

Norm Contestation in International Politics



Anette Stimmer

Nuffield College

Thesis submitted in partial fulfilment of the requirements for the degree of
DPhil in International Relations in the Department of Politics and International
Relations at the University of Oxford.

Trinity Term 2019

95,867 words

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Abstract

First generation norm scholars treat the meaning of a norm as if it was clear-cut and static in order to show the influence of international law on state behavior. Second generation norm scholars acknowledge that legal ambiguities and tensions give rise to debates. However, they tend to end rather than begin with the finding that norm contestation is a common occurrence in international affairs. This project begins with norm contestation as a problematic to understand norm development in international relations.

This study develops a theoretical framework on processes and possible outcomes of norm contestation that can guide empirical research. States can agree or disagree on both the norm frame (justification) and/or claim (action) when applying international law. Thus, norm contestation can have four different outcomes: norm clarification (frame and claim agreement), norm recognition (frame agreement/claim disagreement), norm neglect (frame disagreement/claim agreement) and norm impasse (frame and claim disagreement). These alternate endings have different effects on the clarity and strength of the contested norms, as well as on subsequent debate over them.

This “alternate endings” typology structures an empirical analysis using content-analysis and elite interviews to compare the duration and effect of contestation over security norms. I further show that the malleability of norms does not make them epiphenomenal to power. States pay attention to the legal justifications they provide for their actions, so that norms both structure debates, and are constructed by them.

States act strategically when interpreting norms, but social dynamics intervene in the process, and influence the outcome: the kind of legal framing and legitimation strategy that a state or a third party to which norm interpretation was delegated to engages in matters. Next to this justificatory discourse, the reactions of in- and out-group members to norm interpretations decide over their sustainability.

Acknowledgments

This study has benefitted from the advice and support of many individuals and institutions. I would like to thank Nuffield College and the Department of Politics and International Relations (DPIR) as well as the Friedrich-Ebert-Stiftung for their generous scholarships and the Rothermere American Institute for financial support of fieldwork in New York. I am grateful for feedback from Nicholas Barker, Nicole De Silva, Edmund Downie, Christian Fastenrath, Jessica Gliserman, Ezequiel González Ocantos, Todd Hall, Patrick James, Ian Johnstone, Edward Keene, Walter Mattli, Karolina Milewicz, Jean-Frédéric Morin, Joel Ng, Lara Olson, Duncan Snidal, Nora Stappert, Jacqui True, Shaina Western, Laurence Whitehead, Lea Wisken, and Yuan Yi Zhu. I also appreciated the comments and questions from audience members and discussants at several conferences, where I presented parts of this thesis: the International Studies Association Annual Conferences 2016, 2017 and 2018; the British International Studies Association Annual Conferences 2015 and 2017 and DPIR's Research Colloquium. Moreover, the advice from Daniel Nexon and three anonymous peer reviewers have helped to improve the theoretical foundation of my research.

A few people deserve special mention. Most of all, I would like to thank my supervisor, Duncan Snidal, for his support and guidance throughout the process, and for helping me to develop my own ideas. Duncan's advice on how to present and refine my arguments has been invaluable. It has also saved the reader from many long German-style sentences and paragraphs. I am particularly grateful for his reassurance and his belief in me and this project, and for all the little wisdoms on life as an academic that he has shared with me. I am also grateful to Eddie Keene and Shaina Western for their probing questions at the Transfer of Status Examination, which have given me the idea for this project; to Ian Johnstone for his comments on earlier drafts of my theory chapter and to Nicholas Barker for sharing his experience of conducting interviews and his knowledge of the Balkans and Caucasus with me. I'd also like to thank Lara Olson for her advice on the Kosovo case study and Yuan Yi Zhu for sharing his knowledge of the South China Sea arbitration case with me. A special thanks also goes to Nicole De Silva for taking me under her wing when I arrived in Oxford. Her advice on how to navigate the Oxford system, what conferences to go to, grants to apply to, and our chats on life as DPhil students and academics have made student life so much easier.

My family and friends have been a great source of support, particularly in the last month before submitting this thesis their help with baby-sitting and proof-reading has been much appreciated. I would like to thank my husband, Matthew Addis, for his (almost) never-ending patience and for bringing balance to my life. It is to him that I dedicate this thesis.

To Matthew

Abbreviations

AI	Amnesty International
ASEAN	Association of South East Asian Nations
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFI	(European) Court of First Instance
CIA	Central Intelligence Agency
CID	Cruel, Inhuman or Degrading (treatment)
CIS	Commonwealth of Independent States
CS	Continental Shelf
CSTO	Collective Security Treaty Organization
DoD	US Department of Defense
ECJ	European Court of Justice
EEZ	Exclusive Economic Zone
EU	European Union
GCC	Gulf Cooperation Council
HRW	Human Rights Watch
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IIFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
IL	International Law
IO	International Organization
IR	International Relations
ISIL	Islamic State of Iraq and the Levant
KFOR	(NATO) Kosovo Force
KIG	Kalayaan Island Group
LAS	League of Arab States
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
O	Opponent
OIC	Organization of the Islamic Conference
P3	Permanent 3 UNSC members: US, UK, France
P5	Permanent 5 UNSC members: US, UK, France, Russia and China
PCA	Permanent Court of Arbitration
PoC	Protection of Civilians
PoW	Prisoner of War
RO	Regional Organization
R2P	Responsibility to Protect
SARS	Severe Acute Respiratory Syndrome
SCO	Shanghai Cooperation Organization
UK	United Kingdom

UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNMIBH	United Nations Mission in Bosnia Herzegovina
UNMIK	United Nations Mission in Kosovo
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
US	United States
WHO	World Health Organization
WMD	Weapons of Mass Destruction
WTO	World Trade Organization

Table of Contents

ABSTRACT	III
ACKNOWLEDGMENTS	V
ABBREVIATIONS	VII
 INTRODUCTION: THE POWER AND LIMITS OF NORM CONTESTATION. 1	
1. THE POTENTIAL FOR NORM CONTESTATION IN INTERNATIONAL POLITICS	1
2. POSSIBLE ENDINGS OF NORM CONTESTATION	4
3. PATHWAYS TO ALTERNATE ENDINGS OF NORM CONTESTATION	8
4. METHODOLOGICAL ASPECTS	13
5. OUTLOOK	15
 CHAPTER 1: BEYOND INTERNALIZATION: ALTERNATE ENDINGS OF THE NORM LIFE CYCLE.....	17
1. INTRODUCTION	17
2. CONCEPTUALIZATION OF NORMS AND NORM CONTESTATION	19
3. BREAKING DOWN DISAGREEMENTS: THE ROLE OF FRAMES AND CLAIMS	22
4. CONCLUSIONS.....	36
 CHAPTER 2: THE PROCESS OF NORM CONTESTATION	39
1. INTRODUCTION	39
2. CORE ASSUMPTIONS AND FOCUS OF ANALYSIS	41
3. ANALYZING SOCIAL DYNAMICS	45
4. RESEARCH DESIGN AND METHODOLOGY	61
4.1 <i>The universe of cases</i>	61
4.2 <i>The theoretical lens</i>	62
4.3 <i>Case selection and analysis</i>	67
4.4 <i>Data and sources</i>	73
5. OVERVIEW OF CHAPTERS.....	74
 CHAPTER 3: NORM CLARIFICATION: FROM CONTESTATION TO CONSENSUS ON THE PROHIBITION OF TORTURE AND THE RIGHT TO SELF-DEFENSE IN THE CONTEXT OF INTERNATIONAL TERRORISM ...	77
1. INTRODUCTION	77
2. NORM CLARIFICATION: CONTEXT AND CONSEQUENCES.....	79
3. PATHWAYS TO NORM CLARIFICATION	81
4. COMPARING SITUATIONS OF NORM CLARIFICATION: ANALYSIS OF THE CONTESTATION OVER THE PROHIBITION OF TORTURE AND THE RIGHT TO SELF-DEFENSE IN THE CONTEXT OF INTERNATIONAL TERRORISM	89
4.1 <i>Rejection of Reinterpretation: The Bush administration and the prohibition of torture and of CID treatment or punishment</i>	90
4.2 <i>Acceptance of Reinterpretation: Debates over Self-defense and Terrorism ..</i>	107
5. CONCLUSION.....	118

**CHAPTER 4: NORM RECOGNITION: FRAME AGREEMENT AND CLAIM
DISAGREEMENT IN THE LEAD-UP TO THE IRAQ WAR AND IN THE
CONTEXT OF TARGETED SANCTIONS..... 121**

1. INTRODUCTION	121
2. NORM RECOGNITION: CONTEXT, CONTESTED NORMS AND CONSEQUENCES	123
3. PATHWAYS TO NORM RECOGNITION: THE EFFECT OF DELEGATION ON STABILITY	131
4. COMPARING SITUATIONS OF NORM RECOGNITION: ANALYSIS OF THE ROLE OF WEAPONS INSPECTORS AND OF THE OMBUDSPERSON.....	140
4.1 <i>Contestation over weapons inspections in Iraq</i>	142
4.2 <i>Contestation over the Ombudsperson mechanism</i>	151
5. CONCLUSION.....	165

**CHAPTER 5: NORM NEGLECT: CLAIM AGREEMENT DESPITE FRAME
DISAGREEMENT ON THE NO-FLY ZONE OVER LIBYA AND MARITIME
ENTITLEMENTS IN THE SOUTH CHINA SEA 169**

1. INTRODUCTION	169
2. NORM NEGLECT: CONTEXT, CONTESTED NORMS AND CONSEQUENCES	171
3. PATHWAYS TO NORM NEGLECT	189
4. COMPARING SITUATIONS OF NORM NEGLECT: ANALYSIS OF THE CONTESTATION OVER RESPONDING TO ATROCITIES COMMITTED IN LIBYA AND OVER MARITIME ENTITLEMENTS IN THE SOUTH CHINA SEA.....	193
4.1 <i>Contestation over responding to atrocity crimes committed in Libya</i>	195
4.2 <i>Contestation over maritime entitlements in the South China Sea</i>	206
5. CONCLUSION.....	218

**CHAPTER 6: NORM IMPASSE: PROTRACTED CONTESTATION OVER
THE STATUS OF KOSOVO, SOUTH OSSETIA AND ABKHAZIA..... 221**

1. INTRODUCTION	221
2. NORM IMPASSE: CONTEXT, CONTESTED NORMS AND CONSEQUENCES	223
3. PATHWAYS TO NORM IMPASSE: THE LIMITS OF ENTRAPMENT AND THE POWER OF LEGAL DISCOURSE.....	227
4. COMPARING NORM IMPASSES: ANALYSIS OF THE DISPUTES OVER THE STATUS OF KOSOVO, SOUTH OSSETIA AND ABKHAZIA	232
4.2 <i>Contestation over the status of Kosovo</i>	234
4.2 <i>Contestation over the status of South Ossetia and Abkhazia</i>	244
5. CONCLUSION.....	255

CONCLUSION 257

METHODOLOGICAL APPENDIX..... 267

BIBLIOGRAPHY 283

Introduction: The power and limits of norm contestation

1.The potential for norm contestation in international politics

When Jeremy Greenstock, ambassador of the United Kingdom (UK) to the United Nations (UN) from 1998 to 2003, was questioned in the British Chilcot Inquiry into the Iraq war, he gave the following account of international law:

In international law there is no Supreme Court. It is up to a nation state to make its own national decision as to whether to adhere to the judgments of the International Court of Justice or not... it is possible to have a firm legal opinion on the legality of action under the UN charter for a particular operation. But it is also possible for there to be many different legal opinions as to what is actually legal without having an apex arbiter of what is legal or what is not. So we are still in the position, even now in 2009, of having legal opinions out there that say that what we did in March 2003 was legal and what we did in March 2003 was illegal, and except as a matter of opinion, you can't establish in law which of those two opinions are right finally and conclusively.¹

Greenstock points to a fundamental problem of international law: since international relations are anarchical, no authority can reach and enforce verdicts on the legal interpretations of states. Therefore, law can be interpreted differently, and so there is a risk that it provides little guidance for state behavior. Several factors can compensate for this structural flaw. For instance, the lack of an ultimate arbiter would not be a problem if it was always obvious what international law meant. In fact, in order to show how international law can influence state behavior, scholars have long treated the meaning of legal norms as static and clear.² Once norms are accepted and internalized, first generation norm scholars assume that norms “are no longer a matter of broad public debate.”³

However, as the disagreement of United Nations Security Council (UNSC) members over whether there was a legal authorization to use force against Iraq shows, states can have different opinions over what international law means. Continuing debates over the meaning of established legal norms such as the prohibition of torture⁴ or the subsidiarity

¹ Greenstock 2009, 36–37.

² Finnemore and Sikkink 1998a; Keck and Sikkink 1998; Risse, Ropp, and Sikkink 1999.

³ Finnemore and Sikkink 1998, 895.

⁴ Liese 2009; Keating 2014.

principle in the European Union (EU)⁵ also speak to the prevalence of norm contestation in international affairs. Norm contestation is a regular feature of international politics: there is a possibility for norm contestation whenever a general norm is applied to a specific situation and doing so can change or alter the norm.

A norm is generally defined as “a standard of appropriate behavior”.⁶ This study examines contestation over legal norms, and thus the term “norm” describes a broad category of prescriptive statements of varying legal status and precision.⁷ The subject of analysis is the practical application of international legal norms and how states interpret them rather than technical, legal debates over international law. Norm contestation therefore refers to political disputes over the meaning, validity or application of international legal norms.⁸ I use the terms “norms” and “norm contestation” because they are common in the constructivist political science literature (as opposed to legal studies),⁹ and thus highlight the social and political nature of the construction of what counts as appropriate behavior in the community of states.

It is worth noting that I focus on legal norms that are considered internalized hard law. Their contestation poses the greatest challenge to the accounts of first-generation norm scholars who assume that compliance with such well-established norms is almost automatic.¹⁰

A second generation of norm scholars has argued that certain properties of norms, in particular their vagueness and tensions in their meaning, lead to debates over their applicability.¹¹ Understandings of norms differ because their application to a specific situation can raise questions as to which norm applies, and, if a certain norm applies, what it means.¹² This ambiguity is due to the incomplete nature of norms. As Hart famously put it: “[n]othing can eliminate the duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts

⁵ Van Kersbergen and Verbeek 2007.

⁶ Finnemore and Sikkink 1998, 891.

⁷ Chayes and Chayes 1994, 65.

⁸ Wolff and Zimmermann 2016, 518.

⁹ Finnemore and Sikkink 1998, 891.

¹⁰ Finnemore and Sikkink 1998, 904.

¹¹ Jetschke and Liese 2013; Krook and True 2012; Sandholtz 2008; Wiener 2008; Wiener 2014.

¹² Sandholtz 2008, 102–104.

to all rules a fringe of vagueness or ‘open texture.’”¹³ Actors can have internalized the core of a norm – for instance, that Security Council authorization under Chapter VII of the UN Charter to address a “threat to the peace”¹⁴ is a permissible exception to the prohibition of the use of force. However, they can still question whether the concrete situation constitutes a “threat to the peace” that warrants military action.

This incompleteness of law is inevitable: it is impossible to foresee all future contingencies to which a rule will be applied when drafting it.¹⁵ The drafters of the International Covenant on Civil and Political Rights did not know that the internet would be developed and provide opportunities for mass surveillance of individuals abroad, raising the question whether rights to privacy apply extraterritorially.¹⁶ Policymakers also often need a fringe of vagueness about the meaning of a norm to reach agreement in the first place.¹⁷ Hence, while the incompleteness of law facilitates the formation of international law and its adaptability to new circumstances, it leaves the meaning of rules unclear when applied to new situations. Of course, rules can vary in their degree of imprecision.¹⁸ Even relatively precise rules, which actors regularly use, generate debate and require interpretation when unknown situations arise. However, past invocations offer analogies or inferences that can limit the potential for contestation. Hence, norms can be more or less settled.

While there are debates on the correct use of one norm in a given situation, there can also be “competition with other, often opposing, norms and would-be norms”¹⁹. The inherent tensions in every normative framework often give rise to such competition. The debate over the responsibility to protect (R2P), for instance, is rooted in the tension between human rights and sovereignty in the existing legal code. Both situations of a) clashes between different norms, and b) contestation over the correct interpretation of one norm warrant further study. Both change the content of the normative framework, and thus the guidance norms provide for state behavior.²⁰

¹³ Hart 1994, 123.

¹⁴ Article 39 UN Charter.

¹⁵ Chayes and Chayes 1993, 188–189.

¹⁶ Milanovic 2013.

¹⁷ Chayes and Chayes 1993, 189; Kersbergen and Verbeek 2007, 221–222.

¹⁸ Abbott et al. 2000, 404; Chayes and Chayes 1993, 189.

¹⁹ Krook and True 2012, 104.

²⁰ For a more detailed discussion of legal indeterminacy, see Koskeniemi 2005, Waldron 2012, Dill 2015 and Haque 2019.

Because the literature on norm contestation is still emerging, just like Jeremy Greenstock, scholars tend to end rather than begin with the finding that debates over the meaning of norms are a regular occurrence in international politics. A systematic analysis of what disagreements over international law can look like and of factors that curb, or fuel contestation is missing. This project contributes to the literature on norm contestation and change by exploring the following questions: when norms are contested, what is it that actors agree or disagree on? What (temporary) endpoints can norm contestation have and what are their implications for norm strength? What leads to the resolution of norm contestation or its persistence?

2. Possible Endings of Norm Contestation

Norms provide a reference point for action. They are intersubjective beliefs about what behavior is suitable in a given situation. The arguments that actors exchange on what “appropriate behavior” looks like reveal these intersubjective understandings of norms. Therefore, we can use insights from rhetoric scholars to identify what elements of norms actors can interpret differently.²¹ I argue that norms consist of a *frame*, or a justification, for a *claim* that describes an action that follows from this norm frame.

Arguments that were recently exchanged in the British-Argentinian sovereignty dispute over the Falkland Islands illustrate these concepts. In 2013 a referendum took place, in which only three Falkland Islanders voted against remaining a British Overseas Territory. British Prime Minister David Cameron framed this result as an exercise of the right to self-determination by saying, “[w]e believe in self-determination”, and claimed that the Falkland Islands “are British through and through and that is how they want to stay... now other countries right across the world, I hope, will respect and revere this very, very clear result.”²² Argentinian politicians and government officials rejected the “self-determination” frame by arguing that “[t]here will never be self-determination for an implanted population and there is no legal framework for this.”²³ Based on the frame of

²¹ Krebs and Jackson 2007, 43; Schimmelfennig 2001, 73.

²² British Prime Minister Cameron: Watts 2013. March 12.

²³ Senator Anibal Fernandez: Watts 2013. March 12.

an illegal foreign population living on the islands, they claimed that the referendum had no validity and that, “the Malvinas are Argentine sovereign soil.”²⁴

Actors can disagree on the frame, claim, or both. When adapting Krebs’ and Jackson’s typology of results of policy debates to norm contestation,²⁵ I find that there are four alternate endings of norm contestation: *norm clarification*, *norm recognition*, *norm neglect* and *norm impasse*.

Norm clarification occurs when actors agree on the frame and the claim. Such agreement elucidates what norm applies and what to do in similar situations in the future. This increase in precision strengthens norms. Chapter 3 analyzes two instances of norm clarification: the right to self-defense was clarified when the United States (US) argued that self-defense applies to state-sponsored terrorism after 9/11 and that it authorizes intervention in Afghanistan, which was widely accepted. The rejection of the Bush administration’s interpretation of the prohibition of torture in the context of international terrorism had the same effect of clarifying the norm.

We see *norm recognition* when actors agree on the norm frame that applies, but not on the claim that follows from it. When actors agree that a particular norm frame applies, this recognition focuses the debate. It can also lead to a relatively stable agreement to disagree, provided that the claims that are brought forward do not blatantly contradict the frame. Chapter 4 analyzes the relative stability of two cases, where contestation generated *norm recognition*: the discussion over how to implement due process rights in the context of the UNSC’s 1267 targeted sanctions regime for terror suspects, and the debate over whether UNSC Resolution 1441 (2002) authorizes military intervention or weapons inspections to address the Iraqi threat.

When we see *norm neglect*, the opposite is true: actors agree on the claim but disagree on the frame. In such situations it is not clear what norm guided the claim agreement and resulting joint actions. There is greater uncertainty and dispute parties will be expected to justify different actions in the future. Therefore, norm neglect is likely to be a temporary

²⁴ Ibid.

²⁵ Krebs and Jackson 2007, 43.

result that will either give way to a norm impasse or norm clarification. Chapter 5 illustrates the volatility of norm neglect with a discussion of the claim agreement on the no-fly zone in Libya in 2011 despite persistent disagreement of Security Council members on the frame. Similarly, China accepted the Philippines' claim to fishing rights in Scarborough Shoal in 2016, while continuing to differ over how to draw maritime boundaries in the South China Sea.

Lastly, the contesting parties can reach a *norm impasse* and disagree both on the frame and on the claim. This form of disagreement weakens norms most because it indicates differences both on what to do and on what norm applies. However, a *norm impasse* does not necessarily imply norm disregard. When the dispute parties use legal rhetoric, this can indicate that they are aware that careful framing is necessary to avoid legal obligations and that there is a public expectation to bring forward legal arguments. In chapter 6, I demonstrate these effects with two norm impasses that happened within short succession of each other and involve an interesting reversal of sides. While the US and European states recognized Kosovo's statehood and rejected Russia's emphasis on Serbian sovereignty and territorial integrity, they rejected Russia's recognition of South Ossetia and Abkhazia and emphasized Georgian sovereignty and territorial integrity in 2008.

This typology contributes a systematic analysis of possible endpoints of norm contestation and their implications to the literature. Social constructivists focus on the resolution of norm contestation to explain how norms can become influential. Critical constructivists, on the other hand, study its persistence to provide insights on inequalities in international politics. A systematic comparison of different outcomes is missing.

In the late 1990s, social constructivists developed theories such as the norm "life cycle"²⁶, the "boomerang effects"²⁷ model and the "spiral model"²⁸ that explain how contestation can give way to greater diffusion, or internalization of a norm, which "makes conformance with the norm almost automatic."²⁹ This process usually involves codification in international (and domestic) law. In a similar vein, scholars have turned

²⁶ Finnemore and Sikkink 1998.

²⁷ Keck and Sikkink 1998.

²⁸ Risse and Sikkink 1999.

²⁹ Finnemore and Sikkink 1998, 904.

to analyzing how certain argumentation techniques can resolve contestation: some highlight conventions of legal argumentation,³⁰ whereas others emphasize how prior arguments or commitments to norms can force concessions.³¹ Those scholars, however, mainly focus on how “better” arguments resolved disputes. Therefore, they do not provide detailed accounts of different endings of norm contestation or of why sometimes the exchange of arguments does not lead to norm clarification. Critical constructivists, on the other hand, focus on disagreements over norms and what they tell us about legitimacy gaps of norms,³² identity-categories of actors³³ or power relationships.³⁴ It is time to move beyond this binary focus on agreements or disagreements on norm meaning to explore the full-range of effects that contestation can have on the strength of norms and on their ability to structure disputes.

Chapter 1 provides the theoretical foundation for this typology of possible endpoints of episodes of norm contestation. I discuss these four endings and their implications for the strength of the contested norms in greater detail. Furthermore, I clarify certain methodological choices: based on the rules that govern the emergence and change of international law, I treat both silence and public acceptance of a frame or claim as “agreement”, whereas “disagreement” only encompasses public dissent. This study also primarily analyzes norm contestation between states as their consent is most important to develop international law further.³⁵

The “alternate endings” typology allows not only for a more systematic analysis of the effects that contestation can have on norm strength, but also of the pathways that lead to these four endings. This allows us, for example, to identify under what conditions mechanisms that scholars have identified to curb contestation work only partially or not at all. Chapter 2 engages in a theoretical discussion of the three factors that I identify as influencing the course that norm contestation takes: social support, justificatory discourse and delegation. The next section provides an overview of these pathways to the alternate endings of norm contestation.

³⁰ Bower 2015, 339; Johnstone 2011, 21–27; Sandholtz 2008, 106–110.

³¹ Schimmelfennig 2001, 66; Price 1998, 628; ; Busby 2007, 254.

³² Wiener 2014.

³³ Evers 2017.

³⁴ Epstein 2013; Epstein 2008.

³⁵ Bederman 2010, 34–35; Thirlway 2014, 103.

3. Pathways to Alternate Endings of Norm Contestation

Contestation implies that the norms that could guide behavior are unclear. Thus, like many scholars who study the tactics actors use to promote or oppose norms, I assume that actors act strategically, but also that social dynamics intervene and affect the outcome of norm contestation when actors interact and exchange arguments.³⁶ After all, norms are intersubjective principles and therefore others need to accept a norm interpretation for it to take hold.

I find that three kinds of social dynamics influence the path that norm contestation heads down and the (temporary) ending that it finds: the kind of *social support* the contesting parties receive, the content of the *justificatory discourse* and, when *delegation* takes place, the ability of agents to manage norm contestation.

Social Support

Social support is important for a norm interpretation to take hold and to avoid, or at least contain, social and material costs of disagreements. To cite Jeremy Greenstock's views again:

When you get to legitimacy, it is a fair way of describing that if you have got broad opinion behind you...you are doing something that is defensible in a democratic environment... If you do something internationally that the majority of UN member states think is wrong or illegitimate or politically unjustifiable, you are taking a risk in my view.³⁷

Thus, the UK ambassador to the UN emphasizes that social support is necessary to make a legal interpretation sustainable, and hints at negative consequences of objections to norm interpretations. Dissent from other states negatively affects a state's reputation as responsible community member. If the state does not give up the contested interpretation, the lack of acceptance weakens credibility and social standing and reduces cooperation opportunities.³⁸

³⁶ Bloomfield 2016; Bob 2012; Bower 2015; Schimmelfennig 2003.

³⁷ Greenstock 2009, 37–38.

³⁸ Johnstone 2011, 210–11; Schimmelfennig 2001, 64.

Widespread agreement on a frame and claim is necessary to avoid reputational costs and for norm contestation to end in norm clarification. Building on Finnemore and Sikkink,³⁹ I show that support from critical states is particularly important to render norms acceptable to a broad majority. When it comes to norm contestation, I establish that those states are critical who have institutional power⁴⁰ or are influential in the decision-making process. Since I focus on contestation over security norms, those are the five permanent UNSC members.

However, when a state upholds a contested norm interpretation, I find that support from some interstate audiences is more important than of others. In this context, the distinction between states with a different identity—so-called out-group members—and states with a similar identity – so-called in-group members – matters. Building on Johnston,⁴¹ I show that the reactions of in-group members are particularly influential. Because of identification with the group and thus greater social and material ties, in-group members exert considerable social influence and their agreement with a state’s norm interpretation is therefore particularly important to keep social and material costs at bay. For instance, the US actively sought support from European states for the recognition of Kosovo (claim) as a “*sui generis*” case (frame). The agreement from most European states allowed the US to uphold these frames and claims despite of objections from Russia and others.

The flip-side is that in-group dissent is thus more likely than out-group dissent to make norm contestation unsustainable. The League of Arab States (LAS), the Gulf Cooperation Council (GCC) and the Organization of the Islamic Conference (OIC) asked Russia and China to support a no-fly zone over Libya to protect civilians from atrocities from Gaddafi’s regime. The pressure from their in-group made Russia and China agree on the “no-fly zone”- claim. I consider these organizations as part of Russia’s and China’s in-group as they consist of other non-democratic regimes from the Global South.

The reactions of other audiences can compensate for a lack of clear or uniform in-group support. The support of domestic audiences can provide enough support for decision-makers to follow through on contested claims as the US public’s backing of the Iraq war

³⁹ Finnemore and Sikkink 1998, 901.

⁴⁰ Barnett and Duvall 2005, 51–52.

⁴¹ Johnston 2001; Johnston 2008.

shows. However, international opinion may still affect domestic opinion, depending on how legitimate the contested claim is viewed in retrospect. The Bush administration's reputation suffered from the failure to find large arsenals of weapons of mass destruction (WMD) in Iraq and the US public has become more insistent on UNSC authorization as a result.⁴² Furthermore, states can keep social and material costs of disagreement at bay when critical out-group states do not sufficiently condemn the implementation of contested frames and claims. Despite lackluster in-group support for Russia's recognition of South Ossetia and Abkhazia based on arguments of remedial self-determination, Russia could uphold its contested claim and frame because the US and EU member states soon toned down their criticism and domestic audiences supported the recognition.

Justificatory Discourse

Furthermore, the justificatory discourse that surrounds norm contestation influences how socially sustainable norm interpretations are. Constructivist scholars have argued that legitimacy in a sociological sense—perceptions of what is right rather than actual rightness⁴³—can persuade others. Political actors construct legitimacy discursively by providing justifications for why others should recognize their norm interpretation.⁴⁴ These justifications must show that they fulfil social expectations to be accepted. Constructivists differ on what kind of justificatory discourse has such a legitimizing quality, but usually locate it in the discursive process. Schimmelfennig argues that prior commitment can “entrap” actors⁴⁵ and Risse and Johnstone point to the fairness of the deliberation process.⁴⁶ I refer to the former as *precedent-based legitimation* and to the latter as *process-based legitimation*. Both kinds of legitimation are very demanding; the first requires a clear precedent to point to and for the second, the standards for fair process are very high.

The ability to influence perceptions of a third kind of legitimacy—output legitimacy—is more important, as output legitimacy has the advantage of not requiring a shared

⁴² Tierney 2008, 308–312.

⁴³ Hurd 1999, 381.

⁴⁴ Clark 2007; Hurrell 2005; Johnstone 2011; Reus-Smit 2004.

⁴⁵ Schimmelfennig 2001, 65.

⁴⁶ Risse 2000; Johnstone 2011.

identity.⁴⁷ It “only” requires a shared perception of a problem and of an effective and beneficial solution to this problem. Raising awareness of a problem and of the need to tackle it can persuade out-group states who do not share a similar identity and thus similar principles and prior commitments. Therefore, states rely heavily on such *interest-based legitimation* in their justificatory discourse, when trying to set a generally applicable trend. For instance, when trying to convince other states to accept a broadening of the right to self-defense that includes armed attacks by state-sponsored terrorists, the US relied heavily on arguments that sought to show the necessity and utility of this reinterpretation.

However, sometimes states do not want to change norm interpretations to generate generally applicable norm change, but to carve out exceptional rights.⁴⁸ Such exceptionalism occurs, when the contestant wants to keep the generally agreed on norm frame intact—for example, because it wants others to still be bound by it—but engages in a practice that it knows others would consider illegal under this norm frame. The US engaged in such covert exceptionalism for a while when contesting the prohibition of torture, and in overt exceptionalism when portraying Kosovo as a “*sui generis*” or “special case” that constitutes an exception to the right to territorial integrity. When the intent is to carve out an exception, it is likely that states, where possible, try to conceal “inappropriate” practices that most likely would be criticized by referring to their trustworthiness or credibility regarding the norm. For such *identity-based legitimation* to work, I argue that a “cultural match”⁴⁹ between the contested norm and the powerful state’s domestic legal culture or identity is necessary.

Analyzing the effect that justificatory discourse has on norm contestation requires a detailed analysis of the frames, claims and justifications that the dispute parties bring forward. I rigorously coded the kind of legitimation discourse that states engage in when analyzing what led to norm clarification in chapter 3 (see also methodological annex). Endpoints other than norm clarification, where we do not see both frame and claim agreement, imply that arguments based on legitimacy were not sufficient to convince key

⁴⁷ Jones 2009, 1086.

⁴⁸ Byers 2003, 174–176.

⁴⁹ Checkel 1999, 91; Busby 2007, 254.

audiences. Thus, in those cases other dynamics such as social support and delegation played a greater role, and therefore I prioritized them in the analysis.

In each of the remaining empirical chapters, I focus on coding and analyzing the norm frames and claims that decision-makers rely on in their official statements – whether in fora such as the UNSC, press releases or newspaper interviews. By studying those norm interpretations, we can also make inferences on the limits and power of international law. For instance, while we do not always see that prior arguments “entrap” states, their efforts to couch justifications in legal terms still indicate respect for the law and that there is a public expectation to justify actions in legal terms. Hence, contestation is a sign of the importance of norms as actors feel obliged to justify their conduct.⁵⁰

Delegation

States can decide to delegate the task of managing or resolving their disagreement to an agent. We see such delegation in most cases analyzed in this study. However, delegation did not always play a significant role in the management of norm contestation. I find that delegation is most likely to have an impact on norm contestation, when the dispute parties agree on the frame but differ on its implementation. Delegation involves sovereignty costs because states cannot fully control the actions of the agent.⁵¹ Frame agreement lowers sovereignty costs because it rules out certain claims to action. Since the disagreement is focused and circumscribed, there is less risk of agents proposing unwanted interpretations when we see norm recognition (frame agreement, claim disagreement). This makes consensual delegation more likely. Delegation therefore had most influence in the cases of norm recognition: delegating implementation or information-gathering on contested claims to independent experts had the potential to lend more credibility to one of the contested claims and thus to convince the other dispute party to give up their contestation.

I find that agents are able to contribute to managing norm contestation when they face a favorable problem-structure that allows them to build a reputation as credible and effective: the degree of uncertainty surrounding the agent’s output legitimacy and the

⁵⁰ Howse and Teitel 2010, 134.

⁵¹ Abbott and Snidal 2000, 436–438.

degree of social pressure on principals matters. When conclusive evidence that agents carry out their mandate effectively is available and when critical audiences exercise pressure on principals to rely on delegation, the agent is in a better position to show its output legitimacy and to manage norm contestation. We can see this in chapter 4, when comparing the effect that weapons inspectors had on the claim disagreement over whether inspections or military intervention are better suited to tackle the Iraqi threat and the Ombudsperson's impact on managing implementation of due process rights in the context of targeted UNSC sanctions. The greater availability of information on the Ombudsperson's performance and pressure from European Courts created a more favorable environment for the Ombudspersons to manage contestation. The incomplete information on Iraq's WMD capability because of the ease of concealment and dual-use options and the lack of uniform social pressure on the US made it more difficult for the UN weapon inspectors to demonstrate their credibility and effectiveness.

In sum, I find that three social dynamics can curb or fuel norm contestation: the kind of social support a state receives when advancing a norm interpretation, the state's ability to frame the interpretation as conforming to standards of legitimacy or legality and the ability of agents to influence contestation.

4. Methodological Aspects

A potential challenge to my findings is the argument that power is more important than social dynamics, when it comes to maintaining norm contestation. Realists argue that powerful states' ability to better absorb social and material costs allows them to escape these social pressures.⁵² I agree that powerful states are in a privileged position to shape the law because of their greater influence. That is why I treat those states as critical states in norm contestation that count with institutional or decision-making power. However, unlike realists, I do not consider differences in material power to tell the whole story. To show this, I control for the influence of material power on the outcome of norm contestation in two ways:

⁵² See, for example, Brooks and Wohlforth 2005.

First, I conduct comparisons of two cases in each outcome category of the typology. I control for the role of material power by selecting one case where the US, the most powerful state, was a driving force in norm contestation, and one case where contestation by a less powerful actor such as a weaker state or international court had the same result. The slight exception is my analysis of contestation that led to norm clarification in chapter 3: here I could only identify cases where norm clarification occurred because the US's frame and claim were accepted or rejected, but not a case where the interpretation of a weaker actor was accepted.

