prosecute leaders who will not prosecute themselves is an important benefit of the ICC compared to domestic courts.

As an economist my discussion in this paper will focus on the strategic effects of the existence of the ICC and not the subtleties of international law, which is beyond my area of expertise. I am interested in the types of actions the ICC can or could potentially take to deter violence by a regime against its own people. I will not consider whether the Rome Statutes give the Court the power to do all of the things which I discuss. I also leave aside questions of exactly what constitutes crimes, the details of criminal procedure in ICC cases, if additional crimes like aggression or drug trafficking should be brought under the Court's jurisdiction, or whether everything defined under the statutes is actually related to fundamental political rights. I will presume that deterrence of the regime action by the ICC is a desirable outcome, which may not always be true if the list of "crimes" were expanded too greatly, or if the ICC engaged in bogus, politically motivated prosecutions.

I proceed as follows. Section 2 presents a simple model borrowing from the economics of crime to identify factors of relevance in evaluating the deterrent effect of the ICC. In particular the probability that the ICC's punishment is imposed and the punishment that tyrants face without ICC prosecution are two crucial factors. Section 3 then discusses based on these factors whether the ICC is likely to exert a significant as opposed to a marginal deterrent effect on regime misbehavior. Section 4 then considers whether ICC punishment is always desirable. An authoritarian regime which has already committed