Second, I focus on the contestation of established norms related to international security such as "territorial integrity", "sovereignty" and the "prohibition of the use of force". Realists consider security matters to be the area where international law matters least and material power matters most. Hence, by showing that social and legal pressures even matter in this realm of high politics, I increase their validity and likelihood of playing a role in other instances of contestation, too.

Power, of course, is not limited to material resources alone. As Barnett and Duvall's seminal taxonomy of power shows, social processes and normative structures also influence actors' abilities to exercise influence and to determine their fate.⁵³ What Barnett and Duvall call productive power works through "the social existing, and hence, historically contingent and changing understandings, meanings, norms, customs, and social identities that make possible, limit, and are drawn on for action."⁵⁴ This study is therefore a study of such productive power: the analysis centers on how social and legal pressures structure the debate and construct norm meaning. For instance, there is a social expectation for states to justify their norm implementations and to show consistency with prior interpretations, which sets boundaries for the justificatory discourse and for the behavior that states can engage in.

I thus share the assumption with "thick" constructivists that power resides in social and discursive processes.⁵⁵ However, by treating all actions as shot-through with power, these scholars are unable to tease out the effect that other factors such as international law and

⁵³ Barnett and Duvall 2005.

⁵⁴ Barnett and Duvall 2005, 56.

⁵⁵ See e.g. Campbell 1998, Hansen 2006, Epstein

standards of legitimacy have on social interactions. I see merit in analytically distinguishing between the “justificatory discourse” that surrounds international law and other kinds of productive power: the political contestation over legal norms comes with specific conventions of argumentation and actors.⁵⁶ For example, my analysis shows that (quasi)-judicial agents such as the UN Ombudsperson can help to manage norm contestation and that states carefully craft their justifications, when implementing norms to avoid setting unwanted precedents. By treating international law as a special form of productive power and thus as a variable in its own right, this study can provide insights into how international law affects the process and outcome of contestation. When I speak of power in this thesis, I therefore refer to crude material power unless otherwise indicated.

Furthermore, unlike post-structuralist studies, this project does not focus on deconstructing the knowledge claims and identity categories that discourse creates. Instead, I place greater emphasis on agency and contribute an analysis of how actors and their social interactions produce norm meaning and norm change.

In chapter 2, I provide a more detailed account of the research design and methodology used in this research project.

5. Outlook

This study contributes to the literature on norm contestation and change by dispelling a common myth that ambassador Jeremy Greenstock and many scholars hold: international law would have so much more influence on politics if only states would always interpret international law in the same way or if there was an “apex arbiter” that could enforce judgements on whose interpretation is right.

When focusing the analysis on the norm interpretations that states bring forward, we soon see a different picture emerge: international legal norms structure debates, and in turn, are constructed by them. Hence, even when norms are contested, they leave a mark.

⁵⁶ Chayes and Chayes 1993; Johnstone 2011.

The “alternate endings” typology that I propose in this research project helps us to study different ways in which contestation leaves its mark in international politics: when it strengthens or weakens norms and what factors curb or fuel it. Furthermore, scholars from any theoretical persuasion can use this typology as the classification of the frames and claims dispute parties use does not require us to make any assumption on actor motivations.

Perhaps most importantly, this theoretical framework can guide empirical research. The norm contestation literature tends to be very theoretical and self-referential.⁵⁷ When empirical research is conducted, scholars often only analyze single case studies.⁵⁸ Therefore, more systematic cross-case analyses are needed to help us identify the limits and power of norm contestation. My analysis of eight case studies in this study is a step in this direction.

⁵⁷ Niemann and Schillinger 2017; Wiener 2014; Wolff and Zimmermann 2016.

⁵⁸ Bloomfield 2016; Bower 2015; Mills and Bloomfield 2018; Sandholtz 2008.

Chapter 1: Beyond Internalization: Alternate Endings of the Norm Life Cycle

1. Introduction⁵⁹

The first generation of scholars that emphasized the role of norms in international affairs often treated their meaning as clear and stable.⁶⁰ Doing so made it easier to demonstrate their influence on the behavior of states. However, a growing number of scholars focus on the ambiguous character of norms and how their overlap generates tensions and inconsistencies. Both of these features make norms the subject of debate and contestation.⁶¹

Those studying norm change and contestation agree that the meaning of norms is dynamic and shaped by debate. However, their scholarly agendas differ. One group of scholars analyzes how disputes generate new shared understandings at the international⁶² or regional level⁶³, or trace modifications during the diffusion process.⁶⁴ Another group studies the implications of disagreement over norms: some believe that contestation can take the form of ongoing and inclusive dialogue that makes norms more legitimate,⁶⁵ whereas others are skeptical that actors can share an understanding of the meaning and implications of norms.⁶⁶ However, little scholarship systematically explores different kinds of agreements and disagreements over the meaning of norms and how these variations in disagreements influence state behavior.

In this chapter, I develop a theoretical framework that allows us to capture alternate endings of norm contestation; it refines the idea of the “dual quality” of norms—as both stable and dynamic, structuring and constructed.⁶⁷ Drawing on theories of political

⁵⁹ This chapter was published as a theory note with *International Studies Quarterly* in June 2019, Volume 63, Issue 2, 270-280.

⁶⁰ Finnemore and Sikkink 1998, 904.

⁶¹ Acharya 2004; Acharya 2011; Acharya 2013; Bloomfield 2016; Bower 2015; Evers 2017; Krook and True 2012; Mills and Bloomfield 2018; Niemann and Schillinger 2017; Panke and Petersohn 2016; Sandholtz 2008; Wiener 2004; Wiener 2008; Wiener 2014; Wolff and Zimmermann 2016; Zimmermann 2017; Zwingel 2012.

⁶² Bower 2015, 348-358; Sandholtz 2008, 110-121.

⁶³ Schimmelfennig 2001, 66–76.

⁶⁴ Acharya 2004, 250–254; Krook and True 2012, 109–111.

⁶⁵ Wiener 2014, 3.

⁶⁶ Niemann and Schillinger 2017, 48.

⁶⁷ Wiener 2008, 38.

rhetoric,⁶⁸ I show that breaking norms down into norm *frames* (justifications) and *claims* (to action) allows us to categorize agreements and disagreements over them. The elements that states agree or disagree on affect the precision of norms in different ways; they have distinct implications for a norm's ability to influence state behavior.

Contestation over norm application can end in four different ways.

We see *norm clarification* when contestants agree on the norm frame and claim. Consider the agreement after 9/11 on a right to self-defense against state-sponsored terrorism (frame), and intervention in Afghanistan (claim). Such norm clarification increases normative guidance and social pressure to conform in similar situations in the future.

Sometimes contestants only agree on the norm frame but not on the concrete action, since a range of actions may fall under the frame. The normative agreement still provides a reference point, albeit a weaker one than norm clarification. *Norm recognition* is a stable endpoint, so long as the disagreement on the claim does not blatantly contradict the frame.

In contrast, disagreement on both the frame and the claim decreases normative certainty and cooperation. Consider the dispute over whether Crimeans' right to self-determination or Ukraine's sovereignty prevails (frames) and over which country Crimea belongs to (claims). I argue that whether such a *norm impasse* is sustainable depends on the nature and extent of previously shared commitments.

Lastly, frame disagreement coupled with claim agreement leads to joint actions, and may thus seem like norm clarification. The no-fly zone over Libya (claim), for which Security Council members provided different justifications, is sometimes mistakenly viewed as clarifying R2P. However, such *norm neglect* is a volatile outcome: due to the lack of consensus on a norm frame, states can justify a prior claim agreement as an exceptional compromise in a norm impasse. The joint action may also trigger socialization processes that lead to norm clarification. Further, I argue that whether contestation strengthens or weakens norms also depends on whether it expands or narrows the norm's scope, as well as the outcome that preceded it.

⁶⁸ Krebs and Jackson 2007; Toulmin 1958.

This chapter proceeds as follows. First, I discuss how scholarly analysis of either the resolution or the persistence of norm contestation divides the literature. I suggest moving away from these absolutes to explore the effect of contestation on norm precision and influence. Second, I describe four configurations of norm frames and claims, and the implications of each configuration for the clarity and strength of the contested norm(s) and subsequent debate. I conclude by explaining why mapping norm contestation endpoints matters, and by discussing how this typology can help refine the mechanisms scholars consider to curb or fuel contestation.

2. Conceptualization of norms and norm contestation

The first generation of norm scholars argues that norms matter in an anarchical international environment and explains how they affect state behavior. In so doing, scholars often treated the meaning of norms as relatively static and clear. For instance, Finnemore and Sikkink acknowledge contestation in the early stages of the norm ‘life cycle’.⁶⁹ However, they argue that norm evolution culminates in internalization, meaning that “norms acquire a taken-for-granted quality and are no longer a matter of broad public debate”.⁷⁰ Their theory cannot explain continuing debates about such established legal norms as the prohibition of torture,⁷¹ or the subsidiarity principle in the EU⁷². The same holds for two other prominent constructivist theories on norm diffusion and compliance: the “boomerang”⁷³ and “spiral”⁷⁴ models. These models do not sufficiently explore conflicting interpretations and subtler changes in meaning of established norms. Rational choice accounts that use criminalization of outlawed behavior as indicators of compliance also neglect disputes over legal interpretation.⁷⁵

A second generation of norm scholars argue that contestation can happen at any point in the norm life cycle. Treaty drafters cannot foresee every possible contingency. Linguistic

⁶⁹ Finnemore and Sikkink 1998, 897.

⁷⁰ Finnemore and Sikkink 1998, 895.

⁷¹ Keating 2014.

⁷² Van Kersbergen and Verbeek 2007.

⁷³ Keck and Sikkink 1998.

⁷⁴ Risse and Sikkink 1999.

⁷⁵ Kelley and Simmons 2015, 62.

ambiguities and overlapping norms also reduce interpretive clarity.⁷⁶ Norm contestation is possible whenever actors apply a general rule to a specific situation, and such application may change or alter the rule. Norm application can provoke debates over the meaning of a particular norm, or over the relative importance of different norms. Second-generation scholars primarily focus on international legal norms and consider norm contestation to involve political disputes about the meaning, validity, or application of norms.⁷⁷

Scholars generally define a norm as “a standard of appropriate behavior for actors with a given identity”.⁷⁸ Norms elicit feelings of obligation.⁷⁹ They are intersubjective constructs and provide reference points for which actions others consider acceptable. The clarity of these reference points can vary where actors’ norm understandings diverge. These variations affect future debates, actions and the status of norms. Wiener refers to these variations as the “dual quality of norms as structuring and constructed”.⁸⁰ Debates over norms construct the meaning of norms, and enable or constrain future episodes of norm contestation. The existing literature neglects variations in outcomes beyond disagreement or agreement, and thus fails to fully explore how the meaning of norms is both constructed by actors, and structures their actions.

The recognition of dynamic meaning led to research on how norms change during the diffusion process and helped overcome the Western bias of much of the earlier literature. Local or weaker actors actively participate in norm change. Research on “localization”, “subsidiarity” or “circulation” of the meaning of norms,⁸¹ and on multidirectional processes of norm “translation”⁸² provides many examples. Hence, some scholars consider the inherent contestability of norms as a positive quality because diverse voices become heard. Wiener and Acharya do not see contestation as indicating the irrelevance of norms.⁸³ Rather, they see contestation as an opportunity to uncover different normative

⁷⁶ Krook and True 2012, 109; Sandholtz 2008, 105–106.

⁷⁷ Wolff and Zimmermann 2016, 518.

⁷⁸ Finnemore and Sikkink 1998, 891.

⁷⁹ Abbott et al. 2000, 408–412; Finnemore and Toope 2001, 744.

⁸⁰ Wiener 2004, 191.

⁸¹ Acharya 2004, 244–246; Acharya 2011, 97–99; Acharya 2013, 469–471.

⁸² Zimmermann 2017, 775–777; Zwingel 2012, 124–126.

⁸³ Acharya 2004, 252–253; Acharya 2011, 116–117; Acharya 2013, 471; Wiener 2004, 218; Wiener 2014, 5.

understandings that can enhance the social legitimacy of norms.⁸⁴ These scholars imagine contestation as an ongoing dialogue. Hence, they do not thoroughly explore how variations in understandings affect the contested norms or structure subsequent debates.

Not all critical constructivists view the potential of contestation to increase legitimacy with such optimism. Some consider discourses and debates over norms such as the anti-whaling norm,⁸⁵ as “generative structures that are always charged with relations of domination”.⁸⁶ This strand of the literature explores the ways in which contestation reflects or reproduces pre-existing biases, identity categories, and power relationships. These scholars focus less on the meaning of norms and more on the role that norm contestation plays in creating identity categories of actors, and on the way that relationships structure contestation.⁸⁷ Some consider the meaning of norms as contested “all the way down”.⁸⁸

The malleability of norms makes some scholars question the relevance of international law.⁸⁹ If norms have no fixed meaning, powerful states can manipulate norms to legitimize their preferences and influence the behavior of others.⁹⁰ However, since norms are not subjective but intersubjective, such strategic applications face an important social limit: the need to gain acceptance from others. An influential strand of the literature explores structural constraints on norm interpretations. Some scholars cite the need for actors to portray competence in negotiations over the meaning of norms.⁹¹ Others refer to conventions of legal argumentation,⁹² the power of the status quo,⁹³ the network position of an actor,⁹⁴ or public expectations that prior commitments should be honored.⁹⁵ These scholars uncover social or normative limitations on state behavior. They focus on how

⁸⁴ For a more detailed discussion of Acharya’s and Wiener’s view of contestation as “a good thing” (p. 527), see Wolff and Zimmermann (2016).

⁸⁵ Epstein 2008.

⁸⁶ Epstein 2013, 502.

⁸⁷ Epstein 2008, 22; Evers 2017, 786.

⁸⁸ Niemann and Schillinger 2017, 48.

⁸⁹ Koskeniemi 2005, 61.

⁹⁰ Brooks and Wohlforth 2005, 518; Byers 2003, 173; Ikenberry and Kupchan 1990, 283.

⁹¹ Adler-Nissen and Pouliot 2014, 893–896.

⁹² Bower 2015, 339; Johnstone 2011, 21–27; Sandholtz 2008, 106–110.

⁹³ Bloomfield 2016, 312.

⁹⁴ Goddard 2006, 40.

⁹⁵ Schimmelfennig 2001, 66.

actors could stop powerful states' attempts at manipulation and generate legitimate norm interpretations: but norm contestation does not always end in agreement.

To summarize, critical scholars tend to conceptualize norm contestation either as an ongoing dialogue reflecting diversity or as merely another arena of power relations. The latter assumption prompted research into how social expectations generate agreement on the meaning of norms and limit opportunism to show that norms can guide state behavior. I propose to move beyond a dichotomous understanding of norm contestation and acceptance. A more nuanced account of agreements and disagreements on the meaning of norms helps us to grasp how contestation shapes norms and affects their influence on state behavior. Identifying alternate endings of norm contestation also allows us to better understand the effectiveness of structural constraints on strategic norm interpretations.

3. Breaking Down Disagreements: The Role of Frames and Claims

Rhetoric scholars distinguish two aspects of an argument: a “frame” or “warrant” providing a justification for the “claim” or “implication”, describing an action that follows from it.⁹⁶ Since the exchange of arguments reveals understandings of norms, we can also theorize norms as consisting of a frame and a claim. In law, this is essentially the difference between the rule (frame) and its application to a case that gives rise to a claim to action. For example, state A could argue that due to the prohibition of torture (frame), state B should be denounced for its actions that amount to torture (claim). Other states may subsequently agree or disagree with the frame, claim, or both.

Krebs and Jackson and Schimmelfennig draw on Toulmin when differentiating between frames and claims.⁹⁷ Toulmin analyzes the structure of arguments and what elements make them persuasive.⁹⁸ The three most basic elements of an argument are claims, warrants, and grounds (factual data).⁹⁹ A warrant justifies the claim and explains why the grounds support the claim. I refer to warrants as frames because this concept captures their function in norm contestation well.

⁹⁶ Krebs and Jackson 2007, 43; Schimmelfennig 2001, 73.

⁹⁷ Krebs and Jackson 2007; Schimmelfennig 2003.

⁹⁸ Toulmin 1958.

⁹⁹ Schimmelfennig 2003, 200; Toulmin 1958, 99–100.

Following Goffman, scholars generally define frames as interpretive tools that allow actors “to locate, perceive, identify, and label” occurrences.¹⁰⁰ Frames help to classify events, thereby rendering them meaningful and limiting the range of acceptable actions.¹⁰¹ In the context of norms, norm frames offer standards for assessing whether actions are appropriate. They signal normative commitment and provide actions with a justification. Whether we frame a declaration of independence as an exercise of the right to self-determination or a violation of state sovereignty will determine what actions are considered appropriate. Actors can use frames to highlight some aspects of reality while obscuring others, so as to win support for their interpretation.¹⁰² In this sense, the framing of events is a strategic practice that may prompt contestation. As Schön and Rein observe, a course of action may be compatible with different frames, and one frame may be consistent with several courses of action.¹⁰³ Distinguishing between frames and claims to action lets us capture these different forms of disagreement.

Building on Krebs and Jackson’s typology of argumentation outcomes,¹⁰⁴ I propose four alternate endings of norm contestation (shown in Table 1), depending on what actors disagree about: (1) *norm clarification* (agreement on frame and claim); (2) *norm recognition* (frame agreement, claim disagreement); (3) *norm neglect* (frame disagreement, claim agreement) and (4) *norm impasse* (disagreement on frame and claim).

Table 1: Overview of Norm Contestation Outcomes

	<i>Frame Agreement</i>	<i>Frame Disagreement</i>
<i>Claim Agreement</i>	Norm Clarification	Norm Neglect
<i>Claim Disagreement</i>	Norm Recognition	Norm Impasse

Krebs and Jackson focus on agreements and disagreements over frames and claims in policy debates.¹⁰⁵ In episodes of norm contestation, unlike in policy debates, it is not

¹⁰⁰ Goffman 1974, 21.

¹⁰¹ Entman 1993, 54; Lenz 2018, 44; McAdam, Tarrow, and Tilly 2001, 30; Snow et al. 1986, 464.

¹⁰² Entman 1993, 54.

¹⁰³ Schön and Rein 1994, 35.

¹⁰⁴ Krebs and Jackson 2007, 43.

¹⁰⁵ Ibid.

claim agreement but frame agreement and the associated normative commitment that provides stability. Before discussing this “alternate endings” typology, I will briefly explain whose norm interpretations matter and what constitutes agreement and disagreement.

International law can develop along many dimensions. I focus on the clarification of the meaning of norms. Widespread state consent tends to be necessary for international law to develop further.¹⁰⁶ Hence, state reactions to a norm interpretation have the most direct effect on legal norms, whether hard or soft. Finnemore and Sikkink consider state consent as widespread enough when a tipping point of one third of states is reached, including “critical states (...) without which the achievement of the substantive norm goal is compromised”.¹⁰⁷ In norm contestation, actors are critical to the achievement of the substantive norm goal when their institutional position gives weight to their norm interpretations.¹⁰⁸ Critical states differ from subject-area to subject-area. With security matters for instance, the five permanent UNSC members (P5) are usually critical because enforcement action requires their affirmative vote or abstention.

I consider both public approval and silence to constitute agreement, and only treat public disagreement as evidence of disagreement on a norm interpretation. As Sandholtz aptly observes: “[t]he outcomes of today’s disputes help to shape the context, and the pool of precedents, for later cycles.”¹⁰⁹ Thus states who disagree with a norm frame and claim have an incentive to publicly signal disapproval to quell a precedent that may produce unwanted obligations: silence signals tacit approval.¹¹⁰ Conversely, states who seek to reinterpret a norm require public approval (or at least silence) to create a precedent. Hence, I focus on public debates between states over what norm frame applies to a given situation and what claim to action follows. I will discuss the four different outcomes of norm contestation and their implications in turn.

¹⁰⁶ Bederman 2010, 34–35.

¹⁰⁷ Finnemore and Sikkink 1998, 901.

¹⁰⁸ Barnett and Duvall 2005, 51–52; Busby 2007, 254; Goddard 2006, 40.

¹⁰⁹ Sandholtz 2008, 103.

¹¹⁰ Legally, states can only avoid international customary law obligations by voicing their disapproval from the start (persistent objection). Silence is interpreted as approval. See Thirlway (2014), 103.

Norm Clarification (Agreement on Frame and Claim)

When we see widespread agreement on a frame and claim, the meaning of norms becomes clearer. The different understandings of how to interpret a situation and what to do make way for consensus. Hart described the incompleteness of norms by distinguishing between a “core of certainty” and a “penumbra of doubt”.¹¹¹ When states agree on what frame and claim apply in a previously disputed situation, the penumbra of doubt becomes smaller and the norm clearer. Norm clarification occurs when others accept, reject or synthesize a frame-claim combination.

Acceptance of an interpretation occurs when there is widespread agreement that the frame-claim combination an actor proposes applies. For instance, Article 51 of the UN Charter states that the right to self-defense applies when “an armed attack occurs against a Member of the United Nations”. According to the *Nicaragua case*, invoking this right requires active and significant state involvement in the armed attack.¹¹² The United States sought to lower this bar by citing self-defense (frame) to justify military strikes in response to terrorist attacks – such as the strikes against Libya in 1986 (claim) and against Afghanistan and Sudan in 1998 (claim). Several critical states contested these interpretations: in 1986, Spain and France even denied the use of their airspace, forcing a costlier flying route.¹¹³ These contestations subsided in the aftermath of 9/11. Critical states, and most other states, openly (or at least tacitly) approved the US’s norm frame of self-defense against state-sponsored terrorism and its claim to intervene in Afghanistan.¹¹⁴ The widespread support led to norm clarification.

Rejection of an interpretation occurs when we see widespread agreement that the frame-claim combination an actor proposes does not apply. When Cyclone Nargis hit Burma, French Foreign Minister Bernard Kouchner asked the UN Security Council to cite R2P (frame) to forgo Burmese consent and deliver emergency relief (claim). Others overwhelmingly dismissed the interpretation that R2P applies to natural disasters,¹¹⁵ clarifying the scope of R2P. Another example is the Bush administration’s repeated claim

¹¹¹ Hart 1994, 123.

¹¹² International Court of Justice 1986.

¹¹³ Byers 2003, 178.

¹¹⁴ Cassese 2001, 996–997; Johnstone 2011, 84.

¹¹⁵ Badescu and Weiss 2010, 362–363.

that it did not torture terror suspects.¹¹⁶ The administration attempted to justify these claims by reinterpreting legal frames related to the prohibition of torture such as the torture definition, the Geneva Conventions and the prohibition of extra-ordinary rendition.¹¹⁷ As Keating illustrates, the Bush administration was able to hide these practices, and the memoranda that put forth these interpretations, for several years.¹¹⁸ Once they became public in 2004–2005, domestic and international resistance started to form. As a result, the administration withdrew the contested legal memos. Both 2008 presidential candidates pledged to end Bush’s practices and interpretations: a pledge mostly fulfilled by Barack Obama once in office.

Synthesis occurs when actors reach a compromise between their contrary norm interpretations. This synthesis can be a combination of their different frames and claims or an entirely new frame and claim that all parties can agree to: neither contestant’s interpretation prevails, but a compromise is found. The so-called “Turbot War” serves as example. Depleting fish stocks prompted Canada to implement conservation measures within its Exclusive Economic Zone (EEZ). Foreign vessels continued to fish turbot intensively on the Grand Banks right outside of the EEZ, where according to the UN Convention on the Law of the Sea (UNCLOS), the freedom of the high seas generally applies. Contesting the freedom of the high seas, Canada banned Spanish and Portuguese vessels from fishing turbot on the Grand Banks and in 1995 seized the Spanish trawler *Estai*, using gunfire.¹¹⁹ Contestation ensued over whether the principle of “freedom of the high seas” trumps “sustainable fisheries” (frames), as both are embedded in UNCLOS, and over what nets, quotas and possible fines (claims) could apply.¹²⁰ Eventually, Canada and the EU reached a compromise: they introduced enforcement measures such as observers and satellite tracking devices, and joint quota to improve sustainability. At the same time, Canada repealed its controversial law allowing the arrest of Spanish and Portuguese vessels, dropped criminal charges against the *Estai*’s owners and returned the bond of Can\$500,000 to them, affirming the freedom of the high seas.¹²¹

¹¹⁶ Forsythe 2011, 66.

¹¹⁷ Ibid, 65–76.

¹¹⁸ Keating 2014.

¹¹⁹ Song 1997, 278.

¹²⁰ Ibid, 282–285.

¹²¹ Ibid, 285–286.

Wiener argues that at best, contestation over application closes a legitimacy gap between abstract moral claims of fundamental norms such as “sustainable fisheries” and their practical enactment.¹²² Other scholars have started to identify criteria for when contestation strengthens or weakens norms, and frequently cite Deitelhoff and Zimmermann’s working paper.¹²³ I adopt Deitelhoff and Zimmermann’s main criterion for strengthening and weakening: namely whether the sense of shared obligation towards a norm is questioned.¹²⁴ I argue that application can strengthen or weaken normative commitment along two dimensions: scope and precision. Narrowing the scope of a norm weakens it, as Panke and Petersohn observe, because it reduces the number of situations when states share a commitment to the norm.¹²⁵ For example, international agreement that R2P does not apply to situations of national disaster narrowed its scope, and extended the scope of the competing sovereignty norm. Badescu and Weiss and Deitelhoff and Zimmermann only focus on how the increased precision rendered R2P more acceptable.¹²⁶ They miss that this narrowing weakened R2P vis-à-vis sovereignty. Conversely, norm clarification (frame and claim agreement) strengthens the contested norm when it expands a norm’s scope or prevents its narrowing. We saw the former with the agreement to expand the right to self-defense to cases of state-sponsored terrorism, and the latter with the rejection of the United States’ attempt to narrow the prohibition of torture.

Norm clarification can strengthen or weaken norms vis-à-vis other norms. However, it always increases their precision by clarifying their regulatory ambit. Precision makes legal rules a better reference point for coordination,¹²⁷ and reduces ambiguity, which can enhance the prospects for compliance.¹²⁸ By setting a clearer standard, norm clarification makes what counts as “inappropriate” behavior more obvious and costlier, and thus makes cooperation in similar contexts easier. This renders norm clarification a relatively stable endpoint. The more precise a norm, and the more situations it was consensually

¹²² Wiener 2014, 58–62.

¹²³ Bloomfield 2016, 318–319; Niemann and Schillinger 2017, 36; Wiener 2014, 34–35.

¹²⁴ Deitelhoff and Zimmermann 2013, 14.

¹²⁵ Panke and Petersohn 2016.

¹²⁶ Badescu and Weiss 2010, 367–369; Deitelhoff and Zimmermann 2013, 9.

¹²⁷ Abbott et al. 2000, 413.

¹²⁸ Chayes and Chayes 1993, 188–193.

applied to, the more difficult it becomes to engage in reframing and to escape prior commitments.¹²⁹ Hence, precision increases the norm's ability to regulate state behavior.

However, increased precision strengthens some norms more than others. Norm clarification may hinder diffusion across different implementation levels: the more precise the content of a norm, the less room it leaves for the sort of local reinvention or translation that can enable diffusion.¹³⁰ Thus, precision may strengthen norms that the same actors implement at the same (international) level more universally than those that different actors implement at different levels.

Norm clarification also affects reputation. Engaging in contested practices leads to reputational costs and thus negatively affects cooperation and social standing.¹³¹ The rejection of a frame and claim can damage the reputation of the state whose interpretation others resist. Rejection can even pressure powerful states to drop their interpretation, as the Bush administration's contestation of the torture prohibition illustrates. Brooks and Wohlforth argue that powerful states can shoulder near-term costs of practices and interpretations that many other actors consider illegal better than others.¹³² However, the above example shows that they cannot do so indefinitely. By contrast, social acceptance of a frame and a claim or synthesis prevent reputational costs. The social consensus converts a hitherto inappropriate interpretation into an appropriate one.

In sum, agreement on a frame and claim constructs a clearer reference point. Such norm clarification structures future debate by making "entrapment" with the international community's clarified normative expectations more likely.¹³³

Norm Impasse (disagreement on frame and claim)

Norm impasse is the opposite of norm clarification. Here, critical states continue to disagree about whether the scope of a normative frame should be extended or curtailed (for example, whether "state-sponsored terrorism" can trigger "self-defense"), or about

¹²⁹ Sandholtz 2008, 109.

¹³⁰ Krook and True 2012, 123; Zimmermann 2017, 783.

¹³¹ Johnstone 2011, 210–211; Schimmelfennig 2001, 64.

¹³² Brooks and Wohlforth 2005, 518.

¹³³ Bower 2015, 339; Schimmelfennig 2001, 65.

which normative frame applies (for instance, “freedom of the high seas” versus “sustainable fisheries”). They also differ on what the correct claim is (for example, permissible fishing). When norm contestation reaches an impasse, the penumbra of doubt persists.

Persistent disagreement on a frame and claim leads to normative uncertainty about what norm applies and what to do. This impasse is unsatisfactory for those involved, no matter whether different values or interests provoke contestation. Norm entrepreneurs who are convinced of their interpretation’s appropriateness will continue trying to persuade critical states.¹³⁴ “Interest actors” will also try to gain agreement for their norm interpretation to maximize and cement their preferences.¹³⁵ However, actors who publicly uphold norm interpretations that the relevant audiences find unconvincing encounter social and material costs: their social standing and opportunities for cooperation suffer.¹³⁶ For example, when Crimeans voted to secede and join Russia in 2014, Russian President Putin and Crimean authorities argued that the referendum was in line with “the well-known Kosovo precedent” and the right to self-determination of Crimeans.¹³⁷ Conversely, the White House stated that “Ukraine’s sovereignty and territorial integrity must be respected” (frame), claiming that “the referendum in Crimea was a clear violation of Ukrainian constitutions and international law”.¹³⁸ The European Union (EU), another critical actor in this dispute, largely agreed with the United States’ assessment. The dispute over what norm applies and which country Crimea belongs to continues, and has put a strain on the relationship between the parties.

Therefore, when we see persistent disagreement on frames and claims, states face pressures that pull them in different directions. This can render norm impasses very stable or short-lived, depending on whether the benefits of protracted contestation outweigh the (normative, social or material) costs.

Abbott and Snidal argue that interest actors who do not promote a norm interpretation out of moral obligation may be more susceptible to giving up their contestation when offered

¹³⁴ Finnemore and Sikkink 1998, 896–899.

¹³⁵ Abbott and Snidal 2002, S145.

¹³⁶ Johnstone 2011, 210–211; Krebs and Jackson 2007, 44–47; Schimmelfennig 2001, 64.

¹³⁷ Putin 2014.

¹³⁸ White House 2014. March 17.

side payments or coerced.¹³⁹ The participation of interest actors in norm contestation can therefore make a norm impasse less stable. However, as Abbott and Snidal acknowledge, real actors generally have mixed motives and sources of motivation are difficult to disentangle.¹⁴⁰

I contend that the degree to which contestants have previously shared commitments is more likely to affect the duration of the norm impasse than the motivations of actors. Scholars often cite a repertoire of shared values, symbols and commitments (referred to by sociologists as in-group identification) as a precondition for reaching common positions on norm interpretations.¹⁴¹ Therefore, it matters whether the opposing sides are culturally dissonant or harmonious and have weak or strong ties with each other:¹⁴² when in-group members disagree on a frame and claim, their close relationship is likely to render norm impasses unsustainable. This may explain the quick resolution of the Turbot War, for which the contestants, Canada and Spain, had manifold cultural ties. However, when in-group and out-group members disagree on what frame applies and what claim follows, a norm impasse is harder to break: social and material costs are lower, and there are fewer cultural ties to aid resolution. This dynamic may explain why contestation over Crimea persists.

Other scholars are more confident that international legal norms (as opposed to moral or political norms) constitute globally shared standards that can overcome in- and out-group divisions.¹⁴³ The quality of the legal arguments then determines whether an impasse will persist. For instance, the more often actors consensually applied a norm in similar situations,¹⁴⁴ and the more precise the norm is,¹⁴⁵ the more apparent it becomes when legal arguments are misguided and inconsistent. This renders advancing different frames and claims costly in reputational terms and a norm impasse unsustainable. Vague norms and less clear-cut precedents have the opposite effect.

¹³⁹ Abbott and Snidal 2002, S147-50.

¹⁴⁰ Ibid, S144.

¹⁴¹ Johnston 2001, 497; Krebs and Jackson 2007, 56; Schimmelfennig 2001, 62–63.

¹⁴² Goddard 2006, 45–47.

¹⁴³ Bower 2015, 339; Johnstone 2011, 21–27; Sandholtz 2008, 106–110.

¹⁴⁴ Sandholtz 2008, 109.

¹⁴⁵ Bower 2015, 346.

In sum, the duration of a norm impasse depends on the degree to which actors have previously shared commitments. We may locate these shared commitments in culture, relationships, or legality. A norm impasse that persists for a long time prevents the setting of a clear precedent, weakening the contested norms because it reduces normative certainty in similar situations.

However, this contestation outcome does not necessarily signal impending norm death. When a norm impasse revolves primarily around the facts of the case (grounds), the contested norm commands a significant amount of respect. For instance, in response to the 2017 chemical weapons attack in Syria, the United States launched missile strikes on Syria. President Donald Trump justified this response by saying that “[t]here can be no dispute that Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention”.¹⁴⁶ North Atlantic Treaty Organization (NATO) and EU countries and officials agreed that the use of chemical weapons was unacceptable and “must be answered”.¹⁴⁷ Russia and Syria criticized the strikes but did not deny the applicability or validity of the taboo to use chemical weapons. Instead, Russia talked about a “complete disregard for factual information”.¹⁴⁸ Russian President Vladimir Putin questioned that the Syrian government had launched this attack and attributed it to the rebels.¹⁴⁹ One year later, he questioned whether it had even occurred.¹⁵⁰ The criticism of the grounds allowed Putin to frame the US strikes “as an act of aggression against a sovereign state delivered in violation of international law”¹⁵¹. When history repeated itself a year later, the dividing lines were similar.¹⁵² Hence, Russia and the United States invoked different frames (sovereignty versus chemical weapons ban) and claims (illegitimate versus legitimate missile strikes). However, Russia’s criticism of the grounds rather than of the frame signals that the taboo of chemical weapons use is a strong norm that both sides agree to in principle, but disagree about when and how to apply. Different views about the relative importance of the chemical weapons ban and sovereignty, rather than about their validity, characterize the norm impasse. By contrast,

¹⁴⁶ BBC News 2017a. April 7.

¹⁴⁷ BBC News 2017b. April 7.

¹⁴⁸ Kremlin 2017. April 7.

¹⁴⁹ Ibid.

¹⁵⁰ Kremlin 2018. April 14.

¹⁵¹ Kremlin 2017. April 7.

¹⁵² Kremlin 2018. April 14; White House 2018. April 13.

direct criticism of the frame, for example of the chemical weapons taboo, indicates weak feelings of obligation.

Norm Recognition (frame agreement, claim disagreement)

Norm recognition occurs when we see widespread agreement on the norm frame but disagreement on the claim. It implies a partial resolution of norm contestation. Frames categorize events and help actors to make sense of the world.¹⁵³ Psychologists see categorization as a vital cognitive process: we have a desire for coherent, structured knowledge and need to categorize information to ascertain how to interact with the world.¹⁵⁴ Widespread social agreement on a specific norm frame therefore helps to interpret an event and narrows the range of acceptable responses.¹⁵⁵ The sense of normative commitment that is attached to norm frames (as opposed to policy frames) renders some claims illegitimate and socially unsustainable. Norm recognition blocks some argumentative paths and thereby increases normative certainty compared to a norm impasse, where the frame disagreement allows the advancement of a greater range of claims.

Thus, agreement on a norm frame is consequential. It can back states into a corner and force them to accept claims they hitherto considered unacceptable. Bower illustrates this with the debate over the UNSC mandate for the UN peacekeeping mission in Bosnia and Herzegovina (UNMIBH).¹⁵⁶ He describes how the US sought to obtain immunity for peacekeepers and thus a global exemption for its soldiers from International Criminal Court (ICC) jurisdiction. As part of its argument, the United States cited Article 98 of the Rome Statute, which exempts third states from the ICC's jurisdiction. However, other Council members invoked Article 16 of the Rome Statute as a frame, claiming that granting immunity is only possible on a case-by-case basis for one year and requires UNSC agreement. The US then recognized the Article 16 frame, but claimed that it covers an automatic annual renewal of immunity unless the Security Council decides otherwise. Key Security Council members rejected this claim as contradicting the Article 16 frame.

¹⁵³ Entman 1993, 52; Goffman 1974, 21; Snow et al. 1986, 464.

¹⁵⁴ Billig 1987, 122.

¹⁵⁵ Entman 1993, 54; Lenz 2018, 44; Zimmermann 2017, 776.

¹⁵⁶ Bower 2015, 351–355.

They drew on its negotiation history to suggest that Article 16 was not intended to authorize the Security Council to grant permanent immunity. When critical actors argued that the US's claim did not fall under the Article 16 frame, the US could not negate the applicability of the frame anymore as it had already recognized it. This earlier recognition forced the United States to accept the claim of a more modest one-year exemption in Resolution 1422. Agreement on a norm frame narrows down the range of claims that actors can legitimately advance. Thus, when critical states consider claims as contradicting the proposed frame, norm recognition may be a *via media* towards norm clarification and a transitory outcome.

However, when the claim disagreement does not blatantly contradict the prior history of the frame, norm recognition is a relatively stable endpoint. The contestation over the *Kadi* case (ongoing since 2002) illustrates this.¹⁵⁷ The UNSC agreed, after some contestation with the European Court of Justice (ECJ), to grant blacklisted terror suspects some due process rights (frame) and thus an avenue for removal from the 1267 sanctions list. The two institutions still differ on what this avenue should look like (claim): an independent Ombudsperson, favored by the Security Council, or an external court, favored by the ECJ. Since neither of these claims blatantly contradict the due process frame, norm recognition has been stable and reputational costs limited. The classification of an event into a normative category reduces normative uncertainty. It limits the range of actions that actors can legitimately pursue and publicly affirms the commitment to the norm frame. I contend that when the actions fall within the permissible range this makes norm recognition socially sustainable, and a relatively stable outcome.

Norm recognition strengthens a norm when a norm impasse precedes it. Consensus around a norm frame expands the scope of that norm and increases normative certainty by narrowing the range of claims that actors can credibly advance. However, norm recognition does not increase precision as much as norm clarification, which sets a clearer precedent due to the claim agreement.

Hence, when preceded by norm clarification, norm recognition can weaken a norm by reducing its clarity. For example, after Iraq's invasion of Kuwait, UNSC members largely

¹⁵⁷ Morse and Keohane 2014, 395–398.

agreed that Saddam Hussein's non-cooperation on WMD constituted a "threat to the peace" within the meaning of Article 39 of the UN Charter, requiring a response under Chapter VII (frame): the imposition of sanctions (claim). The frame agreement persisted around the 2003 Iraq invasion. However, the permanent Security Council members then disagreed on the resulting claim: some argued that the threat emanating from Saddam Hussein's WMD program required military intervention; others considered sanctions and diplomacy adequate.¹⁵⁸ This claim disagreement weakened normative certainty of what reaction to a perceived threat to the peace is appropriate. However, the agreement on the "threat to the peace" frame reduced uncertainty more than a norm impasse by ruling out options such as inaction.

Norm Neglect (frame disagreement, claim agreement)

Norm neglect occurs when we see widespread agreement on the claim despite of persistent disagreement on the frame. This scenario is best described as norm neglect since normative uncertainty persists despite tangible action. Krebs and Jackson argue that the outcomes that involve acceptance of the claim are "(at least temporary) terminuses" that are "relatively stable outcomes in the short and medium run."¹⁵⁹ I contend that when it comes to norm contestation, frame agreement provides more stability because it signals normative commitment and narrows the range of claims that states consider appropriate. Since claim agreement leads to joint actions, it is more visible than words. Hence, norm neglect is likely to require explanations from the action's supporters when a similar situation arises in the future. This makes norm neglect an unstable outcome: it produces a temporary and partial consensus that will eventually result in either a norm impasse or norm clarification.

When actors agree to a claim without accepting a frame, "acculturation" might be at work: social pressure leads to "outward conformity with a social convention without private acceptance".¹⁶⁰ Unlike frame agreement, claim agreement alongside frame disagreement does not signal normative commitment: it only signals outward conformity. Thus, I contend that states can portray their acceptance of a claim that does not correspond to

¹⁵⁸ Johnstone 2011, 126.

¹⁵⁹ Krebs and Jackson 2007, 44.

¹⁶⁰ Goodman and Jinks 2004, 643.

their normative understandings as an exception. Actors can refer to the particularities of the claim agreement to advance a different frame in the future and to escape entrapment. For instance, permanent UNSC members have long differed over whether R2P or sovereignty prevails when states engage in mass atrocities, but they did agree to establish a no-fly zone over Libya in 2011. Instead of accepting the R2P frame, China reaffirmed its commitment to sovereignty and referred to the special circumstances in Libya, and both Russia and China cited regional organizations' request for, and endorsement of, the no-fly zone (frame).¹⁶¹ Hence, Russia and China can refer to the special circumstances surrounding the Libya case to explain why another context is different. Russia resisted UNSC resolutions on Syria by arguing that the toppling of the Libyan regime went beyond the claim (no-fly zone) it had agreed to.¹⁶² Hence, the possibility of referring to the circumstances surrounding the claim agreement can make norm neglect a temporary concession in a longstanding norm impasse.

On the other hand, claim agreement may be a step towards norm clarification. In Risse and Sikkink's spiral model, strategic tactical concessions of repressive governments such as the release of prisoners can generate momentum.¹⁶³ The concessions empower the opposition and create more space for socialization efforts. The government's agreement with the opposition's claim, despite frame disagreement, may thus legitimate the opposition's activities and make their efforts to gain acceptance for their frame more effective. Constructivists find that socialization can trigger norm compliance,¹⁶⁴ or in this case, norm clarification. Socialization works by persuasion and social influence: information, arguments and cognitive cues that alter behavior and beliefs, and praise and rewards for rule-conforming behavior.¹⁶⁵ By agreeing to a claim, actors may receive social recognition and new information that convinces them to accept a different norm frame. An example is China's dispute with the World Health Organization (WHO) on how to manage the severe acute respiratory syndrome (SARS) outbreak. China refused to accept health measures and travel warnings that the WHO suggested (claim). Hence, China reaffirmed its commitment to sovereignty and contested the WHO's authority in managing health emergencies (frames). Under international pressure, China eventually

¹⁶¹ UNSC Doc. S/PV.6498. 2011, 8–11.

¹⁶² Johnstone 2015, 243.

¹⁶³ Risse and Sikkink 1999, 25.

¹⁶⁴ Checkel 2005; Finnemore and Sikkink 1998; Johnston 2001.

¹⁶⁵ Johnston 2001, 496–502.

made concessions and accepted the WHO's claims, which helped to contain the SARS crisis. Agreeing with the WHO's claims provided China with new information and persuaded it to more actively engage in global health governance, even leading China to accept a strengthening of global health norms and of the WHO's authority (frame).¹⁶⁶

Hence, while claim acceptance can be a temporary concession, it can also trigger socialization processes that lead to norm clarification. It is a task for future research to examine more systematically when norm neglect generates norm clarification or norm impasse.

4. Conclusions

This chapter developed a typology on alternate endings of the norm life cycle that clarifies the way that actors can agree or disagree over norms. I close with three thoughts about how this typology helps us to advance research on norm contestation and change.

First, scholars of international law and international relations work closely together in the study of norms in world affairs. However, the former use insights from the latter far more than the other way around.¹⁶⁷ As scholars of international law are experts at identifying the frames and claims states advance in disputes, this typology underscores how their insights can inform research in the field of international relations.

Second, by coding the justifications, frames and claims that critical actors advance, scholars can uncover legitimation strategies and mechanisms through which norm contestation, and sometimes norm clarification, unfolds. This typology therefore facilitates theoretically grounded empirical research into norm contestation dynamics. Such research could fill a gap in the literature since norm contestation research is often theoretical and self-reflective.¹⁶⁸

¹⁶⁶ Huang 2010; Kreuder-Sonnen 2016, 213–241.

¹⁶⁷ Sandholtz 2008, 102.

¹⁶⁸ Niemann and Schillinger 2017; Wiener 2014; Wolff and Zimmermann 2016.

Third, this typology helps scholars to identify further pathways that lead to (dis)agreement on frames and/or claims. Scholars can use it to find scope conditions when their mechanisms limit contestation and opportunism. For instance, drawing on Habermas, some scholars argue that “better”, legally more correct, arguments carry more weight in norm contestation.¹⁶⁹ However, strong legal arguments often fail to produce norm clarification on their own, as the debate over the prohibition of torture showed. Habermasian scholars of deliberation could use this typology to explore how variations in negotiating settings or in the characteristics of the contested norms produce different sorts of outcomes. Other scholars find that the configuration of relationships between contestants explains the resolution or persistence of contestation.¹⁷⁰ As I find in this research project, studying in-group/out-group dynamics could shed light on what makes different norm contestation outcomes likely, and help to refine reputational mechanisms.

Practice scholars could also use this typology to refine their approach. Adler-Nissen and Pouliot highlight the contribution of competent negotiating skills to the agreement on the no-fly zone over Libya.¹⁷¹ Practice scholars could investigate why practical competence could generate claim agreement, but not frame agreement, and what types of competence, or lack thereof, generate the four outcomes. Moreover, the typology should also help us to analyze disagreements arising from the implementation of norms between settings, as local, regional, and international actors may disagree about norm frames, claims, or both.

In the next chapter, I will lay the foundation for such theoretically grounded empirical research that is structured by the “alternate endings” typology: I theorize the factors that influence the course that norm contestation will take. I also discuss the research design and methodology that I have used to develop and corroborate these pathways to the alternate endings of norm contestation.

¹⁶⁹ Johnstone 2011, 27; Risse 2000, 20.

¹⁷⁰ Goddard 2006, 40; Krebs and Jackson 2007, 55–56.

¹⁷¹ Adler-Nissen and Pouliot 2014, 891.

Chapter 2: The Process of Norm Contestation

1. Introduction

In the preceding chapter, I have shown that norm scholars tend to treat norm contestation and acceptance as binary categories. This obscures variation in how much states agree over how to apply international law to specific situations. To capture this variation, I introduced a typology of four different outcomes of norm contestation based on whether actors agree or disagree over norm frames (justifications) or claims (actions): norm clarification (frame and claim agreement), norm recognition (frame agreement/claim disagreement), norm neglect (frame disagreement/claim agreement) and norm impasse (frame and claim disagreement). These alternate endings of norm contestation differ in their effects on the clarity and strength of the contested norms, as well as on subsequent debate over them. The “alternate endings” typology can help scholars of any theoretical persuasion classify norm contestation outcomes. Tracing agreements and disagreements over frames or claims does not require us to make any assumptions about what influences or motivates actors.

In this chapter, I turn to studying the processes that influence the duration and outcomes of norm contestation and explain the research design that I use to do so. I start from the assumption that states act strategically when advancing their preferred norm interpretations but face several social influences that determine the duration and endpoint of norm contestation. To identify these social influences, I argue that we need a more fine-grained analysis of audience reactions and of the contestants’ justificatory discourse than scholars usually engage in. I find that the reactions of some audiences are more important than those of others: states need the support of other states with a similar identity (in-group) or at least the absence of clear in-group criticism in order to sustain their contestation of frames and/or claims. Otherwise, the cost of disagreement becomes too high. Support from domestic audiences for a particular interpretation can also compensate for international dissent.

Furthermore, the justificatory discourse of states reveals that they pursue different goals when interpreting norms: sometimes states seek generally applicable norm change, whereas at other times they try to carve out an exception for themselves. Depending on

their goal, states employ different legitimation strategies: appeals to output legitimacy matter when they attempt generally applicable norm change or overt exceptionalism, whereas references to their identity and thus trustworthiness are more prevalent when states want to hide exceptionalist norm implementation. When states delegate the management of norm contestation to agents, both output legitimacy (that is, appeals to the necessity and effectiveness of a norm interpretation) and credibility also play a role. For instance, I show that the more information suggests that the agent's norm interpretation or implementation is effective and credible, the more likely it is that delegation will help to address disputes.

This study thus draws on insights from International Relations (IR) scholarship that is influenced by rhetorical theories.¹⁷² As such, it analyzes the political struggle that often ensues when states apply international law and its effect on the social acceptability of legal norms rather than technical, legal debates over international law. I rely on content analysis of public statements and interviews to enhance our understanding of the mechanisms that scholars have identified to influence the duration of norm contestation: audience reactions, strategies of argumentation and legitimation, and power dynamics. Unlike other IR scholars who put norm disputes at the center of analysis, I do not focus on a single case study,¹⁷³ but draw on eight case studies. While these case studies are plausibility probes, their number and variety increase confidence in the validity of the explanatory mechanisms that I identify.

This chapter proceeds as follows. I first explain why I assume that both strategic action and social influences affect the course of norm contestation. I then discuss the social dynamics that affect the duration and outcome of norm contestation, including their observable implications. I conclude by explaining the research design and methodology used in this project.

¹⁷² Bower 2015; Goddard and Krebs 2015; Krebs and Jackson 2007; Schimmelfennig 2001; Schimmelfennig 2003.

¹⁷³ Bower 2015; Liese 2009; Sandholtz 2008; Schimmelfennig 2001; Van Kersbergen and Verbeek 2007.

2. Core Assumptions and Focus of Analysis

If we accept that norms or intersubjective “standard[s] of appropriate behavior”¹⁷⁴ do not always make it clear what counts as “appropriate behavior” in a given situation, then actors have some leeway in interpreting them. Hence, like many other norm contestation scholars, I assume that actors act strategically, seeking to promote the norm understanding that best suits their interests and values.¹⁷⁵ Similarly, I also maintain that social expectations affect the decision-making process.¹⁷⁶ Social expectations matter because norms, by definition, are shared community standards. Actors need to legitimate their favored norm understanding vis-à-vis key audiences to avoid reputational costs—that is, they need to create the perception that their norm understanding is right.¹⁷⁷ Other community members may not accept the interpretation an actor brings forward, which negatively affects the actor’s reputation as a responsible community member. If the actor does not give up the contested interpretation, the lack of acceptance weakens its credibility and social standing and reduces cooperation opportunities.¹⁷⁸ On the other hand, the actor whose interpretation wins has the chance to cement its preferences¹⁷⁹ and to hold others to account in the future.¹⁸⁰ The acceptance of a new norm interpretation, in turn, creates social expectations to comply, which can even “entrap” powerful states into following prior interpretations, even when they would later prefer to deviate from them.¹⁸¹

While scholars agree that social expectations can entrap actors, they differ on what type of arguments and audiences are most relevant: some emphasize the persuasiveness of sound legal interpretations,¹⁸² whereas others argue that prior commitments¹⁸³ or fair procedures¹⁸⁴ lend legitimacy to norm frames and claims. There is also debate over the extent to which the social expectation to legitimate arguments is more influential than material power.¹⁸⁵

¹⁷⁴ Finnemore and Sikkink 1998, 891.

¹⁷⁵ Bower 2015; Bloomfield 2016; Sandholtz 2008; Schimmelfennig 2001.

¹⁷⁶ Schimmelfennig 2003, 157–158.

¹⁷⁷ Hurd 1999, 381.

¹⁷⁸ Johnstone 2011, 210–211; Schimmelfennig 2001, 64.

¹⁷⁹ I use the term “preferences” rather than “interests” to indicate that not only material but also value-based considerations are included in the analysis.

¹⁸⁰ Krisch 2005.

¹⁸¹ Schimmelfennig 2001, 65; Bower 2015, 339; Krisch 2005.

¹⁸² Reus-Smit 2004, 37–38; Sandholtz 2008, 106–110; Johnstone 2011, 21–27; Bower 2015, 339.

¹⁸³ Schimmelfennig 2001, 66.

¹⁸⁴ Risse 2000.

¹⁸⁵ Brooks and Wohlforth 2005; Hurd 2007; Krisch 2005.

However, what unites scholars who emphasize the constraining effect of social expectations to abide by norms is that they locate these social influences in the discursive process. The exchange of arguments indicates which justifications for their norm interpretations actors consider to be socially acceptable and thus most likely to generate consensus. For instance, Reus-Smit contends that “casting claims in the language of law” means “conscripting the power of social opinion to one’s cause. And because norms are guides to action, defining a problem or issue as legal reduces opportunity costs by invoking standardized, socially sanctioned solutions.”¹⁸⁶

When gauging the influence of social expectations on norm contestation outcomes, my project therefore focuses on studying the justifications that actors use for their norm interpretations. Analyzing this justificatory discourse allows me to contribute insights on areas of scholarly contention, namely the interplay of law, legitimacy and power. Since norms are intersubjective, I focus on public justifications as they provide a reference point and thus involve a greater commitment to the norm interpretation. Public interpretations also provoke reactions from others, and thus agreement or disagreement on frames and/or claims.

I consider actors to act strategically and social influences to affect the outcome of norm contestation when actors interact and exchange arguments. Hence, this study is somewhat agnostic on what motivates actors to interpret norms in a certain way. Motivations are hard to identify as we cannot get a glimpse into people’s minds.¹⁸⁷ Even if we could, we would probably find that a mix of self-interested and value-based considerations influenced the norm interpretation.¹⁸⁸ In addition, focusing on the exchange of arguments allows us to identify the conditions under which subjective understandings of norms turn into intersubjective ones, as well as when we are likely to observe the different outcomes of norm contestation.

Some norm contestation scholars may disagree with the decision to exclude motivations from the analysis. Antje Wiener, one of the leading scholars in the field, defines norm

¹⁸⁶ Reus-Smit 2004, 38.

¹⁸⁷ Krebs and Jackson 2007, 40-41.

¹⁸⁸ Abbott and Snidal 2002, S144.

contestation as “the range of social practices, which discursively express disapproval of norms.”¹⁸⁹ This definition is too limiting. The requirement of “disapproval” implies that contestation involves the intent to undermine a norm. However, it is difficult to tell whether actors disapprove of norms just by looking at the norm interpretations that they are advancing, because norms can be ambiguous and in tension with each other. Hence, it is conceivable that actors may differ on the “right” interpretation of a norm without seeking to undermine it. Nevertheless, contestation is still damaging. As Stimmer and Wisken note, “regardless of intent, contestation reduces the precision of norms and thus the guidance they provide and their capacity to regulate behavior.”¹⁹⁰ Therefore, I define norm contestation as any kind of political dispute about the meaning, validity or application of norms.¹⁹¹

While scholars who use constructivist insights agree that social influences affect the outcome of norm contestation, they differ over whether the “better” argument wins and the extent to which these social influences generate agreement on the true meaning of law.¹⁹² As the “alternate endings” typology indicates, norm contestation does not necessarily end in agreement, and when we see norm clarification, the most *socially acceptable* interpretation has prevailed, which might not be the most technically accurate one. As I consider norm meaning to be flexible and socially constructed, the meaning of law is what actors make of it.

Critical scholars argue that this malleability of law implies that powerful states have undue influence over its interpretation and can use it as an instrument of domination.¹⁹³ Realists agree that power differences rather than social influences account for the outcomes of legal disputes because there is no authority in international affairs that can reach and enforce binding verdicts.¹⁹⁴ These scholars therefore consider international law to be epiphenomenal to power and conclude that powerful states determine the interpretation of norms.

¹⁸⁹ Wiener 2014, 1.

¹⁹⁰ Stimmer and Wisken 2019, 525.

¹⁹¹ See chapter 1. Wolff and Zimmermann 2016, 518.

¹⁹² Risse 2000; Schimmelfennig 2001.

¹⁹³ Koskeniemi 2005.

¹⁹⁴ Morgenthau 1985, 296.

I find that power influences the course that norm contestation takes, but it is not a sufficient explanation. I consider states that have “institutional power”¹⁹⁵ to be “critical states ... without which the achievement of the substantive norm goal is compromised”¹⁹⁶ because such power allows them to decide over a norm interpretation and gives them the capacity to be heard. For instance, the five permanent Security Council members are critical states when it comes to security matters because their consent (or abstention) is necessary for norm clarification and implementation. Hence, power in terms of access to decision-making matters, as it gives weight to norm interpretations. However, material power alone does not determine the endpoint or duration of norm contestation: realists have difficulties explaining why powerful states use legal discourse to justify their preferences or actions and why weaker states can prevail in legal disputes.¹⁹⁷ To illustrate this, I account for the role of material power by conducting controlled comparisons and by focusing on security disputes, where law is traditionally considered to have the least influence. I explain these controls in further detail below when discussing the research design of this project.

Lastly, it is important to highlight that international law plays an important role in this study. Legal norms are distinct from social norms because of law’s action guidance and justiciability.¹⁹⁸ Law establishes what behavior is called for (action guidance). It also provides for some form of retroactive assessment of behavior (justiciability), which can take the form of adjudication but also manifest itself in other ways.¹⁹⁹ As adjudication is not often available or significant in international affairs, justiciability in the form of public scrutiny mainly affects the ability of states to uphold their norm interpretations: there is not only a social expectation for states to justify why their actions conform with international legal norms, but the international community’s judgement also affects the outcome of contestation. Social acceptance of a norm application can set a precedent for future actions and social disapproval can entail social or material costs.²⁰⁰

¹⁹⁵ Barnett and Duvall 2005.

¹⁹⁶ Finnemore and Sikkink 1998, 901.

¹⁹⁷ Reus-Smit 2004, 18.

¹⁹⁸ Dill 2015, 53-54.

¹⁹⁹ Dill 2015, 54.

²⁰⁰ Schimmelfennig 2001; Krisch 2005; Johnstone 2011; Bower 2015..

Even though legal norms are always indeterminate to some extent, they focus the debate more than diffuse social norms by spelling out in greater detail which actions are required. This, for example, affects the strength of the effect of frame agreement: agreeing on which legal norm applies narrows down the range of permissible claims much more than agreement on abstract moral principles or diffuse social norms would.

Naturally, codified law provides clearer and more accessible guidance than customary law because it is written down, whereas the identification of customary international law entails studying state practice and pronouncements of *opinio juris* (belief that IL requires a certain practice). However, the use of both sources of international law in justifications of behavior comes with specific conventions of argumentation, actors and procedures (such as the prospect of adjudication and the possibility to set precedents). As I will show, these conventions and actors leave their mark on the process and outcome of contestation. Studying the contestation over the application of legal norms thus focuses the analysis and allows me to uncover how legality, and the social conventions and expectations that surround it, affect the process and outcome of norm contestation.

3. Analyzing social dynamics

The duration and outcome of norm contestation depend on how other states react to a norm interpretation – we only see norm clarification, and thus negligible social or material costs, when there is widespread agreement on a frame-claim combination. IR scholars who analyze rhetoric or social dynamics agree that social support or lack thereof leads to norm clarification only when states form part of a community of values or in-group.²⁰¹ In-group members share values²⁰² or social expectations about what counts as acceptable argument²⁰³ that can be mobilized to (de)legitimize norm interpretations.

Because of this focus on social support and substantive legitimacy, other scholars who study rhetorical entrapment²⁰⁴ or rhetorical coercion²⁰⁵ concentrate on disputes within in-

²⁰¹ Johnston 2008, 497; Krebs and Jackson 2007, 56; Schimmelfennig 2001, 63-63.

²⁰² Schimmelfennig 2001, 62-63.

²⁰³ Krebs and Jackson 2007, 56.

²⁰⁴ Schimmelfennig 2001.

²⁰⁵ Krebs and Jackson 2007.

groups. I consider this an unnecessary limitation. An in-group focus is ill-suited to investigating why episodes of norm contestation vary in duration and outcome. When contestation persists, for instance, it might be precisely because only out-group states dissent, showing that they exercise less influence on the proponent of norm change. Furthermore, many instances of contestation occur across different communities of values and should be included in the analysis.

Johnstone does broaden the analysis and, drawing on Stanley Fish, argues that an interpretive community judges the validity of the claim and thereby refines international law.²⁰⁶ The interpretive community's influence is based on its ability to make credible legal judgments and depends on how unified it is.²⁰⁷ He argues that this interpretive community consists of three concentric circles. The inner circle contains the decision-makers responsible for making and applying international law.²⁰⁸ The second circle consists of officials, lawyers and other experts working on the issue-area regulated by the norm, and the third circle is the public at large, including those who are affected by the norm or who speak for them. However, Johnstone fails to specify how these circles or audiences interact and whose opinions count when different elements of the interpretive community favor different frame-claim combinations.

When we broaden the analysis to include different communities of values, social dynamics and legitimation strategies still matter. However, I find that in addition to dynamics within groups, in-group/out-group dynamics and other legitimation strategies than those that are based on shared principles account for the alternate endings of international norm disputes.

Social Support

The distinction between states with a different identity (out-group members) and states with a similar identity (in-group members) is an important one. The reactions of in-group members are particularly influential. What Johnston calls "social influence" is at play

²⁰⁶ Johnstone 2011, 33.

²⁰⁷ Ibid., 44, 54.

²⁰⁸ Ibid., 41-45.

here: because of real or imagined group pressure, an actor conforms with the position advocated by the group.²⁰⁹ This effect derives from identification with the group. Different sociological theories trace the pressure to conform with the in-group's position back to the desire to be liked by a similar group, to be consistent with prior commitments and values, and/or to the desire to maximize social status and prestige, which publicly affirm the actor's worth.²¹⁰ The behavior of in-group members is an important source of information for actors, regardless of whether they follow a logic of appropriateness or of consequences. Actors who follow a logic of appropriateness gather information on role expectation by observing how others like them behave; they seek to avoid inconsistencies.²¹¹ Those who follow a logic of consequences factor social praise or opprobrium into their calculation of gains and losses. Hence, when in-group members criticize a powerful state's proposed norm frame and/or claim, the (cognitive, social or material) costs of upholding the contested norm interpretation may become too high. This effect becomes stronger the more ties in-group members share. Simply put, the opinions of allies and friends weigh more heavily than those of adversaries and strangers: "the strength of backpatting and opprobrium depends on two related factors: the nature of the actor's self-categorization, and which other actors, by virtue of this self-identification, become important, legitimate observers of behavior."²¹²

For instance, when it comes to the P5 UNSC members, the US, UK and France share a similar culture, history and values and often work in tandem. The relationship between the so-called P3 and the other two permanent UNSC members, Russia and China, is less close. There are fewer material, ideational and social ties to aid resolution. Therefore, dissent from Russia and China weighs less heavily for P3 states than disagreement among themselves. The P3 went ahead with launching strikes against Islamic State targets in Syria even though out-group members Russia and China disagreed with their claim that the frame of UNSC Resolution 2249 authorized these strikes. On the other hand, US President Barack Obama refrained from military action against Syria to enforce his red line on chemical weapons use when the British Parliament did not approve British troop contributions. Thus, out-group dissent had less effect than in-group dissent. Actors expect

²⁰⁹ Johnston 2008, 79.

²¹⁰ Ibid., 80-84.

²¹¹ March and Olsen 1998, 690.

²¹² Johnston 2008, 84.

to disagree more often when there are fewer ties between them. In-group dissent inflicts more shame or reputational costs due to stronger (cognitive, social and material) ties with in-group members that give their opinions weight. Note that while group pressure can trigger public conformity, the change in the norm frame and/or claim does not necessarily come with private acceptance.²¹³ Nevertheless, newfound agreement on a norm frame and/or claim is still consequential because of the social expectation to abide by it in the future.

The categories of in-group and out-group imply a dichotomy, but relationships are never that clear-cut. It is a theoretical language to talk about separation. While we allocate actors to one group or the other in theory, in reality there are many blends and combinations in between. Take, for example, the shared history and bond between the US, Canada and Europe. The so-called special relationship between the US and the UK indicates that within this in-group some members are more close-knit than others. Or take the relationship between the P3 on one side and Russia and China on the other. The in-group/out-group language captures the fact that, in security affairs, the topic of analysis of this study, we often see differences between these two groups of states. However, if we were studying the relationship between Non-Governmental Organizations (NGOs) and states, we would classify those five states as in-group members. Thus, these two categories are fluid and context-dependent.

International Organizations (IOs) are a good indicator of in-group membership: states establish them “to act as a representative or embodiment of a community of states.”²¹⁴ This effect is strongest for IOs that are selective in their membership criteria. Selective membership criteria imply that those who participate in the organization have to share similar values and goals. Hence, a regional organization such as the EU is a tighter-knit in-group than the UN, which has almost universal membership. Therefore it does not come as a surprise that rhetoric scholars in IR who focus on disputes within in-groups cite regional organizations as the venue where rhetorical coercion works best in international affairs²¹⁵ or focus their analyses on contestation within regional

²¹³ Ibid., 80; Schimmelfennig 2001, 62-65; Goodman and Jinks 2004, 643.

²¹⁴ Abbott and Snidal 1998, 24.

²¹⁵ Krebs and Jackson 2007, 56.

organizations.²¹⁶ Organizations with a narrow regulatory ambit also have selective membership criteria: they indicate a community of values as their members share a commitment to tackle a joint problem. Geographical and regulatory limitations can also coincide. In security affairs, for example, the UN has the most universal membership and a broad mandate, whereas NATO—particularly during the Cold War—has had a more focused mandate and geographical scope. Hence, we can identify in-group members as members of institutions with selective membership criteria in the subject-area under contention. Those members with greatest decision-making privileges matter most.

Given that in-group and out-group membership is somewhat fluid and context-dependent, institutional membership is one way to measure in-group membership, but not the only one. Another important indicator is whether countries have a shared culture or history, as shared values and experiences lead to greater identification with others. The relationship between the United States and Western Europe serves as an example. Therefore, who counts as the most relevant in-group and out-group members varies from subject-matter to subject-matter.

For instance, when it came to voting on establishing a no-fly zone over Libya, the position of the pertinent regional organization, LAS, exercised considerable influence on Russia. As a regional organization of the Global South, LAS forms part of Russia's in-group, and the LAS decision to disown one of its members, Libya, made the LAS request to the UNSC particularly powerful. However, when it came to security disputes in Russia's near abroad—that is, debates over the status of Kosovo, South Ossetia, and Abkhazia—it was not the opinions of LAS members that mattered but those of pertinent Eurasian security organizations such as the Collective Security Treaty Organization (CSTO). This illustrates that which in-groups matter depends on the topic and location of debate.

Treating institutions as a proxy for in-groups acknowledges the important role they play in norm contestation. Institutions are a forum for debate and keep records of prior justifications. They thus provide “information about the degree to which actors are behaving in ways consistent with this shared understanding”²¹⁷ of a norm.

²¹⁶ Schimmelfennig 2001.

²¹⁷ Johnston 2008, 86.

When in-groups do not openly support a state's norm interpretation, the interpretation becomes difficult to uphold. For instance, combined with domestic opposition, once European states started to criticize the Bush administration's attempts to reinterpret the prohibition of torture, these interpretations became less sustainable. There are, however, several factors that mitigate lack of in-group support: the intensity of the dissent and the reactions of out-group members and of domestic audiences.

I defined "agreement" on a norm frame and claim as both open agreement and silence, as public criticism is necessary to quell unwanted obligations under international law.²¹⁸ There are, of course, gradations between silence and agreement. When other states object loudly to an interpretation, the shaming effect and reputational costs are stronger than when the criticism is relatively subdued. Clear and open criticism implies a strong feeling that international law was unduly twisted, whereas vague criticism reflects more ambivalence and thus can be more easily discarded without fearing adverse consequences for social standing and cooperation. For example, Russia's recognition of South Ossetia and Abkhazia based on arguments of remedial self-determination was not enthusiastically received by its in-group members, but their criticism was very muted. This made the dissent more manageable.

The same applies to the reactions of out-group members. Clear criticism from out-group members is less influential than criticism from in-group members because the relationship is less significant. However, when out-group members' criticism weakens over time or is very muted, it can somewhat mitigate lack of support from a state's in-group, particularly if in-group dissent is muted, too. Russia could also uphold its contested frame of remedial self-determination and claims regarding South Ossetia's and Abkhazia's independence because the US and EU member states soon toned down their criticism, preferring not to adversely affect their relationship with Russia over their interpretive differences.

Lastly, domestic reactions count, too. Robert Putnam has portrayed treaty-negotiations as a two-level game of international and domestic factors, whereby strong domestic limitations on what negotiators can agree to can strengthen their international bargaining

²¹⁸ See Thirlway 2014, 103.

positions.²¹⁹ We can observe similar dynamics when it comes to norm application. The Permanent Court of Arbitration's ruling on Scarborough Shoal resonated with domestic audiences, thereby pressuring Philippine President Duterte to remind China of its claim agreement, namely to grant access to the contested fishing grounds of Scarborough Shoal. This keeps the claim agreement on Scarborough Shoal alive, despite frame disagreement on territorial entitlements, as I illustrate in chapter 5. However, domestic opinion does not always influence international disputes over the application of international law. For instance, even though the British public did not support the Iraq War, Prime Minister of Great Britain Tony Blair decided to honor his pledge of support to US president George W. Bush. It is a question for further research to ascertain under what conditions domestic opinion compels leaders to abandon or modify their preferred norm frame or claim.

When gauging the influence of social support on the duration and endpoint of norm contestation, I look at the public statements of in-group and out-group members, and where possible use interviews to ascertain whether those reactions mattered.

Note that it is not necessarily the case that both the norm frame and claim are contested. For instance, as the debate over the Iraq War shows, there might be frame agreement (Saddam Hussein constitutes a threat to the peace under Art. 39 UN Charter) but claim disagreement (conduct intervention or inspections to tackle the threat). Hence, in-group/out-group dynamics only influence contestation over the claim, and thus whether the claim disagreement persists or turns into claim agreement, and thus norm clarification.

In the following section, I will show that the goal that states pursue with their norm interpretation—either generally applicable norm change or exceptionalism—affects their legitimation strategy. I start by conceptualizing these different goals. I then discuss why states need to legitimate their norm interpretation when they seek to gain support from others.

²¹⁹ Putnam 1988.

Justificatory Discourse

Strategy

The kind of strategy states pursue with their norm interpretation influences the justificatory discourse—that is, the discursive moves that are open to them—and the likelihood of having to make concessions. We can distinguish between states who portray their norm interpretation as a generally applicable precedent and those who prefer to engage in exceptionalism to avoid making long-term commitments.²²⁰

We see exceptionalism when a state wants to keep the generally agreed-on norm frame intact—for example, because it wants others to still be bound by it—but engages in a practice (claim) that it knows others may consider illegal under this norm frame. Rubinfeld sees such exceptionalism at the heart of the US’s attitude towards international law, particularly human rights.²²¹

This exceptionalism can take different forms. Chapters 3 and 6 show that exceptionalism occurs when a state implements a claim that many others see as contradicting a well-established norm frame such as the “prohibition of torture” or “territorial integrity.” Exceptionalism can be covert and overt.

Where possible, we would expect exceptionalism to be covert to prevent reputational costs. The Bush administration’s efforts to cover up practices that are widely considered to be torture, such as waterboarding, illustrate this. However, when norms are not implemented domestically, it becomes difficult to hide contested behavior. Under these circumstances, states may engage in overt exceptionalism that can be explicit and implicit.

Explicit exceptionalism involves a public acknowledgement that a norm interpretation is an exception to a rule and communicates the intent to prevent a redefinition of the existing consensus. We can see this explicit exceptionalism in chapter 6, where US ambassador to the UN, Zalmay Khalilzad, amongst others, framed Kosovo as a unique or *sui generis*

²²⁰ Byers 2003.

²²¹ Rubinfeld 2004.

case and stated that “[w]e have not, do not and will not accept the Kosovo example as a precedent for any other conflict or dispute.”²²² Similarly, to justify its abstention from Resolution 1973, China referred to the “special circumstances” in Libya to explain this claim agreement despite its general prioritization of sovereignty and territorial integrity.²²³

However, exceptionalism can also be more implicit. Such exceptionalism occurs when a particular claim to action is not explicitly framed as an exception and no clear-cut norm frame is advanced as justification. The Libya and South China Sea cases illustrate implicit exceptionalism. China, for example, did not clarify the legal status and meaning of the “nine-dash line” nor cite any norm frame to explain its claim agreement on Scarborough Shoal. Implicit exceptionalism is characteristic of norm neglect: the dispute parties prioritize finding a pragmatic solution to a joint problem over resolving their normative differences. Hence, legal framing is neglected.

Whether we see covert, explicit, or implicit exceptionalism depends on how a state expects others to react to a norm frame or claim. Since the goal of explicit exceptionalism is to make a one-off exception to the rule while keeping it intact, we are more likely to see it when the contested norm is well-established “hard” or “internalized” law of general applicability. There needs to be a community expectation to comply with a norm, for states to feel the need to justify themselves to avoid reputational costs or to prevent a precedent.²²⁴ The more established a norm is, the greater the social expectation for justification, and the more likely it is that states feel the need to explicitly portray their frame and/or claim as an exception.

In contrast, when a norm is still emerging, there is less expectation to invoke the norm and to make one’s commitment explicit. Take the UNSC’s agreement on the no-fly zone claim regarding Libya, while leaving open under what norm frame this mandate was issued. Neither R2P nor the protection of civilians (PoC) norm fit with the mandate, and since R2P and PoC are emerging norms, the permanent UNSC members could be vague about the normative basis for their claim agreement regarding Libya. This ambiguity

²²² Khalilzad: UNSC Doc. S/PV.5839. 2008, 19.

²²³ Li (China): UNSC Doc. S/PV.6498. 2011, 10.

²²⁴ Chayes and Chayes 1993; Schimmelfennig 2001; Krisch 2005; Johnstone 2011.

combined it all for the P3, that is the UK, France, and US: they could pursue their preferred claim, the no-fly zone, while keeping the flexibility to selectively use R2P (or a mixture of R2P and PoC) without being bound by the norm. Russia and China, in turn, explicitly portrayed the claim agreement as an exception to their preferred norms in these situations, since they care more about keeping their commitment to the norm frames of sovereignty and territorial integrity intact in future situations of mass atrocities.

The South China Sea case shows that we can also see implicit exceptionalism when well-established norms such as maritime rights under UNCLOS are involved. China's superior power, compared to other states bordering the South China Sea, allows it to better shoulder social costs and thus avoid the entrapment that may come with claim agreement.²²⁵

While explicit exceptionalism at least acknowledges the risk of entrapment by prior interpretations and thus that law matters, implicit exceptionalism may be considered a sign that law does not matter in a given situation. Instead, other factors such as material interests may matter more. However, chapter 5 shows that social expectations to justify actions in legal terms continue to have an influence. We see states adapting contested frames to the claim agreement, or shortly after. The blending of the PoC and R2P frames and the increasing substitution of the "nine-dash line" with UNCLOS concepts and justifications such as the "four sha" frame illustrate this. These adaptations recognize that other states are more receptive to different norm frames or that there is a social expectation to invoke those frames.

To identify what makes norm interpretations resonate with others, I will now first assume that states aim to achieve support for norm clarification that is generally applicable to all, as scholars of norm change focus on this scenario. I then relax this assumption and shed light on what legitimization strategies can sustain exceptionalism.

²²⁵ Brooks and Wohlforth 2005.

Legitimation

Scholars across theoretical divides argue that two factors are particularly important when it comes to resolving or maintaining norm contestation: power and legitimacy.²²⁶ Because norms are standards of appropriate behavior, shaping their meaning is a way to impress ideas on others and to influence their actions in the future. Ikenberry and Kupchan and Krisch argue that introducing norms and socializing others to them has always been an important tool in the hegemon's quest for influence.²²⁷ However, there is disagreement over how much powerful states themselves are bound to the norm interpretations they introduce.²²⁸

Because of the legitimacy benefit of gaining acceptance for rules that legitimate favored practices, Brooks and Wohlforth argue that a far-sighted hegemon may accept considerable costs and risks in the short-term, gambling on a change in the standard of legitimacy in the long-term.²²⁹ While powerful states' ability to absorb costs may explain why norm contestation can go on for a long time, Brooks and Wohlforth do not explain how agreement on the hegemon's favored norm interpretation can be reached, other than pointing to the need to show legitimacy. Other scholars regard standards of legitimacy to be very stable and therefore able to trump power, as long as it can be shown that a frame-claim combination is in accordance with this standard of legitimacy.²³⁰ Thus, while there is agreement that legitimacy matters, there is disagreement on how and what kind of legitimacy backs up norm interpretations.

Following Max Weber, it is commonly argued that legitimacy has its foundation in a shared belief in a consensual normative order that binds those who rule and are ruled. Hurd describes this shared belief in a consensual normative order as the "normative belief by an actor that a rule or institution ought to be obeyed."²³¹ Legitimacy is therefore an inherently social phenomenon, as social recognition is what gives "oughtness" to a rule.²³² Legitimacy in such a sociological sense is different from legitimacy in a normative sense.

²²⁶ Ibid.; Hurd 2007; Sandholtz 2008.

²²⁷ Ikenberry and Kupchan 1990; Krisch 2005.

²²⁸ Brooks and Wohlforth 2005.

²²⁹ Ibid., 518.

²³⁰ Johnstone 2011; Schimmelfennig 2001.

²³¹ Hurd 1999, 381.

²³² Reus-Smit 2007, 161-163; Wiener 2014.

It is based on perceptions of what is right rather than on actual rightness or goodness.²³³ Social recognition of a norm interpretation is constructed by social interaction.²³⁴ Political actors construct legitimacy discursively by providing justifications for why their norm interpretation should be recognized by others.²³⁵ These justifications must show that they fulfill social expectations in order to be accepted. Thus, legitimacy is constructed through social interactions, but it also structures them.

States are expected to explain their interpretations. Their justifications must show that frame-claim combinations fulfill social expectations and standards of legitimacy to gain approval. Hence, I refer to such justifications as legitimization. What justifications for a norm frame and claim are most likely to be considered valid, including by out-group members whose consent is necessary for norm clarification?

Scharpf famously distinguished between input-oriented legitimization and output-oriented legitimization.²³⁶ The former is derived from procedural fairness and based on identity, since some identification with others is necessary for majority decisions to be acceptable. Output legitimacy, on the other hand, is derived from the perception that an effective solution was found and is based on common interests. Norm scholars have mainly pointed to the importance of procedural or input legitimacy for norm clarification: Schimmelfennig shows that prior commitment may “entrap” actors and Risse and Johnstone point to the fairness of the deliberation process.²³⁷ However, both mechanisms are very demanding: rhetorical entrapment only works if there was a past consensus and if there is agreement that the past and present situation are alike. The Habermasian criteria for fairness—common lifeworld, equal standing and equal voice—are difficult to achieve in international affairs. Of course, this “ideal speech” situation is never fully present because of power discrepancies and the multitude of different cultural backgrounds; it is an ideal yardstick against which deliberations are measured. Moreover, inclusive, fair deliberations alone are unlikely to be sufficiently persuasive, when deep-seated beliefs or power dynamics are involved. Nevertheless, opponents of a frame-claim combination are likely to criticize the contestants’ failure to honor obligations and to be inclusive. I refer

²³³ Lindgren and Persson 2010.

²³⁴ Wiener 2009, 179.

²³⁵ Schimmelfennig 2001; Reus-Smit 2007; Hurrell 2005; Johnstone 2011.

²³⁶ Scharpf 1999.

²³⁷ Schimmelfennig 2001; Risse 2000; Johnstone 2011.

to the former as *precedent-based legitimation* and to the latter as *process-based legitimation*.

States may also engage in *principle-based legitimation* and refer to substantive moral values to legitimate a norm interpretation.²³⁸ This may particularly be the case when the contestation revolves around which of multiple candidate norm frames and claims should apply. If one group of states can successfully convince the other that their preferred norm frame and claim is morally superior, this may lead to norm clarification. If principle-based legitimacy mattered in the process of argumentation, we would primarily expect to see arguments on the obligation states feel to uphold a certain norm understanding. However, as tensions between morally valuable norms are present in every system of beliefs,²³⁹ it is difficult to see how principle-based legitimation will resolve norm contestation.

I find that it is much more likely that states will respond to community expectations to illustrate the output legitimacy of their arguments. Output legitimacy is derived from the provision of an effective solution to a shared problem. A focus on beneficial consequences, what Scharpf famously labelled ‘output’ legitimacy, has the advantage that it does not require a shared identity.²⁴⁰ As Van Kersbergen and Van Waarden state, “[o]utput legitimacy implies that a political system and specific policies are legitimated by their success.”²⁴¹ Such *interest-based legitimation* is thus more likely to be persuasive. The delegation of authority to an international decision-making body is often considered legitimate if this delegation provides effective solutions.²⁴² Decisions by the UNSC on how to interpret international norms—for instance, whether a threat to international peace and security exists—have output legitimacy when they are perceived to solve a shared problem. It is not prior commitments, an intrinsic belief in appropriateness or the quality of deliberations that confer legitimacy, but rather the perception that a norm frame and claim successfully tackle a joint problem. The case study of contestation over the extension of the right to self-defense to state-sponsored terrorism after 9/11 (see chapter

²³⁸ Hurrell 2005.

²³⁹ Sandholtz 2008, 106.

²⁴⁰ Jones 2009b, 1086.

²⁴¹ Van Kersbergen and Van Waarden 2004, 158.

²⁴² Hurrell 2005.

3) shows that output legitimacy is influenced by external, non-discursive events that raise awareness of a common problem and the need for effective solutions.

Steffek criticizes the focus on successfully addressing common problems because it disregards the fact that legitimacy has a normative dimension and thus cannot be based on personal advantage.²⁴³ However, what makes a given output (and the norm interpretation that generates it) legitimate is not personal advantage. Rather it is a common perception that a particular action ought to be taken because it solves a shared problem. Hence, the oughtness is derived from the *intersubjective* understanding that an interpretation works rather than from situation-dependent individual advantage. States show a willingness to commit to this interpretation in the long-term because of the beneficial solutions they expect it to provide. Therefore, output legitimacy is defined here as the provision of an effective solution to a shared problem which leads to a collective long-term commitment.

Interest-based legitimation is relevant in the context of norm contestation because it explains why, even when the dispute parties did not commit to the same norm frame and claim in the past, there is still possibility of agreement. If perceptions change such that a state's norm frame and claim are seen as inadequate for solving a shared problem, this state could face significant pressure to accept another frame and claim. If only one normative frame and claim can provide a successful solution to the problem, the opposing norm frame and claim will likely be dropped. This leads to norm clarification.

I have assumed in the preceding discussion that states intend to create a generally applicable new norm interpretation. States, however, may also engage in exceptionalism—for example, when trying to cover up human rights violations. In these cases, we would expect states to be as secretive about their behavior as possible and to engage in denial when others uncover the dissonance between the claim and frame.²⁴⁴ States who seek to carve out an exception for themselves may have difficulty convincing others of the output legitimacy of their exceptionalism. The lack of consistency with prior interpretations explains why arguments based on output legitimacy are unlikely to resolve

²⁴³ Steffek 2015.

²⁴⁴ Risse and Sikkink 1999.

norm contestation when states try to justify their exceptionalist arguments or behavior. For instance, the US's *sui generis* argument regarding Kosovo's independence and appeals to the negative consequences of not supporting it helped to gain support from European in-group members but failed to convince out-group members such as Russia.

When engaging in covert exceptionalism, states may use their reputation for trustworthiness with regard to the norm as a cover. Aristotle and many subsequent scholars have considered the credibility or *ethos* of the speaker as the most potent means of convincing the audience, particularly when the logical validity, i.e. the frame and/or claim, of an argument is disputed.²⁴⁵ “Character”, “competence”, “trustworthiness” and “authoritativeness” of the source of the argument are among the most frequently cited traits of a credible speaker.²⁴⁶ States need to be what Barnett and Finnemore call “an authority” with regard to the contested norm: that is, to have a characteristic that puts them in a position of authority and makes their arguments persuasive.²⁴⁷ I refer to legitimacy that derives from credibility, trustworthiness, or image as *identity-based legitimation* since there needs to be a “cultural match” between the norm and the identity or domestic legal culture of the state.²⁴⁸ Liberal states, for example, will be considered more trustworthy interpreters of human rights than illiberal ones. Their opponents may in turn question their credibility. In chapter 3, I find that the Bush administration for a long time referred to US identity—the character of its legal system, its image, its honoring of domestic and international obligations—when trying to cover up prisoner abuse and persuade others that detainees suspected of terrorism were treated humanely.

In sum, to persuade others of their norm interpretations, proponents of an interpretation are likely to resort to identity- or interest-based legitimation depending on whether they pursue covert exceptionalism or generally applicable norm change. As a result, their opponents are likely to resort to the same legitimation strategies—that is, to question the proponent's credibility or the utility of the proposed interpretation. My case studies show that this is particularly likely when contestation revolves around how to interpret one norm rather than disputing the relative importance of two or more norms. When others

²⁴⁵ McCroskey and Young 1981.

²⁴⁶ Ibid., 25-27.

²⁴⁷ Barnett and Finnemore 2004, 24–25.

²⁴⁸ Busby 2007, 254.

disagree on the applicability of the norm frame, it is likely that they will also resort to principle-based legitimation to emphasize their commitment to the alternative frame. Precedent-based legitimation is also likely in these cases, but only possible if there is a clear precedent to draw upon.

Delegation

States can decide to delegate the task of managing or resolving their disagreement to a third party. Because delegation is particularly influential when it comes to norm recognition, I discuss its relevance in norm contestation in further detail in chapter 4. Here it suffices to say that agents are better able to manage norm contestation when they succeed in building a reputation as credible and effective. Hence, identity- and interest-based legitimation matter here, too.

Delegating implementation or information-gathering on contested claims to independent experts has the potential to break deadlock. As their judgments are less biased than those of the dispute parties, independent experts can lend more credibility to a particular claim than one of the dispute parties can. As noted above, when the audience perceives the speakers as competent and credible, their claims are more trustworthy.²⁴⁹

Thus, agents can help manage norm contestation when they face a favorable problem-structure that allows them to establish their credibility and effectiveness; the degree of uncertainty surrounding the output legitimacy of their work and the degree of social pressure on principals to maintain delegation matters. When there is conclusive evidence that agents carry out their mandate effectively and when critical audiences pressure principals to rely on delegation, the agent is in a better position to show its legitimacy and to manage norm contestation.

In sum, I find that three social dynamics can curb or fuel norm contestation: the kind of social support a state receives for its norm interpretation, the state's ability to frame the

²⁴⁹ Gottweis 2006, 242-243; Frost 1994, 86, 104.

interpretation as conforming to standards of legality or legitimacy, and the agents' ability to influence the outcome.

4. Research Design and Methodology

4.1 The universe of cases

The universe of cases comprises all instances of contestation of well-established norms that involve at least one powerful state.

Norm contestation in the later stages of the norm life cycle is a puzzle for first-generation norm scholars who assume unquestioned compliance with such norms.²⁵⁰ First-generation norm scholars acknowledge that emerging norms are contested since, by definition, these norms seek to make behavior "appropriate" that was hitherto considered "inappropriate".²⁵¹ Contestation in the emergence stage makes sense; the contestation of entrenched, highly legalized norms, which are assumed to be accepted and followed, needs further explanation.

Norm contestation scholars do not consistently select well-established norms, where contestation is less expected.²⁵² Focusing on contestation over emerging norms is problematic because it leads scholars to see norm contestation everywhere and, at the far end of the spectrum, to consider norm meaning to be entirely flexible. For instance, Bob's study of the rival norm entrepreneur networks of the global left and right portrays norm contestation as endemic and entrenched. He underlines this with martial language: "[i]ndeed, the combatants do not seek compromise. They long for conquest, working as passionately to thwart their foes as to advance themselves".²⁵³ Given Bob's selection of cases – sexuality and gun control norms – which are not highly institutionalized

²⁵⁰ Finnemore and Sikkink 1998, 904.

²⁵¹ Ibid., 897.

²⁵² Bloomfield (2016) and Deitelhoff and Zimmermann (2013) study, amongst others, the responsibility to protect, claiming that it is in the later stages of the norm life cycle, which is a strong claim, given the lack of legal formalization of the norm. Krook and True (2012) look at gender-mainstreaming norms which are also better described as 'soft' than as 'hard law'. It is generally acknowledged that new norms give rise to debate. Contestation is much more puzzling, when well-established norms are subject to debate.

²⁵³ Bob 2012, 7.

internationally, it is not surprising that we see contestation.²⁵⁴ Niemann and Schillinger go one step further, maintaining that contestation is so prevalent that we can consider the meaning of norms to be contested “all the way down.”²⁵⁵ However, as the “alternate endings” typology shows, norms can be more or less settled. We can gain important insights into the effect of contestation on norm strength by acknowledging that some elements of norms can be accepted while others are contested. By focusing on well-established norms, I can show that norms are neither as settled nor as unsettled as scholars make them out to be and I can trace how contestation over the application of norms can change which norm elements are accepted and contested.

What is more, I study episodes of contestation that involve powerful states because powerful states are in a privileged position to shape the law due to their greater influence. Realist scholars see law merely as an instrument of the powerful, and thus may argue that differences in material power alone can explain whether norm contestation culminates in agreement or disagreement.²⁵⁶ To show that material power is not a sufficient explanation for why we observe the various endpoints of norm contestation, I compare debates over norms that were initiated by actors with different degrees of material power but that led to the same norm contestation outcomes.

Since norm contestation of well-established norms is an understudied phenomenon, the challenge for case selection was not to find representative cases out of a known universe of cases, but rather to find cases from an unknown universe of cases that still help to establish the internal validity, and the possibility of external validity, of the theoretical framework.

4.2 The theoretical lens

This study analyzes rhetorical norm contestation which involves “the deliberate and self-interested use of language to achieve policy goals.”²⁵⁷ As norms are at the center of my analysis, the focus is on appeals to international law and legitimacy, and thus on the

²⁵⁴ See Bloomfield 2016, 320-21, for a similar criticism.

²⁵⁵ Niemann and Schillinger 2017, 29.

²⁵⁶ Morgenthau 1985, 296.

²⁵⁷ Bower 2015, 342.

“strategic use of norm-based arguments.”²⁵⁸ Similar to other scholars of rhetoric in IR, I assume that states do not strive for the most legally correct norm interpretation but rather apply norms strategically in the pursuit of beneficial outcomes.²⁵⁹ Appeals to shared normative principles can add legitimacy to an interpretation and render it more acceptable. However, as norms are intersubjective principles, states need to gain approval from others to change the law or to uphold their norm interpretations. Thus, states have to take into account social expectations and conventions of legal argumentation if they wish to succeed.²⁶⁰ The contestants therefore have “thin” instrumental rationality but normative and social pressures bear on them and leave a mark on the process and outcome of norm contestation.²⁶¹

Schimmelfennig’s concept of “rhetorical action” and Bower’s concept of “strategic argumentation” rest on the same assumptions. However, their studies focus on showing how social and legal rules lead to a new shared understanding of norms that is different from the outcome we would expect given “the constellation of actor preferences and their relative bargaining power.”²⁶² I also control for material power but I discuss a greater variety of possible outcomes than norm clarification, and show that social expectations (e.g. to gain support from peers and to use legalistic language) still bear on agents when contestation continues. For instance, the US would not have gone to great lengths to present Kosovo as a *sui generis* case that does not set a precedent if there had not been a social expectation to use consistent norm interpretations or at least to justify why an exception should be made. Thus, unlike other scholars of rhetoric in IR, I analyze how social and normative pressures affect the process of contestation rather than how legal and social rules lead to shared understandings of norms.

Some might see endpoints of contestation other than norm clarification as evidence that social interaction and intersubjective meanings are not constitutive of agents’ ideas and interests. However, each episode of norm contestation adds to the repertoire of a norm, even when states disagree on the norm frame, claim, or both. No matter the outcome,

²⁵⁸ Schimmelfennig 2001, 62.

²⁵⁹ Schimmelfennig 2001; Bower 2015. Note that here beneficial outcome can both mean the pursuit of principles and interests as I bracket the motivations for action in my analysis.

²⁶⁰ Sandholtz 2008; Johnstone 2011.

²⁶¹ See Pouliot 2008, 262-263 for a discussion of thin rationality within normative environments.

²⁶² Schimmelfennig 2003, 158.

contestation over norm application always constructs the norm configuration for the next time when states apply the norm, and thus influences the arguments that they can make going forward. The aftermath of the claim agreement to implement a no-fly zone in Libya, despite persistent frame disagreement, illustrates this “dual quality”²⁶³ of norms as both constructed and structuring: the lack of agreement on the norm frame, namely how to balance humanitarian considerations and Libya’s sovereignty, led to different assessments of the implementation of the claim (no-fly zone), which in turn has affected subsequent debate. Russia and China could resist attempts at a UNSC mandate to stop the mass atrocities in Syria by arguing that the toppling of the Libyan regime went beyond the claim (no-fly zone) they had agreed to.²⁶⁴

These conceptualization of agency and of the argumentative process differ both from those of “pure” rational choice scholars and of “thick” constructivists such as post-structuralists.

In the pure rational choice account, “the collective outcome will be determined by the constellation of actor preferences and their relative bargaining power alone ... social rules do not have an impact”.²⁶⁵ Pure rational choice scholars therefore do not pay much attention to norm construction, and to how social dynamics affect the collective decision-making process on what norm applies in a given situation. Norms mainly matter as a coordinating device among goals in deep-seated problems of coordination where “actors have a strong desire to coordinate but some differences over exactly where to coordinate.”²⁶⁶ Norms, however, only serve as coordinating device when their meaning is fixed; otherwise they cannot steer actors towards a coordination point.

As I illustrate in this study, such a conceptualization of norms does not capture their “dual quality”; in particular, that norm meaning is often not clear-cut but constructed by contestation. The pure rational choice account misses that social expectations to justify norm interpretations affect the kind of arguments states can bring forward and the decision-making process. For instance, since China’s “nine-dash line” frame failed to

²⁶³ Wiener 2004, 191; Wiener 2008, 38.

²⁶⁴ China: Fung 2016, 44; Russia: Johnstone 2015, 243.

²⁶⁵ Schimmelfennig 2003, 158.

²⁶⁶ Snidal 1985, 93.

convince in the South China Sea dispute with the Philippines, China has started to make an effort to include more UNCLOS concepts in its justifications as, for example, the so-called “four sha” argument indicates. China’s increasing resort to UNCLOS terminology shows that while social and normative pressures do not always make states accept prevailing standards of legitimacy, states cannot ignore these standards and do adapt to them. The assumption that actors have “thin rationality” and that social dynamics influence the process of interaction,²⁶⁷ allows us to study the manifold ways in which norms structure social interactions and are constructed by them. This escapes a pure rational choice analysis.

“Thick” constructivists, on the other hand, put discourse and the productive power that resides within it, rather than instrumental agency, at the center of analysis. Post-structuralists, in particular, see public discourses as the site where identities are produced and reproduced, while others become simultaneously excluded.²⁶⁸ Epstein, for instance, discusses how the discourse surrounding whaling has changed from portraying whales as everyday object (e.g. as fuel and economic product) to depicting them as an endangered species worth protecting.²⁶⁹ Post-structuralists therefore are concerned with revealing how meaning is historically contingent, and both structured and unstable.²⁷⁰ I share this research goal. However, post-structuralists often go one step further and expose how the “process of interpretation does not depend on the incidence of ‘objective’ factors for its veracity.”²⁷¹ For instance, there is a discrepancy between public risk perceptions of terrorism in the US, and the low number of deaths due to terrorist attacks.²⁷² Thus, contestation is entwined with forms and expressions of power: discourses produce material facts and prioritize some over others.²⁷³ Poststructuralists consider it as important to be “fostering an ethos of critique” and to be “always working to destabilize ‘truths’.”²⁷⁴ This project does not engage in such deconstruction as the focus is on how

²⁶⁷ Schimmelfennig 2003, 158.

²⁶⁸ Hansen 2006, 16. See also Campbell 1998 and Epstein 2008.

²⁶⁹ Epstein 2008.

²⁷⁰ Hansen 2006, 17.

²⁷¹ Campbell 1998, 2.

²⁷² Ibid.

²⁷³ Campbell 1998, Epstein 2008, Hansen 2006.

²⁷⁴ Mutimer 2016, 102. For examples of works that have such an “ethos of critique” regarding norm scholarship in IR, see Inayatullah and Blaney 2012; Engelkamp, Glaab and Renner 2014 and Niemann and Schillinger 2017.

actors apply and contest norms rather than on what norms reveal about actors' identities and preferences.

My study shares the assumption with post-structuralists that meaning (here: norm meaning) is both constructed and structuring but adopts a different research design and methodology to analyze this “dual quality”:

First, I see value in analytically distinguishing between international legal norms and both other forms of productive power and material power. International law comes with special conventions of argumentation and actors.²⁷⁵ Distinguishing between law and other forms of productive power thus allows me to analyze what influence the legalistic discourse that states use and actors such as Ombudspersons and courts have on the outcome of norm contestation. Furthermore, while what we see as signs of material power (i.e. economic and military capabilities) is socially constructed, the effect of these capabilities is distinctive: those states that we consider to have material power can use it to incentivize others with side-payments and sanctions to agree to their interpretation or to absorb the social and material costs of disagreement better. Thus, whether constructed or not, material power puts states in a privileged position when trying to gain approval for their norm interpretations. Hence, it makes sense to take the (possible) influence of material power on the outcome of norm contestation into account.

Second, I see heuristic value in setting temporary “endpoints” of contestation. Poststructuralists may doubt the relevance of doing so. Niemann and Schillinger, for instance, regard contestation as never-ending because they question whether norms can reflect shared understandings and become fixed.²⁷⁶ However, even if states never share the exact same understanding of norms in the abstract, there can be different degrees of consensus on their application to a specific situation. Application shapes the norm and makes its meaning more or less shared. Differentiating between four endpoints—in norm clarification, norm recognition, norm neglect, or norm impasse—allows us to grasp that the flexibility of norms is a matter of degree.

²⁷⁵ Chayes and Chayes 1993, Johnstone 2011.

²⁷⁶ Niemann and Schillinger 2017.

Furthermore, as Bower contends: “[t]he meaning of social norms and legal rules is never fully solidified, though to the extent that they bear upon actors at a particular moment in time, institutions may be studied as *effectively* fixed entities.”²⁷⁷ While the four different endpoints of norm contestation that I identify do not fully solidify norm meaning, particularly those endings where we continue to see disagreement, they nevertheless provide a fixed point for the next time the norm is applied. As such they bear upon actors and structure the debate at particular moments in time.

Lastly, studying specific instances in which norm application led to contestation focuses the analysis and allows me to study the strategies states pursue when vying for their norm interpretations. Seeking to demonstrate the added value of their approach to the field, poststructuralists lean towards studying changes in meaning of foundational categories (e.g. statehood) over a longer period of time.²⁷⁸ My research complements poststructuralist research: the analysis of shorter time periods allows me to provide more detailed insights into the political struggle over norm interpretations such as whose support states seek, what arguments they bring forward, etc.

In sum, this study strikes a middle ground between “pure” rational choice and “thick” constructivist approaches. This allows me to study both strategic action and how social dynamics and discourses bear upon the process and outcome of norm contestation.

4.3 Case selection and analysis

The research design of this project also steers towards a middle ground between explaining the particular and uncovering patterns that apply across different contexts. Constructivist research prioritizes the former.²⁷⁹ Norm contestation scholars often offer little explanation for their choice of cases²⁸⁰ or rely on one or, at best, two case studies.²⁸¹ On the other hand, rational choice scholars, particularly those drawing on game theoretic

²⁷⁷ Bower 2015, 342.

²⁷⁸ Scott 1998.

²⁷⁹ Moses and Knutsen 2012.

²⁸⁰ Wiener 2014; Johnstone 2011.

²⁸¹ Bower 2015; Deitelhoff and Zimmermann 2013; Bloomfield 2016; Sandholtz 2008; Krook and True 2012.

insights, often abstract away too much from the particular to uncover general patterns,²⁸² or engage in statistical research, e.g. to identify the impact of social pressures on compliance,²⁸³ which is ill-suited to tracing debates over the meaning of norms.

The “alternate endings” typology of norm contestation lends itself well to a “structured, focused comparison”.²⁸⁴ Such a controlled comparison is a suitable middle ground: it builds our confidence that the uncovered patterns are internally (and possibly externally) valid, but still allows for a systematic analysis of norm contestation in the individual cases.

When building the theory, I relied on a “most similar” research design, following Mill’s advice to select cases that have different outcomes despite having similar characteristics.²⁸⁵ This allows us to identify what differences in the explanatory variables account for the differences in outcomes.²⁸⁶ Scholars agree that typologies are well-suited for selecting cases for such a controlled comparison because they help to uncover patterns.²⁸⁷ My “alternate endings” typology helps to identify the outcomes—that is, the variation in the dependent variable—for the controlled comparison. I selected the four cases for theory-building on the dependent variable (different outcome) from the aforementioned universe of cases of contestation of a well-established norm by a powerful state (similar characteristics).

I analyzed contestation of the right to self-defense in response to state-sponsored terrorism (norm clarification), the contestation of Resolution 1441 (2002) or the “threat to the peace” in the context of the Iraq War (norm recognition), the contestation of sovereignty and R2P in the context of Libya (norm neglect) and the contestation over the status of Kosovo (norm impasse). All four cases are instances of norm contestation that involve a powerful state, the United States, over well-established norms, particularly sovereignty. Sovereignty, which is contested in all four initial cases, qualifies as well-established norm; it is the structuring principle on which much of international relations

²⁸² Guzman 2010.

²⁸³ Kelley and Simmons 2015.

²⁸⁴ George 1979.

²⁸⁵ Ibid.; Slater and Ziblatt 2013.

²⁸⁶ Hall 2003, 380.

²⁸⁷ Slater and Ziblatt 2013, 12; Klotz and Lynch 2007, 53; George 1979, 59-60.

rests.²⁸⁸ This is also legally reflected in the UN Charter, which cites “sovereign equality” (Art 2 (1)) as core principle and is one of the most subscribed-to treaty regimes with 193 members.²⁸⁹ The four cases mentioned above show that the US’s explanation did not always “win”, as agreement on both the frame and claim was not always reached.

As Slater and Ziblatt write, the advice to avoid selecting on the dependent variable is frequently misunderstood.²⁹⁰ It is difficult to see how a structured, focused comparison can be conducted without selecting on the dependent variable when the goal is to find out whether an outcome typology is of theoretical value in an under-explored area, where neither many cases of the phenomenon nor independent variables have been identified. However, ideally the outcome typology would not only cover mutually exclusive outcomes, but also be exhaustive of all empirical variation.²⁹¹ Since the universe of cases is unknown, I cannot be certain that this typology is exhaustive and thus whether the variation is representative. Nevertheless, the in-depth study of these four cases, and the addition of several external validity cases (see below), make this project a good plausibility probe.

To establish the internal validity of my explanatory mechanisms, I engage in systematic process tracing of alternative explanations. I focus on the explanatory mechanisms that are most contested between theories and that are most crucial for the argument.²⁹² I then make predictions about the observable implications of my explanatory mechanism and of those of rival theories to be able to draw inferences about their validity.²⁹³

I engage in content analysis of actors’ justifications for their choice of norm frame and/or claim. Statements by senior officials such as heads of state, foreign ministers or diplomats are observable implications that scholars interested in framing analyze.²⁹⁴ These statements allow me to trace explanatory factors in the process leading to the outcomes of norm clarification, norm recognition, norm neglect or norm impasse. When conducting content analysis, I focus on identifying frames and claims to see how the dispute changed

²⁸⁸ Hurd 1999, 393.

²⁸⁹ United Nations Treaty Collection 2019. “Charter of the United Nations”.

²⁹⁰ Slater and Ziblatt 2013, 12.

²⁹¹ Ibid.

²⁹² George 1979; Hall 2003, 392; Schimmelfennig 2014, 104.

²⁹³ Hall 2003, 391-392.

²⁹⁴ Klotz and Lynch 2007, 53.

over time, but also what legitimation strategy states pursued and how they reacted to the statements of in-group and out-group members. Scholars disagree on what kind of legitimacy “entraps” actors and leads to norm clarification.²⁹⁵ Legitimacy is an elusive concept, but it can be captured by looking at the arguments states bring forward to justify their norm interpretations. I systematically code the legitimation strategies states rely on in their justifications in chapter 3, where I examine what leads to norm clarification. The other three outcomes indicate that arguments based on legitimacy are not sufficient to convince key audiences, so I prioritize analyzing the dispute parties’ legal framing, the kind of social support contested frames and claims received, and the impact of delegation in the remaining empirical chapters.

The statements of senior officials do not allow us to identify their motivations, but they are a good indication of social standards because they reveal what arguments actors think will resonate with others. However, it is difficult to attribute causality to these arguments because we cannot be sure that other, less visible factors, such as backroom deals, have not brought about agreement instead. The justificatory discourse indicates what actors consider important when interpreting norms and convincing others. The social standards the justificatory discourse reveals have a constitutive effect.²⁹⁶ they shape the way actors think about norm interpretations or communicate them. By shaping discourse, these social expectations may steer norm contestation towards a certain outcome, but it is not possible to say with what degree of confidence they *caused* the outcome, as scholars relying on Boolean algebra like to do.²⁹⁷

The causal impact of in- and out-group reactions, in turn, is easier to measure because we can more directly observe the consequences of disagreement from in-group members. We can tell whether these reactions have an impact by looking at whether the proponent withdraws or changes the norm interpretation or, alternatively, incurs social or material costs for maintaining the norm contestation. The exchange of arguments shows how states seek to gain support for a norm interpretation from in-groups and out-groups, but it cannot prove conclusively that the kind of arguments they deployed is what led to social support. Table 1 provides an overview of the comparison of the four case studies.

²⁹⁵ Schimmelfennig 2001; Risse 2000; Johnstone 2011.

²⁹⁶ Wendt 1992; Katzenstein 1996.

²⁹⁷ Mahoney 2003.

Table 1: Overview of case study findings

	Norm clarification	Norm recognition	Norm neglect	Norm Impasse
Norm conflict	Does self-defense include armed attacks by state-sponsored terrorists (frame) and thus allow US intervention in Afghanistan following 9/11 (claim)?	Are inspections and diplomacy a sufficient response to the threat of WMD (France, Russia, China) or is intervention necessary (US, UK)? (contested claim)	R2P vs. Libya's sovereignty (contested frames) → should a no-fly zone be established (contested claim)?	The special nature of the Kosovo case and Kosovo's right to self-determination vs. Serbia's sovereignty (contested frame) → Kosovo's independence vs. Kosovo forms part of Serbia (contested claim)
Social support	After 9/11: in-group and out-group support US's frame and claim (openly and by remaining silent)	US's in-group is divided on claim US domestic audience supports intervention	In-group's stance is crucial: LAS request for no-fly zone unblocks UNSC	Both US and Russia enjoy support from respective in-groups for their different frames and claims. This social support allows them to shoulder the costs of their disagreement.
Justificatory discourse	US's discursive strategy: generally applicable norm change References to output legitimacy dominate the justificatory discourse, also in prior episodes of contestation (1986 and 1998)	US's discursive strategy: generally applicable norm change US and UK convinced of <i>ex post</i> output legitimacy	UNSC's discursive strategy: implicit exceptionalism: unclear under what frame mandate is issued Frame adaptation: Blending of R2P and PoC	US's discursive strategy: explicit exceptionalism: Kosovo is portrayed as <i>sui generis</i> case US uses appeals to output legitimacy to convince European states
Delegation	N/A	Unfavorable environment for the weapons inspectors to build a reputation as credible and effective: tangible evidence for Iraqi compliance is hard to come by and there is weak social pressure on the US and UK to continue to rely on inspections	Perceived lack of <i>ex post</i> output legitimacy of the NATO-led coalition's implementation of the no-fly zone → UNSC members revert back to norm impasse regarding how to respond to mass atrocities committed in Syria	Delegation of status negotiations to the Troika did not resolve norm contestation, but it helped convince European states to support the US's argument because they felt that now all options to reach consensus were exhausted
Outcome	Agreement on Afghanistan intervention (claim) due to self-defense against state-sponsored terrorism (frame)	Agreement on WMD threat and UNSC Res. 1441 (frame) and disagreement over authorization of Iraq intervention (claim)	Agreement on no-fly zone over Libya (claim) and disagreement over R2P vs. sovereignty (frame)	Disagreement over whether the right to self-determination (frame) can be invoked without Serbia's consent (claim)
Reputational costs	None	High (no <i>ex post</i> output legitimacy)	Low (frame disagreement less visible than frame agreement)	Low (only vis-à-vis out-group)

I look at a particular subset of cases to control for the role of material power and to increase the likelihood of the theory's external validity. To do so, I analyze security debates and compare two cases in each outcome category: one in which a powerful state initiated norm contestation, and one in which a less powerful actor did so.

Looking at security matters allows us to control for the role of material power because security matters are regarded to be the area where international law matters least.²⁹⁸ Realists argue that power politics and group interests are difficult to tame by law in a situation of anarchy.²⁹⁹ Hence, the legal arguments states bring forward do not interest most realist scholars; they argue that power differentials provide a better explanation for policy outcomes. Debates about the meaning of "sovereignty", "territorial integrity", and the exceptions to the "prohibition of the use of force" are thus particularly tough cases for demonstrating that legal argumentation is consequential. Security, and often regime survival, are at stake. The case studies show that states take legal argumentation seriously even in such a vital area as national security. Thus, it is likely that international law is not epiphenomenal to power.

As matters of (inter)national security are a particularly tough case for my argument, if I can demonstrate the applicability of this framework here, it is likely to be valid elsewhere, too. Furthermore, I conduct a second case study in each outcome category to increase the likelihood of external validity. The secondary case studies still fall in the security arena but do not necessarily involve the sovereignty norm. Looking at other well-established norms such as the prohibition of torture, due process rights, or rules on maritime border-drawing helps to show the broad applicability of the framework.

The second case studies in each outcome category also function as a further control for the role of material power: I compare an episode of contestation that the US initiated with one that a less powerful actor such as a weaker state or an international court initiated but that led to the same outcome. The US's goal might not be generally applicable norm change in all cases; if its goal is exceptionalism, for example, the US might only seek support for the claim (norm neglect) or be content with receiving in-group support for a

²⁹⁸ Glennon 2004, 987.

²⁹⁹ Wohlforth 2008, 134-135.

frame/claim combination to make the reputational costs manageable (norm impasse). Hence, the fact that contestation by the US does not always lead to norm clarification is not sufficient to rule out the influence of power, as the US might have pursued an outcome other than norm clarification. The controlled comparisons in each outcome category indicate that less powerful actors can achieve similar outcomes, and thus that material power is not the only explanatory variable that affects the course of norm contestation. I could not identify an instance of contestation by a weaker actor that meets all criteria and leads to norm clarification through acceptance, which shows that material power matters. However, I identified a case where the US had to give up its norm contestation—i.e. the outcome was norm clarification through rejection—which shows that material power is not the only explanation.

4.4 Data and sources

I use four types of sources in all case study for the content analysis of episodes of norm contestation:

Secondary literature. The secondary literature serves as an entry point for each case study analysis as it helps us to understand and reconstruct how the discussion unfolded and to identify the proponents and opponents of a given norm frame and claim. All case studies are covered well in the IR and International Law (IL) literature.

News coverage. News coverage of the debates is one of the most important sources of information. In newspaper articles and transcripts of TV shows, the statements of proponents and opponents of norm frames and claims are reprinted, which are important observable implications. What is more, reporters often shed light on what went on behind the scenes and on the consequences of the (dis)agreement between states. Thus, they also provide information on the social and material implications of norm interpretations. I searched for key terms in the Nexis database to retrieve information on the position of states and their statements in the respective episodes of norm contestation. The search strings often generated hundreds of results. I filtered out those that contained statements or background information. I then coded these statements depending on whether they show contestation of the frame or of the claim, on what kind of legitimation strategy or

legal framing was chosen, and on whether the actor was an in- or out-group member. Where possible, I supplemented these statements with press releases and verbatim records of General Assembly, Security Council, or parliamentary debates.

Official documents. I also relied on official documents made available by states and international organizations involved in the debates. The documents include meeting records, resolutions, letters, press releases and court rulings. When available, the verbatim records of the UNSC and of the United Nations General Assembly (UNGA) are the most thorough and direct evidence of the legal debates between actors. Because of the setting, actors are more likely to engage in arguments that are explicit on the legal frame and claim. When statements are given to journalists for a public audience, the legal discourse is less pronounced. Therefore, I prioritized official documents where available. When the contestation did not take place in an IO, I relied more heavily on newspaper articles and press releases to reconstruct the debate.

Interviews. I conducted interviews with UNSC diplomats, ombudspersons, legal counsels and other decision-makers who were key interpreters of norms or were involved in negotiations and debates over norm meaning. These interviews allow me to add background information and verify that the factors that I identified as influencing the duration of norm contestation actually mattered.

I triangulate the sources, where possible, to be able to reconstruct the episode of norm contestation accurately.

5. Overview of chapters

The analysis proceeds as follows in the subsequent empirical chapters.

In chapter 3, I look at norm clarification (agreement on frame and claim). I compare the US's contestation of the right to self-defense and of the prohibition of torture and cruel, inhuman or degrading (CID) treatment after 9/11, which respectively led to norm clarification through acceptance and through rejection. The case studies show that neither external events nor power are sufficient to resolve norm contestation. Rather, the intent

and identity of the proponent of norm reinterpretation, the presence or absence of shared perceptions of output legitimacy, and in-group reactions matter.

In Chapter 4, I study norm recognition (agreement on frame/disagreement on claim) by comparing the persistence and effects of norm recognition in the context of the 2003 Iraq war (proponents: US and UK; main opponents: France and Germany) and the 1267 targeted sanction regime (initiator: UNSC; opponent Kadi/ECJ). Regarding Iraq, UNSC members agreed on the ambiguous Resolution 1441 (2002) as they all perceived Iraq as a threat to the peace, but differed over whether military intervention or inspections are better suited to tackle this threat. Regarding due process rights in the context of targeted sanctions, the Security Council prerogative clashed with due process rights. The UNSC and ECJ agreed on the applicability of due process rights but differ over whether an Ombudsperson mechanism or an independent court is necessary to safeguard due process. In both cases, the delegation relationships between the UNSC and UN weapons inspectors and between the UNSC and the Ombudsperson influenced the outcome. The Ombudsperson mechanism has proven more persistent. The availability of tangible evidence of the output legitimacy of the Ombudsperson's work, the clear and consistent messaging of the Ombudspersons and their outreach activities as well as litigation pressure have contributed to the longevity of the mechanism.

In Chapter 5, I look at norm neglect (agreement on claim/disagreement on frame). I analyze the contestation over the intervention in Libya in 2011 (proponents: US, UK, France; initial opponents: Russia, China) in-depth, while the South China Sea arbitration case concerning maritime fishing and border rights (Philippines vs. China) serves as the external validity case. While the claim of the more powerful states was accepted in the Libya case, the opposite happened in the South China Sea dispute. China accepted the Philippines' claim and provided them with access to contested fishing grounds in Scarborough Shoal in October 2016,³⁰⁰ but the frame differences prevail. I show that support of Russia's and China's in-group for the Libya intervention changed their threat perceptions and minds and facilitated the claim agreement. In the South China Sea dispute, the clear ruling of the arbitral tribunal and President Duterte's preference for

³⁰⁰ Reuters 2017. April 10; and Paddock 2016. October 28.

closer ties with China helped to bring about China's concession on access to Scarborough Shoal.

In Chapter 6, I look at norm impasses (disagreement on frame and claim). I compare the contestation over Kosovo's independence (initiator: Kosovo (and the West); main opponents: Russia, Serbia) with the debate over the status of South Ossetia after the Russian intervention in 2008 (initiator: Russia, South Ossetia; main opponents: US, UK, France, Georgia). Both debates have reached an impasse. Power differentials and/or the greater legitimacy of one interpretation have not led to a solution. Both cases happened in short succession, revolve around the same norms and show an interesting reversal of sides: while the US recognized Kosovo's statehood/right to self-determination and rejected Russia's emphasis on Serbian sovereignty, the US rejected Russia's support of South Ossetia's statehood/right to self-determination and emphasized Georgian sovereignty. This shows that prior commitment (precedent-based legitimation) does not lead to entrapment when both sides deviate from it and provides an excellent opportunity to test my framework. I show that despite this reversal of sides, the arguments that the US and Russia rely on indicate that they take international law seriously. Furthermore, each side could maintain their respective norm frames and claims because they counted with sufficient social support: the US and Russia both enjoyed support from their in-group for their position on Kosovo's independence, and Russia could compensate for lackluster in-group support for its support of South Ossetia's and Abkhazia's independence because it enjoyed domestic support and out-group criticism was muted.

The last chapter concludes.

Chapter 3: Norm Clarification: From contestation to consensus on the prohibition of torture and the right to self-defense in the context of international terrorism

1. Introduction

In this chapter, I show that contestation is resolved when all main parties to the dispute agree on a norm frame and claim. This norm clarification comes about when a state's attempts at reinterpretation are either overwhelmingly accepted or rejected. Norm clarification is an important outcome since it makes norms more precise and thus facilitates cooperation. Since norm contestation does not always lead to consensus on the norm frame and claim, this chapter tackles the following question: under what conditions does norm contestation culminate in norm clarification?

Though powerful actors are in a privileged position when contesting norms, material power is neither sufficient to resolve norm contestation, nor to sustain it, because of social pressures to justify and legitimate the choice of norm frame and claim. Scholars have brought forward a variety of explanations for the kind of arguments or social expectations that can facilitate consensus. I show that identity-based legitimation (invoking credibility and/or obligation) and interest-based legitimation (invoking necessity, effectiveness or utility) strategies are particularly prevalent, with the former requiring a “cultural match” and the latter “shared perceptions” to work. Furthermore, it matters for the status of the contested norm(s) whether powerful states actively and overtly reinterpret norms, trying to induce generally applicable norm change, or if they covertly contest norms, arguing in reaction to the criticism of others without the intention of setting a generally applicable new interpretation.

I illustrate my argument with two case studies of norm contestation. These case studies serve as plausibility probes for the factors that contribute to acceptance or rejection of reinterpretations by powerful states: while 9/11 and international terrorism triggered both the US's contestation of the well-established right to self-defense and the prohibition of torture, the Bush administration's attempts at reinterpretation were accepted in the former case and rejected in the latter. This shows that neither material power nor external events are sufficient to resolve norm contestation. Rather, the intent and identity of the norm

challenger, the presence or absence of shared perceptions of output legitimacy, and in-group support matter.

While norm contestation research is rich in theoretical observations, the same is not true of scholarly empirical analysis. Few scholars engage in fine-grained content analysis of the arguments that are exchanged during norm contestation. More often than not, case studies are an afterthought,³⁰¹ based on very few statements,³⁰² or an overview that does not study the arguments that were brought forward in detail.³⁰³ Schimmelfennig's in-depth process tracing and Keating's fine-grained content analysis are the exception rather than the rule.³⁰⁴

Similar to Schimmelfennig and Keating, I conduct a fine-grained analysis of the type of legitimization strategies states relied on in their justificatory discourse. I engage in content analysis of newspaper articles, official statements, speeches and political debates in international institutions such as the UNSC. Studying what arguments states relied on most does not conclusively prove that the factors mentioned in these arguments caused a certain outcome. The arguments that states present in public are nevertheless a good indicator of what they deem important when deciding on a norm interpretation and on what their audiences may base their judgment on. For example, states would not discuss the consequences of a norm interpretation if they did not think that this was an important aspect to consider, and that referring to beneficial consequences may persuade key audiences.

In the following section, I discuss the two different forms such norm clarification can take—acceptance and rejection of a reinterpretation—before analyzing the social expectations that lead to this outcome. I then illustrate my argument with two case studies: the Bush administration's covert exceptionalism regarding the prohibition of torture (norm clarification through rejection); and the US's attempt to broaden the right to self-defense to include state-sponsored terrorism (norm clarification through acceptance).

³⁰¹ Bloomfield 2016; Deitelhoff and Zimmermann 2013.

³⁰² Liese 2009.

³⁰³ Sandholtz 2008; Krook and True 2012; Wiener 2014; Reus-Smit 2007; Dunne 2007.

³⁰⁴ Schimmelfennig 2003; Keating 2014.

These case studies show the importance of legitimation and in-group reactions, and that the preferred interpretation of powerful states (in this case, the US) does not always win.

2. Norm clarification: Context and Consequences

When all parties to the dispute agree on a frame and claim, the norm develops further: the contestation (namely the different understandings) makes way for consensus. In fact, when an interpretation of the law becomes widely shared and consistently used by states, it modifies the law: e.g. by making it deeper or more precise.³⁰⁵ An often-cited example is the change in meaning of UNSC voting rules through subsequent practice: Article 27 (3) UN Charter specifies that an “affirmative” vote of permanent members for certain matters is necessary, which has come to be interpreted as meaning everything but a negative vote.³⁰⁶ Thus, convergence in the interpretation of a norm may start a precedent for future actions, which clarifies the content of the norm.³⁰⁷ This is an important outcome: the more states agree on a specific interpretation, the more precise the norm becomes, and the better guidance it gives for similar situations in the future. Precision is important as it makes legal rules a better reference point for cooperation,³⁰⁸ and reduces ambiguity, which Chayes and Chayes identify as a key obstacle to compliance.³⁰⁹ In addition, such clarification strengthens the norm when it increases the validity or scope of a norm vis-à-vis another norm. For instance, when states agreed following 9/11 that the right to self-defense applies in situations of state-sponsored terrorism, this norm clarification strengthened the self-defense norm vis-à-vis the sovereignty norm. States can now resort to force against other states in a greater variety of situations.

When other states reject a norm frame and claim, the proponent of the norm interpretation may face social and material sanctions for deviating from social expectations.³¹⁰ When there is widespread agreement on a proposed new frame and claim, such reputational costs may be avoided.

³⁰⁵ Sandholtz 2008, 110.

³⁰⁶ Hurd 2014, 44–45.

³⁰⁷ Sandholtz 2008, 103–104.

³⁰⁸ Abbott et al. 2000, 413.

³⁰⁹ Chayes and Chayes 1993, 188–193.

³¹⁰ Schimmelfennig 2001; Krebs and Jackson 2007.

We can therefore differentiate between two ways in which norms become clearer: when attempts at interpretation, and thus efforts to persuade others of a frame-claim combination, are clearly either accepted or rejected. In this chapter, I do not include a case of norm clarification through synthesis of different frames and claims. Synthesis involves a compromise between different frames and claims. Such norm clarification does not show how interpretation of the most powerful state fared as clearly as acceptance or rejection does. Comparing a case where a norm interpretation of the US was accepted and rejected is better suited for identifying the social dynamics that mitigate the role of material power.

Rejection of an interpretation attempt happens when there is widespread agreement that the frame-claim combination proposed by a state does not apply. This clarifies the norm. An example is the debate over the applicability of R2P in situations of natural disasters. When Cyclone Nargis hit Burma, Burmese authorities initially refused foreign aid workers, which led to ineffective administration and a life-threatening shortage of aid. French Foreign Minister Kouchner asked the UNSC to cite R2P (frame) to forgo Burmese consent and to deliver emergency relief (claim). His interpretation that R2P did not only apply to grave humanitarian crises but also to natural disasters was overwhelmingly dismissed – even by his own head of state, French President Nicolas Sarkozy.³¹¹ Hence, the rejection of the frame and claim shed light on the scope of R2P, leading to norm clarification.

Acceptance of an interpretation attempt happens when there is widespread agreement that the frame-claim combination a state proposes applies. This clarifies the norm by identifying its regulatory ambit. An example is the debate over what actions the principle of freedom of movement in the EU allows. Britain argued that it is not obliged to pay family welfare benefits to unemployed EU migrants who have been in the UK for less than five years (claim) because it is proportionate to ensure that the beneficiaries are sufficiently integrated in society (frame). The Commission rejected this claim on the basis that under the right to freedom of movement it is forbidden to discriminate based on nationality (frame). However, the ECJ accepted the UK's frame and claim, arguing that while it is an indirect act of discrimination to require a right to reside, it is proportionate

³¹¹ Badescu and Weiss 2010, 362–363.

to the need to protect the finances of the host state.³¹² Shortly after, Germany also passed a law that requires unemployed EU migrants to have been in Germany for five years to receive social benefits.³¹³ This debate over how to interpret states' obligations under the right to freedom of movement illustrates that the widespread acceptance of an interpretation can clarify the content of a norm, e.g., how far the right to freedom of movement reaches.

We can see that the acceptance and rejection of an interpretation attempt clarify norm meaning. Following Finnemore and Sikkink's criterion for social acceptance of a norm, what matters is that this acceptance or rejection comes from a tipping point of at least one third of states, including critical states without whose support the norm goal would be compromised.³¹⁴ As previously discussed, I consider the P5 as critical states in this study since they have decision-making power regarding security norms.

3. Pathways to norm clarification

I find that three social dynamics influence the outcome of norm contestation when states debate how to interpret and implement norms: the justificatory discourse, social support, and delegation. Since delegation only played a minor role in both cases, I focus on analyzing the justificatory discourse and the degree of social support for the US's interpretation of the prohibition of torture and of the right to self-defense.

Delegation

We do not see delegation in the debate over the US's interpretation of the right to self-defense following 9/11. In the debate over the US's interpretation of the prohibition of torture, delegation only contributed to the general pressure on the US to withdraw its interpretation in the later years of debate. Agents such as UN Special Rapporteurs and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) treaty body issued interpretations on torture allegations regarding the

³¹² Court of Justice of the European Union 2016. June 14.

³¹³ Die Bundesregierung 2016. December 16; Connolly 2016. October 12.

³¹⁴ Finnemore and Sikkink 1998, 901.

US. However, the dispute parties did not specifically delegate the task to analyze the US's conduct to UN experts. The UN experts counted with broader mandates and automatically engaged in the task.³¹⁵ As these reports were routine reports or otherwise not specifically requested by the dispute parties, there was less expectation for the US to engage with these experts and to heed their calls. Furthermore, the UN experts' verdicts came at a time when revelations of US practices by NGOs and the media, and public criticism in general, intensified.³¹⁶ Hence, while these agents contributed to the public pressure through their revelations of practices at Guantanamo and legal interpretations, it is difficult to isolate their influence from that of the NGOs and the media. Delegation was therefore not a key factor in these episodes of contestation.

Justificatory Discourse

In this chapter, I engage in a fine-grained analysis of the justificatory discourse. The arguments the dispute parties relied on indicate the justifications for their interpretations that they considered most persuasive. As the dispute parties reached an agreement on the applicable norm frame and claim, some arguments were more successful than others. In particular, the arguments that the US as challenger of the pre-existing consensus on torture and self-defense relied on give us a good indication of the social pressures and concerns that the US had to address.

I code the arguments that the dispute parties exchanged in the post-9/11 debates over self-defense in response to terrorist attacks, and over the prohibition of torture, depending on the justifications brought forward. I consider whether their arguments related to: factual data (evidence-based legitimation); the prior consensus (precedent-based legitimation); the fairness of deliberations (process-based legitimation); substantive moral values (principle-based legitimation); the credibility of the speaker (identity-based legitimation); or output legitimacy (interest-based legitimation). I find that this distinction covers most arguments exchanged. When actors purely relied on sophisticated legal analysis without citing precedents, I code the arguments as legal framing. I also look at whose consent to an interpretation was deemed most important.³¹⁷

³¹⁵ UN Doc.E/CN.4/2006/120. 2006; UN Doc. CAT/C/USA/CO/2. 2006.

³¹⁶ Guardian 2006. February 16.

³¹⁷ The coding scheme and content analysis is on file with the author and can be shared upon request.

Regarding the US's legal framing: the Bush administration initially engaged in covert exceptionalism when implementing the prohibition of torture but then shifted towards open reinterpretation attempts when its practices were discovered and criticism intensified. When it comes to the right to self-defense, the US's legal discourse indicates that it pursued generally applicable norm change.

When generally applicable norm change is pursued, we would expect the proponent (here the US) to refer to output legitimacy when legitimating its preferred norm interpretation. Thus, we would expect the US to argue that its frame adaptation provides an effective solution to a shared problem, justifying a collective long-term commitment. What matters here is not the actual effectiveness of the norm interpretation in dealing with a problem, but the ability to influence perceptions of effectiveness.³¹⁸ Accordingly, if output legitimacy is what facilitates agreement, we would expect the debate to focus on the utility of a norm interpretation – namely on whether it is beneficial, necessary or effective in addressing the new problem.³¹⁹ I refer to this legitimization strategy as interest-based legitimization.

Furthermore, we would expect debate to consider whether an external event (such as a terror attack or a technological invention) has upset the prior consensus, and so needs a new solution. Most contestation scholars argue that exogenous shocks such as crisis situations like 9/11 reveal the contested and uncontested aspects of norms and provoke norm contestation.³²⁰ The social expectation to show the output legitimacy of a norm frame and claim combination provides a powerful explanation: such exogenous shocks help to show that there is a shared problem needing an effective solution. Hence, when Reagan first used the right to self-defense to justify strikes in response to a terror attack, much of the debate revolved around whether missile strikes were a necessary and effective way to tackle terrorism. Yet it was only when further terror attacks happened, and it became clearer that international terrorism posed a threat to all states (in particular after 9/11) that the international community agreed to a broadening of the right to self-defense.

³¹⁸ Scharpf 1999; Jones 2009; Lindgren and Persson 2010.

³¹⁹ See also Bloomfield 2016.

³²⁰ Wiener 2009; Wiener and Puetter 2009; Liese 2009; Dunne 2007; Müller 2013.

Reaching an understanding on output legitimacy is less demanding than identity-based legitimization strategies related to credibility or precedent- or process-based legitimization strategies. Such interest-based legitimization requires less identification with out-group members.³²¹ Norm clarification through acceptance is thus likely to come about when a change in perception of output legitimacy occurs. The case study on the contestation of the right to self-defense illustrates this.

If opponents do not perceive a change in output legitimacy but prefer an alternative set of frames and claims, they are not only likely to question the need and utility of the proposed norm interpretation but also to engage in principle-based legitimization and legal framing. Out-group members such as the Soviet Union and China portrayed Reagan's military strikes on targets in Libya as "armed aggression", citing the counter-norms of sovereignty, territorial integrity and the prohibition of the use of force, alongside their principled commitment to a state-centric world. When in-group members rejected the Bush administration's interpretation of the prohibition of torture in the later years of the debate, they also primarily relied on principle-based legitimization and legal framing.

Generally applicable norm change is not the only strategy that states may pursue. We also see exceptionalism: a state may prefer others to continue to be bound by a norm interpretation but at the same time prefer to implement a claim that others would consider illegal under this norm frame.³²² When a strong obligation and public expectation to the norm is the basis for norm-following, the hegemon will not be able to easily gain agreement for a contradictory norm frame and claim. Hence, we would expect the hegemon to be as secretive about its behavior as possible and to engage in denial when questioned.³²³ When denying any wrongdoing, the norm challenger is likely to engage in identity-based legitimization where possible, referring to its credibility in relation to the norm. Whether this legitimization strategy works depends on the "cultural match"³²⁴ between the contested norm and the identity or domestic legal culture of the norm

³²¹ Jones 2009, 1086.

³²² Rubinfeld 2004.

³²³ Risse and Sikkink 1999.

³²⁴ Busby 2007, 254.

challenger. Liberal states, for example, are considered more trustworthy interpreters of human rights than illiberal ones.

The Bush administration resorted to such covert exceptionalism regarding the prohibition of torture. The US's image as a liberal, human rights respecting country, meant that the Bush administration could initially keep criticism at bay with reference to this identity. This legitimization strategy resonated with the US's in-group – most importantly, with European states. From 2001-2006, the US's in-group was generally supportive of the Bush administration's claim that it did not engage in torture and agreed that the US's identity as a liberal, human rights respecting state made prisoner mistreatment unlikely. Support waned when more and more evidence of questionable practices became available.

When denial is no longer an option because the exceptionalist behavior is uncovered and criticized, the hegemon faces the same trade-off as when it seeks a generally applicable, universal reinterpretation: absorb the social and material costs and continue to contest, or give up the frame and/or claim because the social costs are too high. The Bush administration gave up some norm interpretations. For instance, it rescinded legal memoranda that lowered the threshold for torture. However, we also see a shift from covert exceptionalism to much more open reinterpretation attempts, when denial was no longer an option: regarding waterboarding, for example. An increase in interest-based legitimization, as we would expect when states pursue generally applicable norm change, accompanied this shift.

Social Support

For norm clarification, widespread support for a norm frame and claim from in- and out-group members is necessary. When a norm interpretation is contested however, in-group dissent is particularly costly, as there are more social and material ties between the states that make disagreements more consequential.³²⁵ As discussed in chapter 2, whether or not countries have a shared culture or history is an important indicator of group membership.

³²⁵ Johnston 2001, 497; Krebs and Jackson 2007, 56; Goddard 2006, 45-47; Schimmelfennig 2001, 62-63.

Due to their shared values, I consider European states, Canada, Australia, New Zealand, Japan and Israel as members of the US's in-group. I pay particular attention to the reaction of European states to the US's norm interpretations because of their shared history and close cooperation.

My analysis shows that how in-group members react to a norm interpretation is indeed decisive for its sustainability. In-group criticism of the Bush administration's practices was muted for a long time (from 2001-2006): even though evidence of potential prisoner mistreatment in Guantanamo surfaced as early as 2002, European states maintained that they did not believe that the US, a human rights respecting state, engaged in torture. When the prisoner abuse in Abu Ghraib became public in 2004, in-group members such as Spain, Germany and Japan expressed trust in US democracy, the investigations, and the claim that Abu Ghraib was an isolated instance of wrongdoing. Towards the end of 2005, with the revelation of more and more US practices, the EU asked the US for explanations, particularly for the alleged operation of black sites in Eastern Europe. However, NATO countries ultimately issued statements of support for the US, saying that they considered the US to have acted within the boundaries of international law. It was only after criticism and evidence from IOs and NGOs to the contrary grew even stronger that social pressure from these in-group countries intensified. The lack of social support left its mark: both presidential candidates clearly distanced themselves from the Bush administration's interpretations, and Obama repudiated all Bush administration legal opinions on torture, stopping the most controversial practices. Thus, in-group reactions matter.

Curiously, out-group members, who themselves often had questionable human rights credentials, were much more outspoken from the beginning. Out-group members could have seen the Bush administration's reinterpretation attempts as an opportunity to weaken the prohibition of torture. Instead of supporting the Bush administration's interpretations, they chose to accuse the US of double standards and hypocrisy, and to deflect from their own questionable human rights practices. It is also noticeable that domestic opposition started to form much earlier than international (in-group) criticism and pressured the Bush administration into withdrawing contested interpretations such as the Bybee memo.³²⁶

³²⁶ For a detailed discussion of the sequencing of domestic and international opposition, see pp. 95-105. Regarding the Bybee memo's withdrawal, see Stevenson 2004. June 23; Liptak 2004. June 24.

Furthermore, the contestation over the applicability of the right of self-defense to acts of terrorism shows that decision-makers consider in-group support important: US President Ronald Reagan sent US diplomats to all major European capitals to convince these countries to support, or at least not condemn, his military response to the terrorist attack on La Belle Discotheque in 1986. However, most European countries questioned the effectiveness of a military response, citing worries that it would only provoke counterattacks and a spiral of violence (interest-based legitimation). The in-group opposition had tangible costs: Spain and France denied use of their airspace. All the more important it was for Reagan that the US's most special partner, the UK, supported his interpretation. Thatcher's support reduced reputational costs and material costs as the US could rely on the UK's airbases. Thus, in-group reactions, and in particular those of core in-group members, matter.

Table 1 provides an overview of the case study findings.

Table 1: Overview of Case Study Findings

	Norm clarification through acceptance	Norm clarification through rejection
Norm conflict	Does self-defense include armed attacks by state-sponsored terrorists (frame) and thus allow US intervention in Afghanistan following 9/11 (claim)?	What actions fall under the prohibition of torture? How do we reconcile the prohibition of torture with the aim to prevent terror attacks?
Social support	After 9/11: in-group and out-group support US's frame and claim (openly and by remaining silent)	2001-2003: Covert exceptionalism → not much contestation 2004-2005: Domestic pressure starts to form when interrogation tactics and legal interpretations become public → withdrawal of memos In-group criticism is muted 2006-2008: Bush administration's open reinterpretation attempts and evidence of prisoner mistreatment grow stronger → in-group and domestic pressure intensifies
Justificatory discourse	US's discursive strategy: generally applicable norm change References to output legitimacy dominate the justificatory discourse, also in prior episodes of contestation (1986 and 1998)	US's discursive strategy: first, covert exceptionalism → indicates strong social expectation to comply When the US's questionable practices were uncovered: attempts at generally applicable norm change
Outcome	Agreement on Afghanistan intervention (claim) due to self-defense against state-sponsored terrorism (frame)	Rejection of US's frame adaptations (e.g. threshold for "severe pain", applicability of laws of war rather than human rights law) and of claim that "enhanced interrogation" techniques are necessary and effective in preventing terrorism
Reputational costs	None	During Bush administration: Moderate (reduced by muted in-group criticism)

4. Comparing situations of norm clarification: Analysis of the contestation over the prohibition of torture and the right to self-defense in the context of international terrorism

In the following section, I trace the arguments exchanged in the debates that ensued after 9/11 over the right to self-defense and over the prohibition of torture. The literature has focused on norm contestation that plays out in public.³²⁷ States who seek to reinterpret a norm require public approval (or at least silence) to create a precedent to point towards. When their interpretation is approved, they have a chance to cement their preferences and to hold others to account in the future.³²⁸ I therefore code the absence of public protest as well as public approval as “agreement” on a norm frame and/or claim, whereas only public disapproval is coded as “disagreement”. Since state consent is necessary for norm clarification, I rely on newspaper articles that contain statements from heads of states and senior officials such as ministers and leading diplomats. I also incorporate political speeches from heads of states and spokespersons, and debates in important institutions such as the UNSC or human rights treaty bodies into the analysis.

These two cases share several similarities. The same phenomenon triggered both episodes of norm contestation: the rise of international terrorism in general, and 9/11 in particular. Furthermore, both case studies fall in the area of security, and involve well-established norms and powerful states, allowing me to control for the role of material power.

While both cases had the same outcome—norm clarification—there were also important differences that help control for alternative explanations, particularly material power. Following 9/11, the most powerful state (the US) managed to gain acceptance for its reinterpretation of the right to self-defense, which had previously been contested. The same cannot be said for its attempt at reinterpreting the prohibition of torture: because of widespread opposition, the US had to make concessions and slowly but surely abandoned its interpretation. This shows that power alone does not determine the outcome of norm contestation: the most powerful state’s preferred norm clarification does not always win.

³²⁷ Sandholtz 2008; Krook and True 2012; Wiener 2014; Bloomfield 2016.

³²⁸ Krisch 2005.

Furthermore, these episodes of contestation involve security issues, where realist scholars are particularly skeptical that (legal) norms matter.³²⁹ Yet international law figured prominently in debates. Realists would expect norm clarification (widespread agreement on a norm frame and claim to action) to be rare. When national security is at stake, different preferences are particularly difficult to reconcile. That states were able to reach agreement on a norm frame and claim in both situations is therefore a good indication that international law matters.

The norms that were contested – the right to self-defense and the prohibition of torture – are widely recognized as internalized, hard law. Finnemore and Sikkink regard codification and widespread ratification as signs of widespread acceptance:³³⁰ the UN Charter and CAT count 193 and 165 treaty parties respectively.³³¹ The prohibition of the use of torture is a *jus cogens* norm and widely considered one of the biggest taboos in international affairs.³³² Self-defense is also a well-established right, not only internationally but in most legal and moral codes as well. The contestation of both norms is surprising, thus illustrating that ambiguity prevents internalization.

4.1 Rejection of Reinterpretation: The Bush administration and the prohibition of torture and of CID treatment or punishment

The US openly and actively contested the right to self-defense, indicating that it desired a universal, generally applicable change in the norm. On the contrary, the US's contestation of the prohibition of torture was less active and from 2001 to 2003 was mainly covert. Revelations of US practices and legal memos, primarily between 2004 and 2005, which others criticized as violating the prohibition of torture, forced the Bush administration to justify itself.³³³ The initial secrecy of the Bush administration indicates that the US did not seek to achieve a universal change of the prohibition of torture, but rather to maintain exceptionalist behavior, at odds with the normative frame. The debate

³²⁹ Glennon 2004, 987.

³³⁰ Finnemore and Sikkink 1998, 901.

³³¹ United Nations Treaty Collection 2019. "Charter of the United Nations" and "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

³³² de Wet 2004.

³³³ Keating 2014.

that ensued revolved around what constituted legal interrogation tactics of terror suspects. It involved several norms, but at its heart was the prohibition of torture.

The prohibition of torture is a very strong prohibition. It is enshrined in 28 human rights instruments with high ratification rates, and a part of the common Article 3 of all four Geneva Conventions of 1949, which has attained the status of generally applicable customary law. The prohibition of torture is non-derogable, even in times of war or crisis, and it is absolute.³³⁴ It has attained the status of *jus cogens*, rendering any contradictory rules or treaties null and void.³³⁵ The prohibition of torture can be classified as an “internalized” norm, which makes its contestation surprising. Article 1 CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining... information...” and inflicted by or with the knowledge of a public official. Furthermore, this prohibition is also enshrined in the US’s domestic legal code.³³⁶

Some scholars argue that practices that the US engaged in after 9/11 caused a reverse norm cascade and significantly delegitimized the norm domestically.³³⁷ McKeown even speaks of “norm death”.³³⁸ Scholars also voiced fears that the US’s domestic contestation would undermine the international status of the prohibition of torture,³³⁹ with some hoping that the reactions of other, liberal, states in Europe are “sufficient to uphold the regime absent the hegemon.”³⁴⁰ Keating shows, based on a fine-grained content analysis of the arguments that were exchanged in the debate, that there is little evidence that a reinterpretation of the prohibition of torture that delegitimized the international norm happened, because of the widespread criticism of the Bush administration.³⁴¹ I agree with his finding that the US’s reinterpretation attempt was rejected. I used Keating’s dataset of newspaper articles and TV coverage in my analysis and supplemented it with other primary sources such as domestic legal memos and international legal opinions.³⁴² I

³³⁴ Liese 2009, 38–40.

³³⁵ de Wet 2004.

³³⁶ Forsythe 2011, 65.

³³⁷ Ibid.; McKeown 2009, 6-7.

³³⁸ McKeown 2009, 10-19.

³³⁹ Dunne 2007; McKeown 2009.

³⁴⁰ Harrelson-Stephens and Callaway 2009, 450.

³⁴¹ Keating 2014.

³⁴² I thank Vincent Keating for sharing his dataset with me. Source: Nexis, All English Language News. Search terms: (“United States” or “America” or “Bush”) w/p “torture”. Timeframe: September 11, 2001 –

disaggregated the arguments that were exchanged to identify what states (dis)agreed about (frame and/or claim), and to find out how states justified their respective positions (interest-based legitimation, identity-based legitimation, evidence-based legitimation, legal framing, etc.). The methodological appendix provides further information on my sources and coding-scheme.

Notably, the US did not openly express the wish or need to reinterpret the prohibition of torture in the context of terrorism, but continuously stated that it did not engage in torture and behaved lawfully.³⁴³ Thus, on the surface, there was agreement on the prohibition of torture (frame): however, states disagreed on the interrogation techniques prohibited under it (claim), which in turn revealed different understandings of what constitutes torture (frame). The discrepancy between the Bush administration's words and deeds only became apparent over time, provoking justification and tactical concessions. This dynamic resembles the early stages of the spiral model, which are "denial" and "tactical concessions".³⁴⁴ Eventually, the domestic and international backlash against the Bush administration's claims led to the rejection of the administration's interpretation, and Obama completely revoked these interpretations. Based on McCain's behavior and criticism of the Bush administration's interpretations, it is likely that he would have done the same if elected.³⁴⁵ Domestic and international rejection of US frames and claims had become too widespread to ignore without significant reputational costs.

The contestation of the prohibition of torture consisted of several sub-debates. Leaked domestic legal opinions and accounts of interrogation techniques under the Bush administration provoked debates on the following matters. Firstly, the definition of the prohibition of torture came under fire. Legal papers, in particular the Bybee memorandum, provoked debate on what constitutes torture – whether torture requires intent, and what amounts to "severe pain".³⁴⁶ Secondly, the US claimed that the laws of war rather than CAT apply in times of war as *lex specialis*,³⁴⁷ and then proceeded to frame

20 January 2009. I provide a detailed account of the dataset and the methods I used when analyzing the statements in the methodological appendix.

³⁴³ See Liese 2009, 33, and content analysis below.

³⁴⁴ Risse and Sikkink 1999, 22-28.

³⁴⁵ See discussion below. McCain, for instance, pushed for permissible interrogation tactics to be limited to those in the Army Field Manual. Savage 2005. October 26; Button 2005. December 8; Eggen 2008. February 7.

³⁴⁶ Forsythe 2011, 65–66.

³⁴⁷ UN Doc. CAT/C/USA/CO/2. 2006.

terrorist suspect prisoners as “unlawful enemy combatants” not entitled to the protection of the Geneva Conventions, while nevertheless claiming to abide by the Conventions and not to engage in torture. Thirdly, the CIA resorted to interrogating terrorist suspects in third states with laxer laws, in so-called “black sites” and Guantanamo, in an effort to escape domestic legal obligations. Such extraordinary rendition is prohibited under Article 3 CAT.³⁴⁸ Lastly, even if the US’s harsh interrogation techniques did not amount to torture, they could still be prohibited as “cruel, inhuman or degrading treatment”, but the Bush administration tried to sidestep this debate by implying that anything other than torture was lawful.³⁴⁹ While leaked domestic legal opinions are explicit about these legal understandings, the Bush administration largely denied them in public, though was eventually forced to acknowledge and rescind most of these legal positions and practices.

The debate can be divided into three phases. From 2001–2003, the US was able to mostly keep its contestation under wraps; from 2004–2005 most of the US’s practices and legal opinions were uncovered and resistance was starting to form; from 2006–2008 there were no new revelations, but more pressure, and more and more open acknowledgement of the Bush administrations’ practices.³⁵⁰

Before analyzing the debates in these three periods and their outcomes, it is useful to look at the change in President Bush’s legitimization discourse as it provides a good overview of the US’s strategy. The president’s statements are of particular relevance since he has the ultimate decision-making power. Thus, I coded official statements from President George W. Bush, and senior administration and White House officials, differentiating between identity-based (reference to image, identity, or credibility), interest-based (terrorist threat, need for protection, effectiveness) or mixed (both identity- and interest-based) legitimization.³⁵¹ Of the 92 observations, I coded six mixed statements twice, once

³⁴⁸ Forsythe 2011, 75–76.

³⁴⁹ Liese 2009, 32.

³⁵⁰ See also Keating 2014, 8.

³⁵¹ For this analysis, I searched the Presidential Documents, compiled by the American Presidency Project, <http://www.presidency.ucsb.edu/>. Keyword: Torture, Timeframe: 2001-2008, 616 results. I filtered out those press briefings and speeches that were not related to allegations of torture or prisoner abuse by the Bush administration, e.g. speeches about torture by Saddam Hussein. I then coded the relevant official statements (92) based on what type of legitimization strategy for the frame and/or claim was used: Interest-based legitimization: justifications based on necessity, utility or effectiveness. Identity-based legitimization: justifications that emphasize the image, trustworthiness, credibility or identity of a speaker. Mixed: justifications that rely on both, interest-based and identity-based legitimization.

as mixed, and once as either identity- or interest-based, when one legitimization strategy was clearly dominant.

From 2002–2004³⁵², George W. Bush and the White House relied on identity-based legitimization when denying allegations of torture or mistreatment, pointing to the US's image as a liberal, rights-respecting state. Domestic and international legal obligations were frequently cited, implicitly backed up by the US's image. Bush also made explicit references to the US's liberal image when rejecting claims of torture. Phrases such as “[t]he values of this country are such that torture is not a part of our soul and our being”,³⁵³ or “we don’t torture people in America. And people who make that claim just don’t know anything about our country”³⁵⁴ reflect this. However, as more information became available (such as the prisoner abuse scandal in Abu Ghraib, and legal memoranda and reports from observers), the more the US's credibility suffered. This is reflected in Bush's and the White House's justifications. In late 2004/early 2005, we see a marked shift towards a mixed legitimization strategy with interest-based justifications becoming more prevalent. This indicates that references to the US's identity alone were not considered sufficiently persuasive anymore, but also a shift towards attempts at open, generally applicable reinterpretation. While continuing to claim that “we don’t torture”³⁵⁵ or “America doesn’t torture”³⁵⁶, Bush and White House Spokespersons started to emphasize the dangerous nature of terrorists,³⁵⁷ the need for covert programs,³⁵⁸ and for protection from terrorist attacks.³⁵⁹ At the very end, when denial was no longer possible, Bush and White House officials openly acknowledged that harsh, alternative interrogation techniques were used: first in the abstract,³⁶⁰ but then by admitting that waterboarding (generally considered to be torture) was used³⁶¹. These practices were justified with detailed accounts of their supposed effectiveness in preventing terrorist plots.³⁶² Despite denying that these practices constitute torture, the claim reflects the reliance on an

³⁵² See below, Bush did not comment in 2001.

³⁵³ Bush 2004. June 22.

³⁵⁴ Bush 2003. October 14.

³⁵⁵ See, for example, White House Spokespersons McClellan 2005a. December 8; Snow 2006. October 27; Perino 2007. October 4.

³⁵⁶ Bush 2008. May 13.

³⁵⁷ See, for example, White House Spokesperson McClellan 2005b. December 14.

³⁵⁸ See, for example, Bush 2005. December 6.

³⁵⁹ See, for example, Ibid. and Bush 2006. September 6.

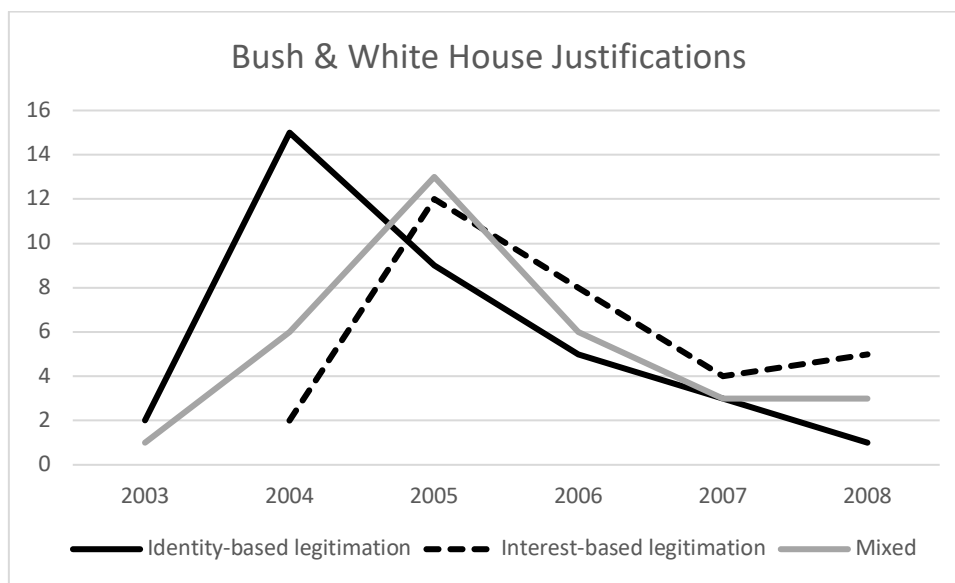
³⁶⁰ Bush 2006. September 6. Excerpts of this speech were reprinted in several newspapers.

³⁶¹ White House Spokesperson Fratto 2008. February 7.

³⁶² See prior two footnotes, but also Bush 2008. March 8.

understanding of torture (frame) that would be a marked reinterpretation of the prohibition of torture, given the widespread criticism of waterboarding. The reliance on accounts of output legitimacy shows that the US felt that the community's expectations were such that describing the beneficial consequences of their practices would help to mitigate reputational costs from reinterpreting the torture prohibition. Figure 4 provides an overview of how the Bush administration's justification strategy changed.

Figure 1: President Bush & White House Justifications



As I will show, once revealed, the reactions of important critical actors such as domestic actors, like-minded states and IOs, made maintaining norm contestation costly. Notably, the criticism of in-group members (European states) was very muted until late in the debate, which may explain why it was possible for the US to maintain its norm contestation for so long.

2001 - 2003. During this time period the US was largely successful in denying torture allegations and avoiding reputational costs for its behavior, despite the surfacing of some evidence about potential mistreatment of prisoners.³⁶³ In early 2002, pictures of hooded, shackled and blindfolded prisoners in transit to Guantanamo surfaced and led to allegations of mistreatment and torture.³⁶⁴ The United States denied this claim, mainly

³⁶³ Keating 2014, 8-9.

³⁶⁴ See Gardiner 2002. January 20; Lowther and Rosenberg 2002. January 20.

referring to necessary security precautions during transfer (interest-based legitimation)³⁶⁵ and the character of its legal system (identity-based legitimation)³⁶⁶. What fueled contestation were Rumsfeld's remarks that while the US "for the most part" complied with the Geneva Conventions, it did not have to because the detainees were "unlawful combatants" without "any rights under the Geneva Convention."³⁶⁷ NGOs rejected the frame and claim.³⁶⁸ The in-group members who spoke out against this statement—Germany, the Netherlands and Britain—rejected the frame (insisting on prisoner-of-war (POW) status)³⁶⁹ but supported the claim of compliance.³⁷⁰ They justified this agreement on the claim of legal treatment with the US's identity and belief in its assurances (identity-based legitimation)³⁷¹, interviews with prisoners (evidence-based legitimation)³⁷² and understanding of the security risk (interest-based legitimation).³⁷³ As a result, the US Department of Defense assured full compliance with the guidelines of the Geneva Conventions, but without explicitly revoking the "unlawful combatant" frame.³⁷⁴ Notably, the pictures from Guantanamo caused more debate abroad than in the US, and President Bush did not comment on the matter.³⁷⁵ When later in 2002 and 2003 reports of prisoner deaths and mistreatment surfaced, criticism mainly came from NGOs and the media, which the US primarily answered with assurances of its belief in (inter)national law and the just character of the US legal system (identity-based legitimation).³⁷⁶ While some out-group members accused the US of hypocrisy, this was not very prevalent, and in-group members' reaction was muted and generally supportive of US claims.³⁷⁷ This shows that there was a situation of norm neglect in the beginning: there was still widespread agreement (or silence) from states on the claim that the US did not mistreat or torture prisoners, but disagreement on the legal frame. In-group members accepted and repeated the US's interest- and identity-based arguments. Domestic debate was muted.

³⁶⁵ US Secretary of Defense Donald Rumsfeld: Bulletin's Frontrunner 2002. January 23; US military spokesperson: Gardiner 2002. January 20.

³⁶⁶ Rumsfeld: United Press International 2002. January 20.

³⁶⁷ Rumsfeld: Washington Post 2002. January 17; Senior Military Official: Martz 2002. February 3.

³⁶⁸ See Lowther and Rosenberg 2002. January 20.

³⁶⁹ Buzbee 2002. January 22; British Prime Minister Tony Blair: Gardiner 2002. January 20.

³⁷⁰ British Spokesperson: "United Press International 2002. January 20; Gardiner 2002. January 20; German Foreign Minister: BBC Monitoring Europe 2002. March 14.

³⁷¹ Ibid.

³⁷² British Senior Officials: Sparrow 2002. January 22.

³⁷³ British Senior Officials: Ibid.

³⁷⁴ Patterson 2002. February 1.

³⁷⁵ Ibid.

³⁷⁶ White House Spokesperson: Cooperman 2002. December 28; US President George W. Bush: Costello and King 2003. October 23.

³⁷⁷ See, for example, BBC Monitoring Asia Pacific 2003; BBC Monitoring Middle East 2002. February 1.

Due to the agreement on the claim, the reputational costs for continuing to treat the prisoners in line with its preferences and for upholding its legal frame were minimal for the US. However, the disagreement on the legal frame, and the failure of the US to explicitly reaffirm the applicability of the Geneva Conventions, point to different normative understandings, and norm neglect. There was no consensus or clarity on the norm. Furthermore, the US was largely able to keep its most controversial legal opinions and practices secret, which points to a strategy of exceptionalism.

2004 - 2005. Civil society leaks and investigative journalism led to revelations of US legal opinions and prisoner abuse, which generated considerable debate, although mostly at home rather than abroad. In May 2004, footage of serious sexual and physical mistreatment of prisoners at Abu Ghraib surfaced. The US and UK apologized for these acts, but painted Abu Ghraib as an isolated instance of abuse, saying that this treatment “does not reflect the nature of the American people”³⁷⁸ and that “[y]ou shouldn’t judge the actions of the coalition as a whole on the basis of the actions of a few”³⁷⁹ (identity-based legitimation). Abu Ghraib was a well-known torture chamber under Saddam Hussein, and its closure had become Bush’s main justification for the Iraq intervention when WMD were not found.³⁸⁰ This made the Abu Ghraib scandal particularly embarrassing for the US. A report by the International Committee of the Red Cross (ICRC), which monitors prison conditions in armed conflicts, and usually only discusses its findings privately with the monitored government, leaked shortly after. The report contained evidence that the abuse of prisoners reached beyond Abu Ghraib and a few military service members, and was widespread in Iraq.³⁸¹ The ICRC and Amnesty International (AI) claimed that they had made evidence of widespread abuse available to high-level decision-makers in the Bush administration several months earlier, which led to speculation around who knew what at what time.³⁸² Domestic doubts about the credibility of the Bush administration’s claims surfaced as a result.³⁸³ Internationally, the outrage over the graphic pictures of abuse in Abu Ghraib was strong, particularly in the

³⁷⁸ Bush: Brogan et al. 2004. May 1.

³⁷⁹ Blair’s official spokesman: Ibid.

³⁸⁰ See, for example, ABC News 2004a. May 3; BBC Monitoring Asia Pacific 2004a. May 3.

³⁸¹ Eisler and Squitieri 2004. May 11.

³⁸² Beaumont et al. 2004. May 9; Wallace 2004. May 9.

³⁸³ Republican Senator John McCain: Syler 2004. May 6; Graham, Republican Senator: Independent on Sunday 2004. May 9; McDermott, Democratic Congressman: Lowther 2004. May 9.

Arab world.³⁸⁴ Several out-group members, with less than stellar human rights' records themselves, seized the moment to accuse the US of double standards (questioning of opponent's (O's) legitimacy).³⁸⁵ Many countries called for thorough and independent investigations of the allegations. Notably, however, important in-group members such as Spain, Germany and Japan, expressed trust in the US's democratic system and praised the investigations (identity-based legitimation).³⁸⁶ Thus, while Abu Ghraib sowed some doubts and damaged the US's image, key allies supported the claim of Abu Ghraib being an isolated instance, citing the US's identity as a reason. This kept reputational costs low.

Domestic doubts were fueled when internal legal memoranda on the treatment of prisoners were leaked in June 2004, later dubbed "torture memos". In particular, the content of the Bybee Memorandum was the subject of intense debate. "Severe pain" in Article 1 CAT, and in domestic law, was interpreted to mean "serious physical injury, such as organ failure, impairment of bodily function, or even death", whereas for mental harm to amount to torture, it had to last "for months or even years."³⁸⁷ The memo also argued that the president had the authority to order torture as commander-in-chief, despite international and domestic legal obligations and cited potential defenses for the use of torture (such as the need for self-defense). Soon after the leak, the Justice Department felt pressure to disavow and rescind the memo, arguing that it was overbroad, irrelevant and unnecessary since administration officials had never asked for the legal authority to torture detainees (interest-based legitimation).³⁸⁸ The withdrawal of the memo clarified that the threshold for "severe pain" (frame) is below "death or organ failure" and "months or years of mental suffering".

Furthermore, John Yoo had written a memorandum that concluded that the Geneva Conventions do not apply to Al Qaeda and Taliban detainees in Afghanistan.³⁸⁹ A Pentagon report of March 2003 answering a request by Donald Rumsfeld, and drawing on the Bybee and Yoo memos, was also leaked.³⁹⁰ Bush and other officials initially sought

³⁸⁴ Arab League: Watson and Blanford 2004. May 1.

³⁸⁵ Malaysia: BBC Monitoring Asia Pacific 2004b. May 3; North Korea: BBC Monitoring Asia Pacific 2004d. May 10; Cuba: Cubavision 2004. May 15.

³⁸⁶ German Chancellor Schroeder: BBC Monitoring Europe 2004a. May 28; Spanish Prime Minister Zapatero: BBC Monitoring Europe 2004b. May 28; Japan: BBC Monitoring Asia Pacific 2004c. May 6.

³⁸⁷ Bybee 2002, 1.

³⁸⁸ See Stevenson 2004. June 23; Liptak 2004. June 24.

³⁸⁹ Yoo 2002.

³⁹⁰ Priest and Smith 2004. June 8.

to quell the debate with assurances that “torture is not a part of our soul and our being”³⁹¹ and that Bush’s instructions had always been to conform to domestic and international laws³⁹² (identity-based legitimation). Some also pointed to the need to protect the US (interest-based legitimation), while denying that the memos had been implemented.³⁹³ The criticism was such that the White House felt the need to declassify memos to prove this point. While a declassified memo showed that Bush accepted that he had the authority to suspend the Geneva Convention’s applicability to Afghanistan, he “decline[d] to exercise this authority at this time.”³⁹⁴ This statement somewhat proved the claim of law compliance, but also showed an acceptance of the frame that the president has the authority to suspend (inter)national laws. The declassified documents also showed that Rumsfeld initially approved a list of aggressive interrogation techniques such as exploiting detainees’ phobias (e.g. fear of dogs) but later replaced them with less aggressive methods.³⁹⁵ While some frame-claim combinations were toned down over time, the Bush administration did not intend to make these legal memoranda public in the immediate future. Rumsfeld, for example, classified his memos for ten years.³⁹⁶ This secrecy paired with the quick distancing indicates that the prohibition of torture is a strong norm and shows that the Bush administration’s goal had been covert exceptionalism.

In the remainder of 2004 and 2005, journalists, NGOs and IOs revealed US practices that sowed domestic and international doubts on the US’s denial of prisoner abuse.³⁹⁷ For instance, memos based on an ICRC report that reported psychological and physical abuse in Guantanamo—ranging from exposure to prolonged cold and noise, to beatings—and which the ICRC called “tantamount to torture”, were leaked to the *New York Times*.³⁹⁸ Furthermore, allegations of the transportation of terror suspects to prisons in third countries with lower standards and harsh interrogation tactics—so-called “black sites” operated by the Central Intelligence Agency (CIA)—caused significant debate towards

³⁹¹ Bush: Henderson et al. 2004. June 23.

³⁹² Bush: Russell 2004a. June 11; Attorney General John D. Ashcroft: Bender 2004. June 9; United States Secretary of State Colin Powell: ABC News 2004b. June 13; White House Spokesperson: Davies 2004. June 16.

³⁹³ United States National Security Advisor Condoleezza Rice: CNN 2004. June 13; White House Spokesperson: Russell 2004b. June 24; White House Counsel Alberto Gonzales: Henderson et al. 2004. June 23.

³⁹⁴ Bush: Birmingham Post 2004. June 24.

³⁹⁵ Henderson et al. 2004. June 23.

³⁹⁶ Stevenson 2004. June 23.

³⁹⁷ See, for example, Hentoff 2005. April 11; Johnston 2005. April 24.

³⁹⁸ Lewis 2004. November 30.

the end of 2005. The airspace of multiple countries had to be crossed to transport the prisoners, and reports of such secret prisons in Eastern Europe surfaced, which stirred domestic debate in Europe.³⁹⁹ These domestic pressures led in-group members to deny complicity in granting overflight rights, landing rights or the operation of secret prisons,⁴⁰⁰ and led the EU to ask the US for explanations, particularly on the alleged operation of black sites in Eastern Europe.⁴⁰¹ Reportedly, the US hurriedly closed down the two black sites in Eastern Europe.⁴⁰² This is a further indication of the US's goal of exceptionalism and the importance of in-group pressure, as the US stopped to implement a claim that was perceived as illegal. However, it also implies that the US had hitherto enjoyed tacit support for the operation of secret prisons from in-group members, as it is hard to believe that thousands of CIA overflights could have gone unnoticed.⁴⁰³ The revelations led to domestic debate and required public justifications. The US addressed European worries by sending Secretary of State Condoleezza Rice to Europe, and by making assurances that the US applied the same legal frame: for instance, by publicly affirming that CAT and the CID prohibition extends to "US personnel wherever they are."⁴⁰⁴ Doubts on the US's trustworthiness had increased by this point, which led Rice to clarify that US personnel meant all American interrogators.⁴⁰⁵ A dinner with the foreign ministers of NATO countries led to statements of support for the US's frame and claim from in-group countries: they believed that, if secret prisons existed, the US had acted within the boundaries of international law.⁴⁰⁶ Tellingly however, the German foreign minister said in his statement of support that Rice "has reiterated that in the US international obligations are not interpreted differently than in Europe."⁴⁰⁷

What is more, while Bush, Rice and other senior officials repeatedly pointed to their legal obligations and to the US's identity as a "nation of laws"⁴⁰⁸ (identity-based legitimization), the justificatory discourse was also ripe with references to the need for protection from

³⁹⁹ See Harding 2005. December 7; McGrory and Reid 2005. November 3.

⁴⁰⁰ Denmark: BBC Monitoring Europe 2005. November 4; Romania: Knowlton 2005. December 5; Ireland: Irish Times 2005a. December 7.

⁴⁰¹ See report on the EU's letter in: Alberts 2005. December 8.

⁴⁰² Staunton 2005. December 7.

⁴⁰³ Cordell 2017. March 14.

⁴⁰⁴ United States Secretary of State Condoleezza Rice: Borger 2005. December 8.

⁴⁰⁵ Rice: Kessler 2005. December 9.

⁴⁰⁶ Netherlands and France: Brinkley 2005. December 9; NATO Secretary General Jaap De Hoop Scheffer: Irish Times 2005c. December 9.

⁴⁰⁷ German foreign minister Frank-Walter Steinmeier: Irish Times 2005b. December 9.

⁴⁰⁸ Rice: Kessler 2005. December 9.

terrorist attacks⁴⁰⁹ and to the importance of aggressive tactics, intelligence and secrecy to achieve this goal.⁴¹⁰ The increase in such interest-based legitimation is notable during this period. While references to the terrorist threat and the need for protection are not explicitly cited as a reason to abuse prisoners, their mention does remind the audience of considerations other than the protection of human rights. Next to in-group pressures, domestic pressures intensified because of the allegations of torture and mistreatment. McCain pushed for an amendment to the Military Appropriations Act to restrict interrogation techniques of all Department of Defense (DoD) personnel to the Army Field Manual, and to prohibit torture and CID without geographical limitation. He resorted to a mix of principled and interest-based arguments.⁴¹¹ While the White House initially threatened to veto the bill due to the need for flexibility in interrogating prisoners,⁴¹² the intense debate over the US's practices in December 2005 made Bush agree to the amendment "to make it clear to the world that this government does not torture... whether it be here at home or abroad."⁴¹³

From 2004-2005 most of the US's practices were revealed, which led to pressures from domestic politicians and in-group members. This made the US withdraw some frames and claims such as the Bybee memo or black sites in Eastern Europe. However, European countries were still generally supportive (both covertly and overtly) of the US's norm interpretation, which lowered reputational costs. Next to journalists, NGOs and IOs, out-group members with less than stellar human rights records were the most outspoken against the US. Out-group members criticized the US openly, questioned the US's credibility and accused the US of double standards, pointing to the torture allegations.⁴¹⁴ This period is therefore best described as a norm impasse, with in-group members who were generally supportive of the "no torture" claim and the frame of rightful interpretation of the prohibition of torture,⁴¹⁵ and out-group members who reject the "no-torture" claim and thus the frame of law-compliance.

⁴⁰⁹ Bush: Gregory 2005. December 12.

⁴¹⁰ Bush: Irish Times 2005b. December 7; White House Official: Knowlton 2005. December 5.

⁴¹¹ McCain: Savage 2005. October 26; Button 2005. December 8.

⁴¹² White House Official: Herald Sun 2005. November 15.

⁴¹³ Bush: Button 2005. December 8.

⁴¹⁴ China: Xinhua 2005. March 3; North Korea: BBC Monitoring Asia Pacific 2005. January 19; Cuba: BBC Monitoring Latin America 2005. January 20.

⁴¹⁵ See, e.g. German foreign minister Steinmeier: Irish Times 2005c. December 9.

2006-2008. At the end of 2005 it seemed as if Bush would accept the McCain amendment. However, in early 2006 he issued a signing statement that effectively introduced a national security exemption to the torture ban (frame) by claiming that Bush would interpret the amendment with the goal “of protecting the American people from further terrorist attacks”⁴¹⁶ (interest-based legitimization). This was met with domestic criticism⁴¹⁷ and signified a shift from covert contestation and exceptionalism to much more open reinterpretation. This shift was accompanied by an increase in interest-based legitimization alongside intensified international denunciation, in particular from the UN human rights system and in-group countries. The social pressures did not go unnoticed. Both presidential candidates, McCain and Obama, clearly distanced themselves from the Bush administration’s interpretations.

An inquiry from the United Nations Human Rights Commission demanded the closure of Guantanamo and called the US’s force-feeding of prisoners a form of torture.⁴¹⁸ The CAT treaty body condemned most of the US’s alleged practices—from inadequate prosecution of mistreatment and torture at Abu Ghraib to CIA black sites and waterboarding—as a violation of CAT (frame).⁴¹⁹ The director of Human Rights Watch (HRW) called the CAT treaty body’s judgement “a complete repudiation of virtually every legal theory that the Bush administration had offered for its controversial detention and interrogation policies.”⁴²⁰ Though the UN experts’ rejection of the US norm interpretations was not binding, the US took the rejection seriously and senior Bush administration officials resorted to downplaying the findings. This was done by questioning the evidence,⁴²¹ by trying to present the treatment of prisoners in a positive light and accusing UN experts of selectivity and misinterpretation (questioning of O’s credibility),⁴²² by reminding the world of the dangerous terrorists in Guantanamo (interest-based legitimization)⁴²³, and by arguing that CAT does not apply in situations of armed conflict (disagreement on

⁴¹⁶ Bush: Hutcheson and Kihnhehn 2006. January 16.

⁴¹⁷ Ibid.

⁴¹⁸ Coughlin 2006. February 13.

⁴¹⁹ See Savage 2006. May 20.

⁴²⁰ Executive Director of Human Rights Watch Kenneth Roth: Golden 2006. May 20.

⁴²¹ State Department Official: Alberts 2006. March 9.

⁴²² State Department legal advisor: Cornwell 2006. May 20; White House Spokesperson: Rosenberg 2006. May 20.

⁴²³ Rumsfeld: Angle et al. 2006, February 17; White House Spokesperson: Gawenda 2006. February 18.

frame).⁴²⁴ However, these arguments failed to persuade other states: out-group members such as China and Russia continued to point to the US's double standards while in-group members criticized the US much more openly.⁴²⁵ Britain, Germany and other EU leaders also demanded the closure of Guantanamo and asked Bush not to sacrifice human rights in the fight against terrorism (principle-based legitimation).⁴²⁶

While continuing to deny torture, Bush started to much more openly acknowledge contested practices and to justify them as effective ways of combatting terrorists by giving concrete examples of how an “alternative set of procedures”⁴²⁷—later dubbed “enhanced interrogation” techniques—had led to the capture of other terrorists and stopped attacks. He also acknowledged the existence of secret CIA prisons abroad.⁴²⁸ The fact that the Bush administration started to make its interest-based legitimation strategy more concrete and prevalent indicates that the US's image had suffered, since the amount of references to the US's identity declined. However, this legitimation strategy also shows that the US decided to pursue a generally applicable reinterpretation of the prohibition of torture in the context of terrorism and that there was a perception that justifications that point out beneficial consequences could resonate with key audiences.

While claiming that the harsh interrogation techniques were effective, the Bush administration did not go into details on the interrogation practices it used, under the pretext of concealing this information from terrorists. However, leaks and reports from inmates intensified the debate on waterboarding. As a result of “the cumulative impact of public discussion of that technique”⁴²⁹, Bush authorized the CIA director to acknowledge the use of waterboarding between 2002 and 2003, “determined lawful, through a process”⁴³⁰ (frame and claim) because more terrorist attacks seemed imminent at that time (interest-based legitimation). Congress passed a bill to stop this enhanced interrogation program and to bind all American interrogators to the techniques authorized in the Army

⁴²⁴ State Department legal advisor: Schofield 2006. May 6.

⁴²⁵ See, e.g. China: BBC Monitoring Asia Pacific 2007. March 9; Russia: BBC Monitoring Former Soviet Union 2008. March 12.

⁴²⁶ Britain: Savage 2006. May 20; Germany: BBC Monitoring Europe 2006. January 9; EU leaders: Statesman 2006. June 27.

⁴²⁷ Bush 2006. September 6.

⁴²⁸ Bush: Lauer 2006. September 11.

⁴²⁹ White House Spokesperson: Ward 2008. February 7.

⁴³⁰ Ibid.

Field Manual, which prohibits physical force.⁴³¹ Bush vetoed the bill pointing to the “proven track record of keeping America safe” and claiming that he has “no higher responsibility than stopping terrorist attacks”⁴³². However, both presidential candidates condemned waterboarding and affirmed their belief in the prohibition of torture.⁴³³

Not only domestic opposition, but also in-group opposition intensified in both words and in deeds. A high-level British parliamentary committee criticized CIA black sites and US mistreatment of prisoners,⁴³⁴ Spain stopped extraditions to the US, and Dutch soldiers were instructed not to hand over Afghan captives to the US anymore because of fears of abuse.⁴³⁵ A senior British intelligence official reported to the parliamentary committee that the use of torture by the US “never crossed my mind” because “we are talking about the Americans, our closest ally. This now, with hindsight, may look naïve, but all I can say is that is what we thought at the time.”⁴³⁶ This statement supports the finding that the US was able to rely on its image as a human rights observing country to cover up its questionable practices for a long time. It also shows that the US’s image suffered because of the revelations of mistreatment and the attempts at framing these practices as lawful.

The social costs of the Bush administration’s reinterpretations did not go by unnoticed. One of Obama’s first acts in office was to issue an executive order on interrogations, which repudiated legal opinions on torture issued during the Bush administration and stopped most contested interpretations and practices. The executive order placed all terror suspects under the protection of the Geneva Conventions, ordered the closing of CIA black sites, granted the ICRC access to all detainees, bound all interrogators to the Army Field Manual and international conventions, and stipulated the goal of closing Guantanamo.⁴³⁷ The Bush administration’s interpretations were thus eventually rejected, which clarified the prohibition on torture. As McCain’s opposition to the Bush administration’s interrogation techniques shows, he would have likely done the same if elected.

⁴³¹ Herszenhorn 2008. February 14.

⁴³² Bush: Myers 2008. March 9.

⁴³³ Presidential Candidates McCain and Obama: Eggen 2008. February 7.

⁴³⁴ Britain: Bonner and Perlez 2007. July 28.

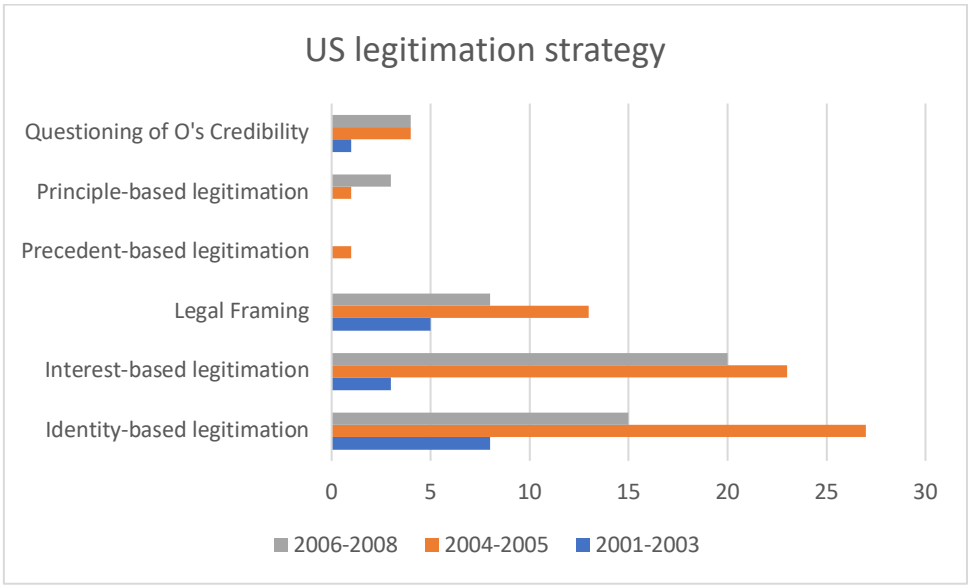
⁴³⁵ Gazette 2008. January 20.

⁴³⁶ British senior intelligence official: Bonner and Perlez 2007.

⁴³⁷ Executive Order 13491.

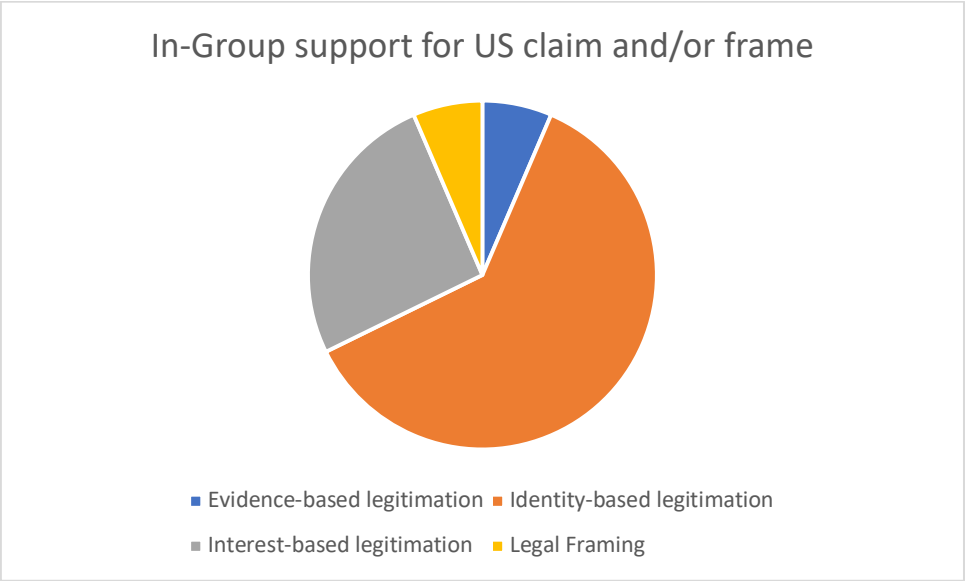
The rejection of the Bush administration’s frames and claims illustrates that the community’s commitment to the prohibition of torture and CID was strong. At the same time, this episode of norm contestation also shows that a mix of identity-based and interest-based legitimation resonates with the community and allows proponents of different interpretations to uphold them for a long time. Figures 2-4 illustrate what kind of legitimation strategies the US and in- and out-group members engaged in. Figure 2 shows that the US mainly resorted to identity-based and interest-based legitimation. While identity-based legitimation was the dominant strategy until 2006, it was already almost matched by interest-based references to the war on terror and the need for protection in the 2004-2005 time-period, and overtook arguments backed up by the US’s identity in the time-period of 2006- 2008 (see figure 2).

Figure 2: US legitimation strategy



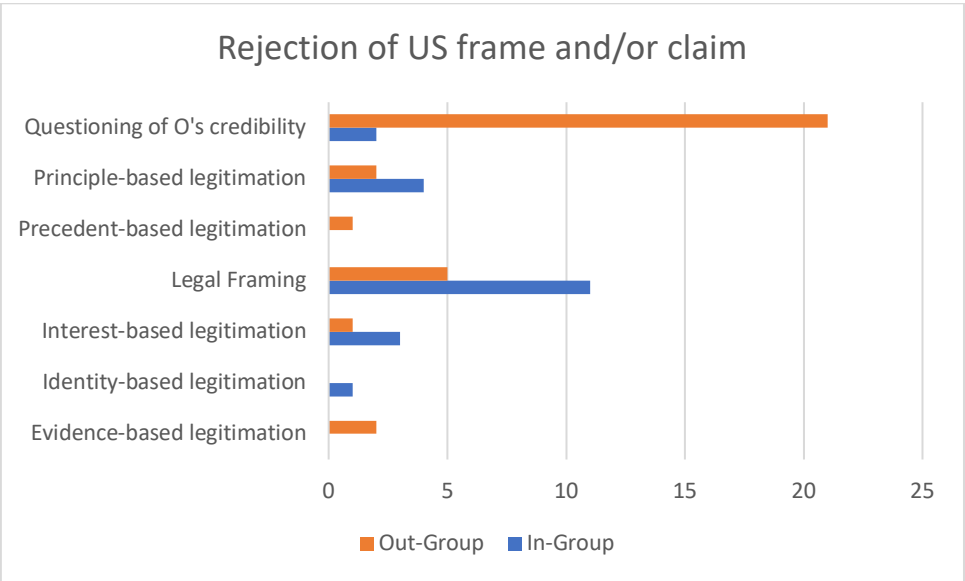
In turn, in-group members who supported the US’s frame and/or claim relied mostly on identity-based arguments (highlighting their trust in US assurances), followed by interest-based backings that highlighted the terrorist threat and other considerations. Out-group members did not support the US’s frame and/or claim. This is interesting, given that many of them also engaged in torture or mistreatment of prisoners and may have benefitted from a reinterpretation of the norm. This shows that the prohibition of torture and CID are strong norms.

Figure 3: In-Group members’ support for US frame and/or claim



Lastly, figure 4 illustrates that out-group members mainly rejected the US’s frame and/claim by pointing to the US’s double standards and cited the torture allegations as reason not to trust the US’s judgment on their domestic human rights situation. This shows that the US lost credibility and the ability to criticize the human rights practices of other countries because of this contestation. On the other hand, in-group members mainly resorted to legal framing and principle-based legitimacy when showing their opposition.

Figure 4: Rejection of US frame and/or claim



4.2 Acceptance of Reinterpretation: Debates over Self-defense and Terrorism

While the US eventually gave up its contestation of the prohibition of torture, which clarified the norm, the US was more successful in making its reinterpretation of the right to self-defense sustainable.

Article 51 of the UN Charter codifies the “inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”. This has given rise to much debate about how imminent an “armed attack” must be for a state to be allowed to engage in preemptive self-defense but also on what constitutes an “armed attack”: amongst other factors, whether it must be carried out by nation states. This last aspect became hotly debated with the rise of international terrorism. In the *Nicaragua* case, the International Court of Justice (ICJ) found that an “armed attack” also includes “the sending by or on behalf of a State” of non-state actors to use force with similar gravity and scale as an armed attack by regular forces.⁴³⁸ This indicates the need for active and significant state involvement for the right to self-defense to be triggered - a bar that was significantly lowered after 9/11.⁴³⁹ Norm clarification through acceptance occurred.

On September 11, 2001 Al-Qaeda terrorists hijacked four airplanes and crashed them into the World Trade Center, the Pentagon and the Pennsylvania countryside. Approximately 3,000 people lost their lives. As a result, the US engaged in a “war on terror”, and against the Taliban regime in Afghanistan for willingly harboring the Al-Qaeda organization, referring to its right to self-defense in response to 9/11 and to deter future attacks.⁴⁴⁰ The widespread consent to this reinterpretation of self-defense is puzzling. Before 9/11, the same argument—that states should be allowed to respond to terrorist attacks by targeting states which had made themselves accomplices by willingly harboring the terrorists—did not resonate sufficiently. Two examples are often cited in this context: the lack of support for the US’s invocation of self-defense (frame) to justify strikes against Libya in 1986 (claim), and against Afghanistan and Sudan in 1998 (claim).

⁴³⁸ International Court of Justice 1986, para. 195.

⁴³⁹ Johnstone 2011; Murphy 2002; Cassese 2001.

⁴⁴⁰ UN Doc. S/2001/946.

On April 4, 1986, a bomb exploded in La Belle Discotheque in Berlin, killing 3 (including an American soldier) and wounding more than 150 others, including approximately 60 Americans. American officials noted clear indications of Libyan responsibility.⁴⁴¹ Ten days later President Reagan ordered US fighter planes to bomb military and paramilitary targets, which caused significant damage to the Libyan military infrastructure. These events led to a significant amount of contestation.

Following the terrorist attack, the debate mainly revolved around who planted the bomb and whether there was sufficient evidence to attribute the attack to Libya. US officials spoke of congratulatory radio messages from Qaddafi to the Libyan Embassy in Berlin⁴⁴², and "substantial" and "clear" information.⁴⁴³ However, Reagan took his time to draw conclusions. He made any actions conditional on "what we learn"⁴⁴⁴ and having "identification enough".⁴⁴⁵ This shows the strength of the competing sovereignty norm and of the pre-requisite of state involvement to trigger the self-defense – the US felt pressure to provide evidence of Libya's involvement.

When justifying the claim that striking terrorist facilities and military assets was necessary in a broadcast address, Reagan cited what he called "direct", "precise" and "irrefutable" evidence: communication between Qaddafi and the Libyan People's Bureau in East Berlin on planning and executing the attack. He used this evidence to back up his claim that missile strikes were necessary and framed them as an act of self-defense "fully consistent with Article 51 of the United Nations Charter."⁴⁴⁶ President Reagan and White House officials also pointed to the risk of future attacks to show that the danger from Qaddafi continued and a pre-emptive strike was necessary.⁴⁴⁷ Reagan framed self-defense not only as a legal, but also a moral obligation, by saying that "[s]elf-defense is not only our right, it is our duty."⁴⁴⁸ He went on to link this duty to the output legitimacy of the

⁴⁴¹ Reisman 1999, 31.

⁴⁴² US official: Gelb 1986. April 8.

⁴⁴³ White House Spokesperson Larry Speakes: Allen 1986a. April 8; US ambassador to West Germany Richard Burt: Daniel 1986. April 8.

⁴⁴⁴ US President Ronald Reagan: Allen 1986b. April 9.

⁴⁴⁵ Reagan: United Press International 1986a. April 9.

⁴⁴⁶ Reagan: New York Times 1986a. April 15.

⁴⁴⁷ Ibid.; White House Spokesperson Larry Speakes: New York Times 1986b. April 15.

⁴⁴⁸ Reagan: 1986a.

pre-emptive strikes: namely that they would lead to a reduced capacity for terrorism and a safer world (interest-based legitimation).⁴⁴⁹

According to an administration official, US diplomats went to all major European capitals to persuade them to support, or at least not criticize the military response, in the lead up to the pre-emptive strike.⁴⁵⁰ Receiving at least one key partner's (i.e. Britain) support was seen as vital.⁴⁵¹ Whether the action counted with backing from Western allies was also a main question in the Q&A following Larry Speakes' statement.⁴⁵² This indicates that in-group support for a norm frame and claim is considered important by decision-makers and key audiences.

Yet the European in-group members were in the majority reluctant to remain silent about their misgivings, which were primarily rooted in a different perception of the consequences of a military response to the bombing. In particular, Belgium, Italy, Spain and France openly opposed the US strikes, citing worries about the "consequences"⁴⁵³, "a chain reaction of violence"⁴⁵⁴, disagreements "with this method of dealing with terrorism"⁴⁵⁵ and "a tangle of problems that certainly cannot be solved by a military blitz"⁴⁵⁶ (interest-based legitimation). UN Secretary-General Javier Perez de Cuellar agreed with this assessment and stated "the resort to force is not an effective means of resolving disputes and will only lead to further violence."⁴⁵⁷ Thus, the opponents resorted to interest-based legitimation as they questioned the applicability of self-defense, because the use of force was not seen as an effective way of preventing further attacks. While these concerns were linked to procedural legitimacy—the feeling that there was room for a political solution and diplomacy⁴⁵⁸—what figured most prominently in political statements were concerns about the missile strikes provoking more acts of terrorism (interest-based legitimation).

⁴⁴⁹ Ibid; Reagan: Associated Press 1986a. April 15.

⁴⁵⁰ Administration Official: Cannon 1986. April 12; Speakes: United Press International 1986b. April 14.

⁴⁵¹ Webster and Cowton 1986. April 14.

⁴⁵² Speakes: United Press International 1986b. April 14.

⁴⁵³ Belgian Minister of Foreign Relations Leo Tindemans: Xinhua 1986.

⁴⁵⁴ French government: Ibid.

⁴⁵⁵ Spanish Prime Minister Felipe Gonzales: Associated Press 1986b. April 15.

⁴⁵⁶ Italian Prime Minister Bettino Craxi: Pick and Tomforde 1986. April 12.

⁴⁵⁷ UN Secretary-General: Associated Press 1986c. April 15.

⁴⁵⁸ Dutch Foreign Ministry: Petty 1986. April 15. Germany: Xinhua 1986. April 14.

Spain and France denied the use of their airspaces for the military strikes, lengthening the flight route significantly, because of their disagreement with a military response to terrorism.⁴⁵⁹ This made it all the more important for the US to secure support from other in-group members – Britain, Australia, Israel and Canada.⁴⁶⁰ Britain’s consent was particularly vital due to social and material reasons: the special relationship between the US and UK makes Britain’s position particularly influential and the use of UK airbases facilitated the missile strikes on Libyan targets. Thatcher justified British support with the right to self-defense under Article 51 UN-Charter, clear evidence of Libyan involvement, the limited nature of the strikes and the failure of past diplomatic sanctions to deter the bombing.⁴⁶¹ Her argument that “[i]f one always refuses to take away risks because of the consequences, terrorist governments will win and one can only cringe before them,”⁴⁶² also shows that leaders face pressure to show the output legitimacy of their interpretations.

The out-group, namely the Non-Aligned Movement and the Soviet bloc, also rejected the claim to military action, but based their opposition on different frames. A draft UNSC Resolution that accused the US of armed aggression in violation of the UN-Charter and pointed to peaceful means for dealing with terrorism was vetoed on April 21, 1986, by the UK, US, and France.⁴⁶³ However, a United Nations General Assembly (UNGA) Resolution that condemned the US military strikes in the same manner passed with the support of seventy-nine states on November 18, 1986.⁴⁶⁴ In the debates over the two resolutions, most out-group members openly condemned the US military strikes as illegal actions, labelling them as an “armed aggression” by an imperialist, powerful state against a defenseless, weak state,⁴⁶⁵ questioning the US’s real motives.

⁴⁵⁹ Dionne Jr. 1986. April 16.

⁴⁶⁰ Reisman 1999, 33.

⁴⁶¹ British Prime Minister Margaret Thatcher 1986. April 15.

⁴⁶² Thatcher: Jones 1986. April 15.

⁴⁶³ The resolution was brought forward by Congo, Ghana, Madagascar, Trinidad and Tobago and the United Arab Emirates. France vetoed the resolution because of its one-sided criticism of the US and lack of criticism of Libya. See UN Doc. 1986, 342.

⁴⁶⁴ See voting record at: UNGA 1986. A/RES/41/38. November 20.

⁴⁶⁵ See statements by Uganda, Lao, Algeria, Afghanistan and the Soviet Union: UNGA Doc. A/41/PV.78. 1986.

Several states based this claim on the rights to sovereignty, territorial integrity and the prohibition of the use of force, which they saw as violated.⁴⁶⁶ China, for example, stated “[w]e are against using terrorist means to carry out a political struggle. At the same time, we are also against violating the territory of a sovereign state on the ground of combating terrorism.”⁴⁶⁷ In the same vein, the Soviet Union argued that “[i]ndividual criminals and individual terrorist cannot be unified with States and peoples. Individual incidents cannot be used in order to punish peoples and States, as was the case with Libya”⁴⁶⁸ (principle-based legitimation). While not directly mentioning Article 51, these statements question the applicability of self-defense when it comes to terrorism. In fact, apart from Ghana, which dissected the meaning of an “armed attack” in its rejection of the frame, most out-group members did not directly reject the right to self-defense, but rather pointed to other rights and the possibility of peaceful resolution. Thus, out-group members mainly relied on frames that reflect different normative preferences. However, the Soviet Union also cited the lack of output legitimacy as justification for its condemnation of the US missile strikes: “I should like to add that action such as the aggression against Libya and several others can only create fertile soil for the growth of extremism and violence.”⁴⁶⁹ These statements show that out-group members did not regard terrorism as a threat requiring a definition of self-defense that goes beyond armed attacks by states.

In conclusion, most states rejected the claim to military action based on the self-defense frame that the US had brought forward. Securing in-group support was perceived as important by the Reagan administration. Interestingly, most opponents did not directly state that self-defense does not apply. While out-group members advanced different substantive frames—sovereignty and territorial integrity—to support their rejection of the claim, in-group members questioned the output legitimacy of military strikes. This implies that self-defense is a strong norm that is generally accepted and difficult to argue against: however it also implies that when it comes to state-sponsored terrorism, other norms or considerations were considered more important. Put differently: the US failed to convince the majority of states that because of the threat of state-sponsored terrorism,

⁴⁶⁶ See statements by the Soviet Union, China and Libya: Ibid.

⁴⁶⁷ China: Ibid., 63.

⁴⁶⁸ Soviet Union: Ibid., 18.

⁴⁶⁹ Soviet Union: Ibid., 18.

a new framing of self-defense was necessary and effective.⁴⁷⁰ Only Britain, Israel, South Africa, Australia and Canada supported the US's norm interpretation. The US's norm frame and claim was so clearly rejected by most states that the norm of self-defense looked likely to develop in a way that excluded responses to state-sponsored terrorism. Perhaps because of this overwhelmingly negative response, when Pan Am 103 was blown up a few years later by Libyan agents, Reagan's successor George H. W. Bush did not respond with the use of force but with economic sanctions and prosecution.⁴⁷¹

However, things changed in 1998, when on August 7, bombs exploded in US embassies in Nairobi and Dar es Salaam. 12 Americans and 250 others died; with many more heavily injured.⁴⁷² These attacks were attributed to Osama bin Laden, who was already hiding in Afghanistan at the time. The US responded by bombing paramilitary training camps in Afghanistan and a Sudanese pharmaceutical plant suspected of being a chemical weapons facility. This time contestation was more muted.

The debate initially focused on possible suspects for the embassy bombing, and Bin Laden quickly emerged as the prime suspect for sponsoring and orchestrating the attack.⁴⁷³ Electronic interceptions of messages supported this suspicion.⁴⁷⁴ The US's response first focused on law-enforcement. Several of Bin Laden's followers were arrested in Albania and Pakistan⁴⁷⁵, and President Clinton, in his first radio address, listed peaceful efforts, diplomacy, and law enforcement when vowing to "continue to take the fight to terrorists."⁴⁷⁶

⁴⁷⁰ Some argue that the European countries' opposition to military and economic sanctions was based on economic considerations (see e.g. Reisman 1999). It is beyond the scope of this research project to determine whether this is the case. However, no matter whether the opposition to the use of force in self-defense against state-sponsored terrorism was rooted in moral or opportunistic considerations, the opposition shows that the 'right to self-defense' is not internalized. If this right was internalized, such considerations should not have played a role. Furthermore, what matters for present purposes is not why the self-defense frame is questioned but rather how this opposition is framed in public. This framing has consequences for the status of the norm, in particular its precision. European allies did not publicly cite economic concerns as reasons for their opposition.

⁴⁷¹ *Ibid.*, 35.

⁴⁷² UN Doc. S/1998/780.

⁴⁷³ Shenon 1998. August 8.

⁴⁷⁴ Loeb and Grundwald 1998. August 21.

⁴⁷⁵ Sisk 1998. August 15.

⁴⁷⁶ US President Bill Clinton: Clinton 1998a. August 8.

The military strikes thirteen days later therefore took many by surprise.⁴⁷⁷ The US's claim that the military action was justified rested on the frame that the Taliban regime and the Sudanese government had not responded to a request to shut these facilities down, which therefore continued to be a threat, triggering Article 51.⁴⁷⁸ Evidence of Bin Laden's involvement in the embassy bombings and "extensive ties to the government" of Sudan and Afghanistan were also cited.⁴⁷⁹ The US resorted to legal framing and explicitly referred to its right to self-defense in letters to the UNSC and Congress, and, to a lesser extent, in the President's address to the nation. Clinton relied heavily on interest-based legitimization in his address, warning that "[t]he risks from inaction, to America and the world, would be far greater than action"⁴⁸⁰ and arguing that "law enforcement and diplomatic tools are simply not enough, when our very national security is challenged."⁴⁸¹ Clinton's statement that "countries that persistently host terrorists have no right to be safe havens"⁴⁸² nods at the competing right to sovereignty, but also cites reasons why it is necessary to prioritize other rights in this matter. While Clinton's interpretation of the right to self-defense was also met with disapproval, it mainly came from traditional US opponents rather than from its core identity group.

Foreign leaders were informed of the decision only after the air strikes.⁴⁸³ Russian President Yeltsin was "outraged" and "denounced" this lack of consultation, saying that his "attitude is indeed negative as it would be to any act of terrorism, military interference, failure to solve a problem through talks."⁴⁸⁴ The Russian Foreign Ministry warned of a "dangerous precedent."⁴⁸⁵ The criticism therefore rested on a perceived lack of process-based legitimacy, but did not directly question the self-defense frame.

China initially was more neutral, stating that it "advocates handling the explosions in Kenya and Tanzania according to the U.N. Charter and international legal standards."⁴⁸⁶ Shortly thereafter the state newspaper, China Daily, criticized the violation of other

⁴⁷⁷ Birmingham Evening Mail 1998. August 21.

⁴⁷⁸ UN Doc. S/1998/780.

⁴⁷⁹ Clinton 1998c. August 21.

⁴⁸⁰ Clinton 1998b. August 20.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ Berger and McCurry 1998. August 21; Enda and Donnelly. 1998. August 22.

⁴⁸⁴ Russian President Boris Yeltsin: Lafraniere 1998. August 22.

⁴⁸⁵ Russian Foreign Ministry: Jamestown Foundation 1998.

⁴⁸⁶ Chinese Foreign Ministry: Lafraniere 1998. August 22.

countries' sovereignty and the US's "tit-for-tat retaliation" as unjust and ineffective in the fight against terrorism.⁴⁸⁷ The Chinese Vice-Premier Minister stated that he was "highly concerned and deeply disturbed" by the US airstrikes.⁴⁸⁸ This indicates Chinese rejection of the US's norm frame and claim. China thus resorted to a mix of interest- and principle-based legitimation.

Pakistan, Iran, Iraq, Libya and Malaysia also protested, accusing the US of "international terrorism" amongst other charges, and questioned Clinton's credibility by arguing that the missile strikes were a welcome distraction from the Lewinsky affair.⁴⁸⁹ The most formal complaint was issued by LAS, which criticized the strikes on the pharmaceutical plant of its member country, Sudan, as illegal. In a statement sent to the Security Council, LAS called the act "a blatant violation of the sovereignty of a State member" and argued that such acts "instigate feelings of public outrage and encourage violence and counter-violence, thus endangering international peace and security."⁴⁹⁰ Thus, to convince others that sovereignty trumps self-defense, LAS felt that interest-based legitimation was an important backing. The UNSC only briefly discussed the matter without taking any action.⁴⁹¹

While out-group members remained skeptical of the US's attempt to adapt the "right to self-defense" to state-sponsored terrorism, this time in-group members positioned themselves more uniformly in favor of the norm frame and claim. Traditional US allies—Australia, UK, Germany, France, Spain and Japan—expressed their support. Clear evidence and the perceived risk of future attacks played an important role in their arguments.⁴⁹² The UK acknowledged that the US was acting in self-defense⁴⁹³, and British Prime Minister Tony Blair justified the UK's support with the need to take successful measures in deterring terrorism.⁴⁹⁴ While France only "takes note" of the US's invocation of self-defense, French Prime Minister Lionel Jospin also stated that "determined and firm responses against terrorism"⁴⁹⁵ were necessary. Italy was the only

⁴⁸⁷ Hobart Mercury 1998. September 3.

⁴⁸⁸ Ibid.

⁴⁸⁹ Lines 1998. August 22; Hall 1998. August 22.

⁴⁹⁰ UN Doc. S/1998/789.

⁴⁹¹ BBC News 1998. August 24.

⁴⁹² Drozdiak 1998. August 21.

⁴⁹³ British Spokesperson: Ibid.

⁴⁹⁴ British Prime Minister Tony Blair: Smith 1998. August 22.

⁴⁹⁵ French Prime Minister Lionel Jospin: Lafraniere 1998. August 22.

in-group member that continued to warn of the negative consequences of military strikes and the need for political solutions.⁴⁹⁶ Hence, interest-based legitimation figured prominently in the justifications of in-group members.

In conclusion, perceptions of (lack of) effectiveness played an important role in the debate. While there was a greater willingness to accept that a reinterpretation of self-defense was necessary because of the threat of terrorism, a significant amount of states still pointed to the competing norm of sovereignty (frame) and/or favored political solutions (claim). The lack of prior consultation also did not help the US's case. However, the rejection of the US's frame and claim came mainly from out-group members, which made upholding this contestation less costly: overflight of airspaces was not blocked and so diplomatic tensions with in-group members did not have to be overcome. Only out-group members Russia, China and LAS opposed the US. This made the contestation more sustainable. However, the opposition from out-group members also indicates that a few years before 9/11, there was still a norm impasse over whether military action (claim) is justified in self-defense against state-sponsored terrorism (frame). What was it then that led to the widespread agreement after 9/11 that the US could exercise its right to self-defense?

A change in threat perceptions occurred, which upset the prior consensus, lowering the bar for showing state involvement in "armed attacks" to justify self-defense. Opposition to a right to self-defense against state-sponsored terrorism was dropped after September 11, when it became clear that terrorists can carry out large-scale attacks. Even the toleration of terrorist activities and training camps in a state became seen as a threat that had to be addressed to effectively prevent future attacks. The US also made sure to provide evidence and to stress in its justifications that the Taliban's toleration of Al-Qaeda made 9/11 possible.⁴⁹⁷ This change in perception of the threat from harboring terrorists facilitated agreement on a new application of self-defense, which is reflected in a number of statements.

⁴⁹⁶ Italian Prime Minister Romano Prodi: Ibid.

⁴⁹⁷ UN Doc. S/2001/946; Bush 2001. September 29.

The North Atlantic Council stressed that the “commitment to collective self-defense embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism.”⁴⁹⁸ This statement indicates a recognition of major changes in global circumstances, which requires a reinterpretation of the right to self-defense to address effectively the new threat of international terrorism. This perception is also reflected in EU Commission President Prodi’s statement that this “barbaric attack ... is a watershed event and life will never be quite the same again”⁴⁹⁹, and in German Foreign Minister Fischer’s remark that “[i]t’s a very emotional reaction because this is also a criminal and mass murderous attack on the open society, on the way we live.”⁵⁰⁰ This sentiment was not only echoed by US’s closest partners who saw it as an attack on their common, liberal values: Russian Foreign Minister Igor Ivanov, for instance, argued that “international terrorism has caused a blatant challenge to all civilized humanity, to all civilized world.” When asked about future American military action, Ivanov responded “[a]ll means must be used in the fight against terrorism, beginning from political and legal means and including, when and if necessary, use of force.”⁵⁰¹ Even China did not explicitly disagree with the self-defense frame and offered lukewarm support for the claim to use force against the Taliban regime: “China opposes terrorism of any form, hoping that relevant military strikes on terrorism should be targeted at specific objectives, so as to avoid hurting innocent civilians.”⁵⁰²

What is more, the main theme in these statements was a perceived need to use force to combat the terrorist threat (interest-based legitimation). Prime Minister Blair, for example, argued that it was in Britain’s “direct interest” to use force in self-defense against the Taliban to protect themselves from terrorism.⁵⁰³ Thus, 9/11 changed perceptions and assumptions about the world, diminishing the output legitimacy of a state-centric interpretation of the right to self-defense. This facilitated agreement on the US’s norm frame and claim despite prior contestation.

⁴⁹⁸ North Atlantic Council 2001. September 12.

⁴⁹⁹ Prodi 2001. September 12.

⁵⁰⁰ Fischer 2001. September 19.

⁵⁰¹ Ivanov 2001. September 19.

⁵⁰² Chinese Foreign Ministry Spokesman: Donohoe 2001. October 8.

⁵⁰³ Blair: Cowell 2001. October 8.

The US's norm frame of "self-defense against states who willingly harbor terrorists" and its claim to intervene in Afghanistan was met with approval from its in-group. Britain directly participated in the intervention. NATO and the Organization of American States expressed their support for the US's interpretation of self-defense and pledged to provide assistance.⁵⁰⁴ For the first time in its history, NATO invoked Article 5 on collective self-defense. Approval also came from traditionally more distant corners: Russia, China, and several Arab states signaled their support for it,⁵⁰⁵ and those countries who may not have agreed with the US's interpretation and actions "pointedly refrained from condemning it."⁵⁰⁶ Only Iraq, Iran, Sudan, Malaysia and Cuba openly opposed the military action with some calling it "an act of aggression", "domination and expansionism", and others pointing to negative consequences of the use of force such as an increase in terrorism.⁵⁰⁷ Overall, however, the acceptance of the US's self-defense frame and claim to use force was widespread. References to "world opinion"⁵⁰⁸ and "international cooperation"⁵⁰⁹ were common in Bush's and Blair's justification of the Afghanistan intervention, and even Russian President Vladimir Putin praised the use of force, saying that terrorists "did not expect such a unity of humanity before a common enemy."⁵¹⁰ Legal scholars agree that because of this widespread (open and tacit) support for the US's frame and claim, norm clarification occurred.⁵¹¹ In the words of Michael Byers:

"As a result of the legal strategies adopted by the US, coupled with the already contested character of the rule and a heightened concern about terrorism world-wide, the right of self-defence now includes military responses against States which actively support or willingly harbor terrorist groups who have already attacked the responding State."⁵¹²

Securing acceptance for this norm interpretation did not only have the long-term advantage of cementing normative preferences, it also had tangible short-term benefits for the US. From intelligence to air transit and troop contributions, the logistical support

⁵⁰⁴ North Atlantic Council 2001. September 12; US Permanent Representative to OAS Noriega 2001. October 10; OAS Ministerial Resolution 2001. September 21.

⁵⁰⁵ Schauble and Kremmer 2001. September 15.

⁵⁰⁶ Johnstone 2011.

⁵⁰⁷ Iraqi President Saddam Hussein, Supreme leader of Iran Ayatollah Khamenei and Malaysian Prime Minister Mahathir Mohamad: Collins 2001. October 9.

⁵⁰⁸ Blair 2001. October 4.

⁵⁰⁹ Bush 2001. September 29.

⁵¹⁰ Russian President Vladimir Putin: Collins 2001. October 9.

⁵¹¹ Byers 2002; Murphy 2002; Cassese 2001; Johnstone 2011.

⁵¹² Byers 2002, 409-410.

that in- and out-group members ranging from Germany to Uzbekistan and Russia provided made the intervention in Afghanistan less costly.⁵¹³

This is not to say that there was not also some disagreement. The US wrote in the letter to the Security Council that “further actions with respect to other organizations and other states”⁵¹⁴ may be necessary in self-defense. This statement proved controversial and there was a widespread rejection of the right to self-defense allowing for a wider war on terror.⁵¹⁵ There were fears that the US would extend military action to Iraq. Even Britain, which also relied on the self-defense frame to authorize its intervention in Afghanistan, rejected an extension of this authorization beyond Afghanistan.⁵¹⁶ Thus, while this episode of norm contestation reduced the penumbra of doubt of the self-defense norm, it did not eliminate it entirely.

5. Conclusion

Widespread acceptance or rejection of a proponent’s norm frame and claim leads to norm clarification. This acceptance or rejection makes the norm more precise and provides a clearer reference point for actions. Neither material power nor external events resolve contestation because of the need to legitimate a new norm interpretation. I have shown that there are two pathways to norm clarification: if the goal is to find a generally applicable new norm interpretation, that is a redefined norm frame and claim, proponents of norm change are particularly likely to convince both in- and out-group members with an interest-based legitimation strategy because it does not require a shared identity. Indeed, both case studies have shown that a large proportion of arguments revolve around the perceived utility or effectiveness of norm interpretations.

However, the proponent’s goal could also be exceptionalism - to rhetorically uphold the norm but to secretly deviate from it. When the deviation from the prior consensus norm interpretation becomes public, the proponent faces a choice of abandoning this exceptionalism, of persuading others to tolerate the exceptionalism or of engaging in open

⁵¹³ Ibid.; Daily Star 2001. October 8; Schauble and Kremmer 2001. September 15.

⁵¹⁴ UN Doc. S/2001/946.

⁵¹⁵ Riley 2001. October 11.

⁵¹⁶ Kaur 2001. October 12.

reinterpretation aimed at generally applicable norm change. Identity-based legitimation plays an important role in covering up exceptionalism, whereas open criticism from in-group members is likely to lead to norm clarification through rejection, as it makes contestation costly.

I have illustrated these insights with in-depth case study analysis. External events can trigger contestation but they do not determine the outcome: while 9/11 led to the shared perception that terrorist attacks can be attributed to states that actively support or willingly harbor terrorist groups that have attacked the responding state and that self-defense is warranted in such situations,⁵¹⁷ the same cannot be said of the need for harsh interrogation techniques and higher bars for what counts as torture. Despite being the most materially powerful state, the US was not able to get approval for its preferred norm interpretations in both cases. This goes back to the intent behind the contestation, the reactions of others, particularly in-group members, and the choice of legitimation strategies.

The US's strategy was different in both cases: while the US sought to achieve a generally applicable, universal consensus on self-defense when it came to the prohibition of torture, the US initially tried to carve out an exception only for itself. Otherwise, the US would not have been secretive about its new understanding of what constitutes torture nor engaged in denial when criticized.

This also led to different legitimation discourses: while the US sought to show the necessity and utility of a reinterpretation of self-defense, it initially heavily relied on identity-based legitimation with respect to the prohibition of torture, arguing that the "United States does not torture"⁵¹⁸. This justification strategy was possible because of the cultural match of the norm with the US's identity, and shows the importance of credibility. However, as more was revealed about the US's harsh interrogation techniques, the more the US engaged in open reinterpretation and the more prominent references to the output legitimacy of these practices became.

⁵¹⁷ Byers 2002, 409-410.

⁵¹⁸ Bush 2006, September 6.

When it came to the audience accepting an extension of the right to self-defense after 9/11, output legitimacy figured prominently in the statements of support: arguments about 9/11 changing the world and the need for effective solutions in dealing with international terrorism were predominant. In episodes of contestation prior to 9/11, other perceptions of output legitimacy, e.g. a violent response only fueling more terrorism, were often presented when rejecting the US's interpretation of self-defense. However, principled disagreement was also common: particularly from out-group members who prioritized alternative norm frames and claims.

With regard to the torture and mistreatment debate, out-group members mainly pointed to the US's hypocrisy when criticizing the Bush administration, whereas in-group members mainly cited trust in the US when initially supporting the US's claim of humane treatment of prisoners (identity-based legitimation). Later, in-group members engaged in principle-based legitimation and legal framing when rejecting the Bush administration's claims. This suggests that proponents are most likely to resort to interest-based legitimation and identity-based legitimation, whereas opponents may also advance principled reasons or question credibility when rejecting interpretations.

The case studies also show the importance of in-group members' reactions. Only when other liberal states started to criticize the Bush administration's interpretation of torture did the US start to make tactical concessions and eventually abandon its reinterpretation. Regarding the debate over self-defense, when in-group consent was absent in prior episodes of contestation, pursuing the claim had tangible costs, such as longer flight routes and lack of troop contributions.

Evidence also played an important role: the US felt compelled to provide evidence of the willingness of the state against whom the right to self-defense is exercised to harbor dangerous terrorists. This shows that prioritizing self-defense over the competing norms of non-interference and sovereignty by using force is not taken lightly. Regarding the US's contestation of the torture norm, the US initially kept its reinterpretation attempts secret. The US often withdrew interpretations when they became public and provoked criticism from key audiences. Hence, the norms at the center of contestation were strong norms that enjoyed significant social support.

Chapter 4: Norm Recognition: Frame agreement and claim disagreement in the lead-up to the Iraq War and in the context of Targeted Sanctions

1. Introduction

After much contestation in 2002-2003 over whether military intervention or diplomacy was better suited to counter the Iraqi threat, UNSC members agreed to Resolution 1441 (2002). This resolution was ambiguous because the UNSC adopted it under Chapter VII, which allows for enforcement action, but it did not explicitly include trigger words for the use of force. Scholars agree that the UNSC intentionally passed a resolution with ambiguous language that would allow both sides to use it to support their respective claim.⁵¹⁹ What is more, the US and UK withdrew a second resolution that would have more clearly authorized military intervention in Iraq when they lacked the necessary support to keep this ambiguity alive. When actors agree on what norm frame applies (i.e., Iraq is a threat to the peace), but not on what claim to action follows from it, we see norm recognition.

A similar instance of norm recognition occurred in the dispute between the UNSC and the ECJ. The *Kadi* case revealed disagreement over whether the UNSC should provide an avenue for delisting from the 1267 sanctions list to terror suspects. The pressure from the ECJ made the UNSC recognize due process rights and create an Ombudsperson mechanism for individual delisting requests that has gained significant independence over time. Thus, it looked like both the UNSC and ECJ now agreed on the same norm frame – due process rights for listed persons – and on how to implement them. However, with its *Kadi II* verdict in 2013, the ECJ signaled that it understands due process rights to entail a different claim – it maintained that rather than an Ombudsperson an independent court for judicial review of delisting requests was necessary. However, contrary to the Iraq case, this situation of norm recognition has been relatively stable: the Ombudsperson mechanism continues to exist and to be used alongside the European Courts.

Both cases have in common that they culminated in norm recognition and that Security Council members delegated the implementation of the norm frame they agreed upon to

⁵¹⁹ Stromseth 2003; Byers 2004; Johnstone 2015.

agents – weapons inspectors and Ombudspersons – in the hope that this would resolve claim disagreement. Delegation has been more effective in managing norm contestation regarding targeted sanctions than regarding the Iraqi threat as norm recognition persists to this day. This raises the following question: Why has norm recognition been relatively stable regarding the targeted sanction case but not regarding the Iraqi threat case?

Delegation manages norm contestation when the problem-structure allows the agent to show the output legitimacy of its work. I find that the more social pressure the principal faces from key parts of the interpretive community to maintain delegation and the less uncertainty surrounds the effectiveness of the work of the agent, the more likely it is that the agent's work can contribute to the management of norm contestation. Then, delegation has the potential to bring about claim agreement or at the very least to manage the claim disagreement in a way that it does not blatantly contradict the agreed-upon frame, and thus prevent the weakening of the norm.

Comparing the contestation over how to implement Chapter VII of the UN Charter in the lead-up to the Iraq war and over due process rights in the 1267 sanctions regime helps us to identify when delegation contributes to and sustains norm recognition. These cases provide good plausibility probes for the effect of delegation on the outcome of norm contestation. First, both delegation relationships share many similarities: the same principals, similar tasks for the agents such as to secure cooperation from a third party and to lend credibility to a claim, and the need to tackle security concerns. Second, while the outcome—norm recognition—was similar in both instances, the initial conditions were different. In the Iraq case, the most materially powerful actors challenged the status quo, whereas, in the case of targeted sanctions, the challenger was the comparatively weaker actor. This power discrepancy shows that material power alone is not sufficient to resolve norm contestation. Lastly, since norm recognition has been longer lasting in the case of targeted sanctions, this comparison enables me to make inferences on what contributes to stability. I rely on content analysis of newspaper articles, UN documents, resolutions and speeches to trace how norm contestation unfolded in both cases. Due to the very public nature of the contestation surrounding the Iraq war, I primarily use content analysis. I use findings from the Chilcot or Iraq inquiry to supply some insights into actors' motivations. The debate over due process rights had less public visibility than the debate over the Iraq war. While I can trace most of the debate with court judgments and

UN reports, I draw on elite interviews with diplomats and UN officials to add valuable context and interpretive clarity.

I begin by providing background information on the disputes over the Iraqi threat and over targeted sanctions. I show that the contestation over the Iraqi threat reduced clarity of UN Charter norms, whereas the contestation over due process rights in the context of targeted sanctions strengthened due process rights. The second section explains why agreement on a norm frame allows for more meaningful delegation than other constellations of normative disagreement. This section also discusses the differences in the problem-structure that have allowed the Ombudspersons to be more successful in managing norm contestation than the UN weapon inspectors: certainty over the output legitimacy of the agents' work and social pressure on principals to continue delegating norm implementation are crucial for the stability of norm recognition. In Section 3, I engage in in-depth case study analysis of how delegation affected the outcome of norm contestation. Section 4 concludes.

2. Norm recognition: Context, Contested Norms and Consequences

Norm recognition occurs when critical actors, such as the five permanent UNSC members, agree on the norm frame that applies, but disagree on what action to take under it and thus on the claim. The social agreement on a specific norm frame helps to interpret an event and narrows the range of options that actors can appropriately pursue.⁵²⁰ The sense of normative commitment that is attached to norm frames (as opposed to policy frames) renders some claims illegitimate and socially unsustainable. It blocks some argumentative paths and thereby increases normative certainty. For instance, once UNSC members agreed that Iraq constituted a threat to the peace (Art. 39 UN Charter) or that terror suspects on the 1267 sanctions list possess due process rights, they had to take some action to counter the threat and to protect due process rights. The acceptance of these frames ruled out doing nothing.

⁵²⁰ Entman 1993, 52; Zimmermann 2016, 776; Lenz 2017, 14.

Depending on the kind of agreement or disagreement that precedes it, norm recognition has different effects on the status of the contested norm(s). As norm clarification, and thus claim agreement, preceded norm recognition in the Iraq case, norm recognition weakened Chapter VII norms. On the contrary, a norm impasse (frame and claim disagreement) gave way to norm recognition with targeted sanctions. The agreement on the due process frame led to more certainty on what norm applies and strengthened these rights. I will briefly discuss these effects in turn.

Lead-up to the Iraq War 2003: Contestation of Chapter VII norms

The Council found Iraq's invasion of Kuwait on 2 August 1990 to constitute a breach of international peace and security under Article 39 UN Charter (frame),⁵²¹ and first tackled it with economic sanctions (claim).⁵²² When those proved ineffective, the UNSC authorized military action (claim).⁵²³ To end the Gulf War and to contain Iraq, the Security Council delegated the identification, documentation and destruction of Iraq's chemical, biological and nuclear weapons and of missiles with a range greater than 150 kilometers to international weapons inspectors.⁵²⁴ Resolution 687 (1991) set out the permanent ceasefire conditions. Acting under Chapter VII, the Council imposed arms embargoes and sanctions for non-compliance, established the United Nations Special Commission (UNSCOM) to verify the destruction or removal of Iraq's chemical and biological weapons capabilities and tasked the International Atomic Energy Agency (IAEA) with the same responsibilities regarding nuclear weapons. This decision clarified Chapter VII norms.

Despite cracks under the surface, the Security Council's unified response towards Iraq, and thus norm clarification, mostly persisted until 2002. Each permanent members' veto power made the regime resilient. Due to their interest in trade with Iraq, but also concerns over the devastating impact of sanctions on the civilian population, France and Russia called for declaring Iraq free of WMD and for the lifting of sanctions.⁵²⁵ The US and UK

⁵²¹ UNSC S/RES/660 (1990).

⁵²² UNSC S/RES/661 (1990).

⁵²³ UNSC S/RES/687 (1991).

⁵²⁴ Tierney 2008, 298-299.

⁵²⁵ Chitalkar and Malone 2013, 4; Lewis 2001, 63-64.

remained suspicious of Iraq and committed to inspections and sanctions as the best way to contain Iraq.⁵²⁶ Tensions came to a head in 1998. When it became increasingly obvious that the US used UNSCOM for intelligence gathering, Iraq's mistrust and obstruction of monitoring activities grew.⁵²⁷ As a result, UNSCOM inspectors were withdrawn and the US and UK launched air strikes for four days despite of objections from Russia and France.⁵²⁸ Operation Desert Fox did not count with Security Council authorization and led to a temporary norm impasse.⁵²⁹ However, the Security Council soon found new agreement and decided to overhaul the inspections regime. Resolution 1284 (1999) replaced UNSCOM with the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC).⁵³⁰ To prevent US interference, UNMOVIC was firmly placed under the UN's authority, which ensured the inspector's independence.⁵³¹ However, Saddam Hussein was not persuaded to let UNMOVIC inspectors into Iraq before late 2002, when the Bush administration ramped up the military pressure. Hence, between December 1998 and November 2002, no weapons inspections took place in Iraq.

George W. Bush's speech in the General Assembly in September 2002 squarely put Iraq back on the agenda. He argued that "Saddam Hussein's regime is a grave and gathering danger" due to Saddam Hussein's past non-compliance and use of WMD. As secondary arguments, he also cited "grave human rights violations" and that "Iraq continues to shelter and support terrorist organizations".⁵³² The other permanent Security Council members agreed with the framing of Iraq as a grave threat to security, due to the risk emanating from WMD, but rejected attempts by the Bush administration to invoke a right to pre-emptive self-defense against Iraq to prevent future acts of terrorism.⁵³³ Hence, most of the ensuing contestation focused on the US's and the UK's argument that Iraq's covert WMD program constitutes a threat to international security (frame) that warrants military action (claim).⁵³⁴ There was sufficient concern about the threat posed by WMD in the hands of Saddam Hussein to produce norm recognition, namely agreement on Chapter VII norms under Resolution 1441 (2002). However, the claim—whether it authorizes

⁵²⁶ Chitalkar and Malone 2013, 4.

⁵²⁷ Lewis 2001, 64-65.

⁵²⁸ Johnstone 2011, 124.

⁵²⁹ See speeches at the 3955th Security Council Meeting: UNSC Doc. S/PV.3955. 1998. December 16.

⁵³⁰ Johnstone 2011, 124.

⁵³¹ Tierney 2008, 303.

⁵³² Bush 2002. September 12.

⁵³³ Johnstone 2011, 86.

⁵³⁴ *Ibid.*, 126.

military action—would become more and more contested. France, Russia, China and others favored inspections. In the meeting where the UNSC adopted the resolution, all permanent members, including the US and UK, stressed that there was no “automaticity” or “hidden triggers” regarding the use of force.⁵³⁵ What made the resolution ambiguous, however, is that the US and UK included language that could be read to this effect. The UNSC found Iraq in “material breach” of disarmament obligations and stipulated that this resolution was a “final opportunity” to “cooperate immediately, unconditionally, and actively with UNMOVIC and the IAEA”.⁵³⁶

Because the UNSC delegated inspections and information-gathering to UNMOVIC and IAEA, the reports of their respective heads, Hans Blix and Mohamed El-Baradei, to the Council on 27 January, 14 February and 7 March 2003, became the center of debate. The briefings left room for interpretation and pre-existing beliefs largely shaped the Council members’ readings of the weapon inspectors’ reports. While France, Russia, China and others saw the increasing Iraqi cooperation as a sign that the inspections were working, the US and UK emphasized findings on where Iraq was still falling short. UNMOVIC’s and the IAEA’s activities convinced neither side of the claim of the other, namely that a continued reliance on sanctions and inspections or military intervention were the best way to tackle the Iraqi threat.

Relying on the justification that Iraq’s non-compliance with Resolution 1441 (2002) ended the ceasefire that Resolution 687 (1991) established and revived Resolution 678’s (1990) authorization to use force, the US and UK started military intervention in Iraq on 20 March 2003.⁵³⁷ The other permanent members interpreted Resolution 1441 (2002) differently: they continued to disagree on the claim that military intervention was necessary and deplored the failure to give inspectors more time. As this claim disagreement was preceded by claim agreement for most of the 1990s, it reduced certainty on what to do in similar situations in the future and thus weakened Chapter VII norms. The US and UK would have had to find vast arsenals of hidden WMD to disprove the claim that a few more months of inspections would have led to disarmament. Their failure

⁵³⁵ See speeches at the 4644th UNSC meeting: UNSC Doc. S/PV.4644. 2002. November 8.

⁵³⁶ UNSC S/RES/1441 (2002), para 2 and 9.

⁵³⁷ See, for example, Letter from the UK to the UNSC: UNSC Doc. S/2003/350. 2003. March 21; Letter from the US to the UNSC: UNSC Doc. S/2003/351. 2003. March 21.

to do so made the claim unsustainable that military intervention was necessary to contain the Iraqi threat. It is noticeable that soon the US started to cite different reasons for the intervention, namely freeing the Iraqi people from an oppressive regime.⁵³⁸

Targeted sanctions: Contestation over due process rights

Contrary to the contestation over military intervention in Iraq in 2002-2003, when it comes to the 1267 targeted sanctions regime, norm recognition has had a strengthening effect and has persisted. The UNSC asked states to freeze the assets of members of the Taliban with Resolution 1267 (1999), and then of Osama bin Laden and his associates, including Al-Qaida, with Resolution 1333 (2000). As Resolution 1267 was the first resolution on targeted sanctions in the context of terrorism, the regime complex is often referred to as the 1267 sanctions regime.⁵³⁹ When the UNSC broadened the sanctions criteria and omitted any territorial connection requirement for listing in response to 9/11,⁵⁴⁰ the consolidated sanctions list grew rapidly, from initially 162 individuals and seven entities to 703 individuals and 347 entities in the most recent list as of 21 May 2019.⁵⁴¹

The UNSC has far-reaching powers under Chapter VII to determine what measures to take to maintain or restore international peace and security. The design and imposition of sanctions under Article 41 fall under this prerogative. Further, Article 103 maintains that the obligations of member states under the UN Charter prevail over the obligations of any other international agreement. However, it soon became apparent that the UNSC's failure to provide stricter requirements for listing and avenues for delisting posed a challenge to the 1267 sanctions regime. As this omission clashes with due process rights in many domestic legal systems and international agreements, the UNSC's targeted sanctions regime was soon put to the test. It contributed to the reluctance of member states to implement these sanctions, which put the effectiveness of the sanction regime at risk and led to the advocacy of some states and experts to improve the delisting process.⁵⁴²

⁵³⁸ Bush: BBC Monitoring Former Soviet Union 2003. May 30.

⁵³⁹ Morse and Keohane 2014, 395.

⁵⁴⁰ Ibid.; Eden 2016, 137-138.

⁵⁴¹ UNSC 2019. May 21.

⁵⁴² Morse and Keohane 2014; Heupel 2017.

Due to the justiciability of due process rights, the litigation pressure from listed individuals, i.e. rights-holders, had the most tangible effect. The Council significantly improved the delisting process in response to Mr. Kadi's lawsuit, which he first filed in December 2001 in the European Court of First Instance (CFI).

While the CFI invoked Article 103 of the UN Charter and found that the issue falls "outside the ambit of the Court's judicial review"⁵⁴³, Kadi appealed the decision to the ECJ. The ECJ found that even though it has no jurisdiction to review UNSC resolution, annulling a community measure that implements a resolution "would not entail any challenge to the primacy of that resolution under international law."⁵⁴⁴ This interpretation paved the way for rejecting the frame of the UNSC's prerogative and for finding the due process frame applicable. As a result, the ECJ claimed that the lack of an individual review procedure and the failure to share reasons and evidence for their listing with applicants were incompatible with due process rights. Thus, the ECJ annulled the community regulation but provided a grace period for revisions.

The *Kadi I* judgment presented permanent Security Council members, France and Britain, with a dilemma that Mark Lyall Grant, the UK Permanent Representative to the UN at the time, summed up nicely:

either we would have to be in breach of our UN obligations, or we would be in breach of the ECJ. And you know, we made it very clear that for us the UN was the primary body, not the ECJ... So, the ECJ put the UK and France, in particular, in a very difficult position by the *Kadi* judgments. And therefore, we were prime movers in trying to find a way through.⁵⁴⁵

Of the other permanent members, Russia was most reluctant to make any changes, referring to the supremacy of the UNSC. This reluctance may go back to due process rights not being as ingrained in their identity as in the identity of the Western Council members. Officials with insights into Council dynamics reported that Russian diplomats asked other Council members to tell their courts to stop their challenges or that they

⁵⁴³ Court of First Instance 2005. September 21, ECR II-3655, para 225.

⁵⁴⁴ European Court of Justice 2008. September 3. *Kadi I*, para 288.

⁵⁴⁵ Phone Interview with Mark Lyall Grant, UK Permanent Representative at the UN (2009-2015), 16 May 2018.

questioned the applicability of human rights in the context of terrorism.⁵⁴⁶ However, reportedly, the argument that the prerogative of the UNSC that they all shared was at risk if not enough was done to satisfy the ECJ led to compromises.⁵⁴⁷

Hence, with Resolution 1904 (2009), the UNSC established an Ombudsperson mechanism, which brought the UNSC closer to the ECJ's claim of the need for an independent individual review procedure. The Council took note "of challenges, both legal and otherwise" and expressed its intent to "ensure that procedures are fair and clear", acknowledging the due process frame.⁵⁴⁸ The Office of the Ombudsperson, first occupied by Canadian judge Kimberly Prost, initially had key weaknesses. The Ombudsperson could only make observations regarding delisting requests rather than recommendations. The sanctions committee, composed of the UNSC members, took the ultimate decision for delisting by consensus.⁵⁴⁹ This review process effectively gave every single UNSC member a veto, and thus raised doubts about the independence of the Ombudsperson. The design thus reflects a compromise between due process rights and the Council prerogative that tilts much more into the direction of the Council prerogative.

The European General Court, the successor of the CFI, was not satisfied with this compromise. In response to Kadi's challenge to the EU's 2008 regulation, the General Court recognized the Ombudsperson mechanism, but found the decision-making rules inadequate to protect due process rights, hence annulling the regulation in September 2010.⁵⁵⁰ As a result, the UNSC significantly expanded the powers of the Ombudsperson with Resolution 1989 (2011) by giving her real decision-making powers: she now could gather information on the cases and make recommendations to the sanctions committee, which could only be overturned by a consensus of the sanctions committee to overrule the delisting recommendation. This so-called "reverse consensus" rule gives real bite to the Ombudsperson's recommendations because her verdict now only required the support of one committee member rather than of all of them. If such a reverse consensus ever

⁵⁴⁶ Interview with US diplomat, New York, 6 October 2017; Phone Interview with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018.

⁵⁴⁷ Phone Interview with Mark Lyall Grant, UK Permanent Representative at the UN (2009-2015), 16 May 2018.

⁵⁴⁸ UNSC S/RES/1904 (2009), 2.

⁵⁴⁹ Eden 2016, 148-150.

⁵⁵⁰ European General Court 2010. September 30, para 128.

materialized, the delisting decision would be taken by the Security Council within 60 days, where the standard decision rules apply.⁵⁵¹ So far, the Council has not overturned any recommendation by the Ombudsperson due to the high bar that the reverse consensus introduces and the very public nature of such a dissent, which would entail reputational costs.⁵⁵² As Heupel observes, the Security Council “had never submitted itself to a procedure that restrained its freedom of action in a comparable way.”⁵⁵³ Former Ombudsperson, Kimberly Prost, and other officials voiced surprise that the UNSC went so far as to introduce what they referred to as the “magical”⁵⁵⁴ or “ingenious”⁵⁵⁵ reverse consensus rule. What made this setup so ingenious was that it showed genuine acceptance of the due process frame by giving the Ombudsperson as much independence as possible while not wholly superseding the Council prerogative.

Subsequently, the ECJ Advocate General Bot recommended that the ECJ dismiss Kadi’s case. The ECJ usually follows the Advocate General’s opinion. Hence, now it looked like the UNSC and European Courts agreed on the due process frame and the claim, that is on how to implement them in the context of targeted sanctions. An end to the contestation was in sight. However, the ECJ disagreed with the claim in its decision on the *Kadi II* appeal, issued in July 2013. The ECJ did not discuss the Ombudsperson mechanism in its verdict and claimed that since nothing short of an external court will provide sufficient due process, it will continue to review all EU measures implementing targeted sanctions.⁵⁵⁶ Ever since, the UNSC and the European Courts have been trapped in this situation whereby both sides agree on the frame of due process rights but differ on what claim—the Ombudsperson mechanism or an independent court—follows from it.

Nevertheless, here norm recognition partially solved the earlier norm impasse over whether the Council prerogative or due process rights have priority. The frame agreement

⁵⁵¹ UNSC S/RES/1989 (2011), para 23.

⁵⁵² Heupel 2017, 90.

⁵⁵³ Ibid.

⁵⁵⁴ Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018.

⁵⁵⁵ Phone Interview with Stefan Barriga, Legal Advisor and Deputy Permanent Representative to the Permanent Mission of the Principality of Liechtenstein to the United Nations (2002-2016), 3 May 2018.

⁵⁵⁶ European Court of Justice 2013. July 18. *Kadi II*, para 134 states: “The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality...”

increased interpretive clarity and strengthened due process rights, even though the claim disagreement still leaves some uncertainty as to how they should be implemented.

Thus, norm recognition had different effects in both cases: it reduced normative clarity and weakened the contested Chapter VII norms in the Iraq case, whereas it increased normative clarity and strengthened due process rights in the case of targeted sanctions. What both cases have in common is that the UNSC delegated the management of contestation to agents: UN weapons inspectors and the Office of the Ombudsperson. In the following section, I will shed light on the effect that delegation can have on norm contestation.

3. Pathways to Norm Recognition: The effect of delegation on stability

Delegation occurs when an actor (or actors) with decision-making power, the principal(s), provides another actor (or actors) with the authority to make decisions or to take actions on its (or their) behalf. The grant of authority must be temporary, limited and revocable, otherwise we would not see delegation but abdication of authority.⁵⁵⁷ In both cases, the Security Council delegated authority. Since the UNSC consists of several member states, it is a collective principal.⁵⁵⁸ The P5 are the main principals as their veto power makes their consent indispensable for delegation. In both cases, UNSC members retained significant authority because they did not issue permanent mandates to the Iraqi weapons inspectors or the Ombudsperson but conditional ones. When it comes to the Ombudsperson mechanism, the Council has to make the active decision to extend the mandate roughly every one and a half years,⁵⁵⁹ whereas UNMOVIC's and the IAEA's mandate depended on whether the UNSC perceived Iraq as seizing the final opportunity to cooperate immediately, unconditionally and actively with UNMOVIC and IAEA.⁵⁶⁰ Thus, the delegation of authority was temporary and revocable, and it was also limited to specific tasks: the provision of a procedure for delisting requests and the containment of the WMD threat emanating from Iraq.

⁵⁵⁷ Hawkins et al. 2006, 7; Tierney 2008, 292.

⁵⁵⁸ Tierney 2008, 295.

⁵⁵⁹ See, for example, UNSC S/RES/1904 (2009), para 20; UNSC S/RES/1989 (2011).

⁵⁶⁰ See UNSC S/RES/1441 (2002), para 2 and 9.

In contrast to other cases discussed in this study, here delegation displays some traits that give it a more significant role in the management of norm contestation: the decision to delegate was consensual, that is all critical actors agreed to it, and the agents were tasked with contributing to norm implementation on a potentially ongoing basis rather than with issuing a one-off verdict. Delegation involves sovereignty costs, that is loss of decision-making authority, as the behavior of agents is always to a certain extent uncontrollable.⁵⁶¹ We would expect states to be reluctant to cede control when they disagree over the application of norms. As norms involve long-term commitment to a particular kind of behavior, states are careful to avoid interpretations that would lead to unwanted obligations.⁵⁶² This particularly applies to powerful states like the P5 who may be involved in similar disputes in the future, and whose power is to a certain extent built on others perceiving them as playing by the rules.⁵⁶³ Powerful states will be most reluctant to delegate the interpretation or implementation of contested norms when they disagree over the norm frame that applies. The risk of the agent finding an unwanted norm applicable, and thus requiring a significant change of behavior, leads to high sovereignty costs.

Thus, when delegation occurs in these circumstances, those who trigger it often have to go through the backdoor and against the wishes of the more materially powerful state involved in contestation: the Philippines used an UNCLOS rule to involve the Permanent Court of Arbitration in the South China Sea dispute against China's will (chapter 5), and Serbia used procedural rules that allowed the UN General Assembly to refer the dispute over the status of Kosovo to the ICJ despite of the US's protest (chapter 6). In the status dispute, the ICJ's verdict did not directly speak to the legality of Kosovo's independence and therefore had insignificant effects. China did not recognize the Permanent Court of Arbitration's ruling but made some practical concessions to the Philippines. Delegation did not solve the frame disagreements. However, due to the clarity of the ruling, delegation contributed to claim agreement in the South China Sea case, which however is volatile (chapter 5).

⁵⁶¹ Abbott and Snidal 2000, 436-438.

⁵⁶² Krisch 2005; Schimmelfennig 2001; Johnstone 2011.

⁵⁶³ Krisch 2005.

The Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) that the Council of the European Union established as a “political and diplomatic follow-up to the conflict”⁵⁶⁴ is a slight exception to the rule: despite frame disagreement, both Georgia and Russia cooperated with the Mission. However, as the IIFFMCG was intended as a follow-up rather than as a tool to resolve norm contestation, it had a different role. Furthermore, the IIFFMCG presented the Tagliavini Report with its findings in September 2009, a year after the conflict and Russia’s recognition of South Ossetia and Abkhazia. As by then, the dispute did not rank highly on the political agenda anymore, the findings did not generate much social pressure on the parties.⁵⁶⁵ This illustrates the importance of the timing of delegation: there is most potential for delegation to contribute to managing norm contestation before the dispute parties follow through on their respective claims and so are still willing to solve their claim disagreement.

We see such timely delegation most often, when there is frame agreement. Frame agreement lowers the sovereignty costs of delegation as it narrows the range of permissible claims or ways of implementing the norm. Thus, the risk of agents making undesirable and costly claims is lower. Hence, norm recognition makes delegation of norm implementation more likely.⁵⁶⁶ When actors agree on the frame but disagree on the claim, delegation to an independent party becomes necessary when the contesting parties lack the necessary expertise and credibility to convince opponents of their claims.

UNSC members could not carry out legal evaluations and weapons inspections themselves as they lacked the necessary expertise and credibility. Hawkins et. al find that the gains from delegation are greatest when specific resources are required: “[s]tates sometimes lack technical expertise, credibility, legitimacy, or other resources to make policy on their own. The greater the needs of states, the larger the gains from specialization and the more likely they are to delegate...”⁵⁶⁷ Only agents with significant independence could gain the necessary trust from third parties. Iraq had to cooperate for

⁵⁶⁴ Tagliavini Report 2009. Volume 1, 2.

⁵⁶⁵ Deutsche Presse-Agentur. 2009. September 30.

⁵⁶⁶ Hawkins et al. (2006, 16-17) speak of agenda-setting agents in this context: when states do not agree on policy, they can delegate power to an agent to induce an equilibrium. They cite the weapons inspections in Iraq as example.

⁵⁶⁷ Hawkins et al. 2006, 14.

inspections to provide meaningful information and listed individuals had to use the Ombudsperson mechanism for it to provide due process. Hence, only delegation to a specialist and independent agent would be legitimate enough to convince other P5 or European Courts to accept a contested claim: namely, that military intervention is (not) warranted and that the Ombudsperson mechanism safeguards due process rights. In fact, different views of the ECJ and UNSC on whether the Ombudsperson mechanism is independent enough are precisely what has prevented norm clarification to this day. Thus, delegation is likely to occur when specialist resources are required to lend credibility to a claim.

Instead of delegating implementation, states could have engaged in unilateralism or in international cooperation without delegation.⁵⁶⁸ Criticism and pressure from key audiences led to frame agreement in both cases, and the need to lend credibility to their preferred claim convinced all P5 to delegate implementation to independent agents. While the 2002-2003 contestation over the Iraqi threat eventually culminated in unilateral military intervention, the US and UK opted to go down the “UN route” first.⁵⁶⁹ The US was interested in the alliance with the UK to lower the social and material costs of intervention, and Tony Blair insisted on involving the United Nations. He considered the legitimacy that comes with the UNSC’s stamp of approval desirable and necessary to convince the British public and Labour party members.⁵⁷⁰ Tasking UNMOVIC and IAEA with information-gathering and inspections also bore the potential to convince the remaining P5 of military intervention, and the ambiguous Resolution 1441 (2002) made the US and UK’s legal case stronger.

Hence, as the US and UK had to convince international and domestic audiences of the credibility of the claim that military intervention is necessary to diffuse the Iraqi threat, they faced social pressures that facilitated delegation. Similarly, the Security Council faced pressure from the ECJ to change the implementation of the 1267 regime, which made the prior international cooperation without delegation a costly option.⁵⁷¹ The threat of court challenges that would render the sanctions regime ineffective eventually became

⁵⁶⁸ Hawkins et al. 2006, 10.

⁵⁶⁹ Chitalkar and Malone 2013, 6-7.

⁵⁷⁰ Roe 2008.

⁵⁷¹ Morse and Keohane 2014; Heupel 2017.

credible enough that the P5 granted the Ombudsperson enough powers to give blacklisted terror suspects access to due process.⁵⁷² Delegation, therefore, is likely to occur when actors face social pressures to lend credibility to their preferred claim.

Once agents are tasked with monitoring and providing feedback on norm implementation to manage norm contestation, the problem-structure affects how effective they are in doing so. A comparison of the UN weapon inspectors' and of the Ombudspersons' effectiveness suggests that two conditions affect their ability to show the output legitimacy of their work: (un)certainly involved in assessing the output legitimacy of their work and social pressures on principals to continue to rely on delegation.

To retain their mandate and to manage norm contestation, agents need to legitimate their implementation of the norm vis-à-vis critical audiences such as the principals. As norms are shared community standards, showing legitimacy involves creating the perception that delegation is the right way to uphold these standards.⁵⁷³ Scholars differ on what kind of legitimacy persuades critical audiences. As discussed in chapter 2 of this study, influencing perceptions of output legitimacy is particularly promising when it comes to managing norm contestation. It does not require a shared identity and thus can bridge in- and out-group divisions.⁵⁷⁴ Demonstrating output legitimacy centers around showing that there is a shared normative problem and presenting an effective and viable solution to this problem.⁵⁷⁵ Since frame agreement and subsequent delegation imply agreement that there is a shared normative problem, agents can persuade critical audiences of the output legitimacy of their work when they are able to prove that it effectively tackles the issue at hand (e.g. the Iraqi threat or access to due process). Hence, when the agent's norm implementation satisfies critical audiences, delegation can manage norm contestation: recognition of the effectiveness of the agent's norm implementation has the potential to solve the claim disagreement or at least to manage the claim disagreement in a way that it does not blatantly contradict the agreed-upon norm frame.

⁵⁷² Morse and Keohane 2014, 395-398.

⁵⁷³ Hurd 1999, 381.

⁵⁷⁴ Jones 2009, 1086.

⁵⁷⁵ Kersbergen and Waarden 2004, 158; Bloomfield 2016, 322-323.

However, the problem-structure affects the ability of agents to provide feedback on their effectiveness. First, when the situation is such that agents are unable to provide conclusive evidence of carrying out their mandate effectively, critical audiences have difficulties in assessing whether the agent's work makes a valuable contribution to solving the claim disagreement. The more incomplete the information they receive and the more uncertainty they face, the more actors fall back on existing beliefs. Historical, sociological, and bounded rationality approaches all conclude that there is a strong bias towards existing beliefs, principles and institutions because they involve less risk and have been continuously enforced.⁵⁷⁶

When the uncertainty involved in assessing the agent's work is high, it is unlikely that (some) principals—and other relevant audiences—would abandon their initial assessment and find common ground on a claim. Scholars of rhetoric have shown that the most basic elements of arguments are grounds, claims and frames (also called warrants).⁵⁷⁷ The frame justifies the claim by connecting the grounds, that is factual evidence, to it. Hence, if there is uncertainty about the grounds, claim disagreement is unlikely to disappear. The different conditions that the UN weapons inspectors and the Ombudsperson faced illustrate this obstacle to showing output legitimacy: due to their dual-use potential and the ease with which WMD can be concealed, the agents and principals had to operate in an environment of incomplete information when assessing Iraq's cooperation. Thus, the UN weapon inspectors were not able to provide as conclusive evidence of the output legitimacy of their inspections as the Ombudspersons who could point to statistics that showed that litigation had shifted from the courts to their mechanism. The greater uncertainty made it difficult for the UN weapons inspectors to clearly signal whether their work helped to contain Iraq and thus to change prior claims.

Secondly, when there are pressures on principals from critical audiences to rely on delegation, agents are in a better position to manage norm contestation. When there is claim disagreement, agents have to convince actors with different preferences of the output legitimacy of their work. Scholars of rhetoric find that the credibility of the speaker (or the *ethos*) is crucial for determining the persuasiveness of an argument.⁵⁷⁸ When the

⁵⁷⁶ Thelen 1999; Legro 2000; Jupille, Mattli, and Snidal 2013.

⁵⁷⁷ Toulmin 1958.

⁵⁷⁸ Gottweis 2006, 242-243; Frost 1994, 86, 104.

audience perceives the speakers as competent, their claims are more trustworthy. Competence refers to the perception of critical actors that an agent is effective in implementing a norm. As the UNSC is a collective principal, the P5 are the critical actors to convince due to their veto power and thus influence over the delegation decision. However, other audiences' opinions can influence the perceptions and preferences of the principals: those audiences whose position makes them critical to the achievement of the substantive norm goal,⁵⁷⁹ and those who share similar values, symbols and commitments (in-group members).⁵⁸⁰ Without the consent of these critical audiences either the norm goal cannot be achieved or the social and material costs of implementing a controversial claim are high.

When it comes to targeted sanctions, the UNSC had to convince a critical external audience that it provides due process to listed individuals in order to achieve the substantive norm goal of implementing the sanctions under Chapter VII. Due process rights are subject to trial in court and this brings a critical audience into play—rights-holders—and creates a different route to implementation—courts. This puts additional social pressure on Council members to guarantee due process if they do not want to be bypassed. Scholars argue that the rights-holders' ability to enforce a rights violation before the ECJ was the primary driver of the UNSC's concessions.⁵⁸¹ I find that the litigation pressure from right-holders is also an important explanation for the persistence of the Ombudsperson mechanism. If the UNSC would not support the Ombudsperson mechanism anymore, rights-holders may shift the litigation to the court system again. Hence, justiciability has created a check and balance that has helped to maintain the Ombudsperson mechanism.

However, the more independent the Ombudsperson mechanism has become, the more the UNSC perceives it as a burden and fears for its control over the sanctions regime. The substantive norm goal of the sanction regime is to prevent terrorism. UNSC members fear that while improvements to due process such as more transparency regarding the reasons for their decisions—something the ECJ called for—strengthens due process, it could also increase the risk of terrorist attacks. This concern has led to backlash in terms of

⁵⁷⁹ Barnett and Duvall 2005, 51–52; Busby 2007, 254; Goddard 2006, 40.

⁵⁸⁰ Johnston 2001, 497; Krebs and Jackson 2007, 56; Schimmelfennig 2001, 62–63.

⁵⁸¹ Zürn 2018, 208; Heupel 2017, 104.

cooperation with the Ombudspersons in the last couple of years. Therefore, despite increasing recognition from the European Courts of the Ombudsperson mechanism, it is unlikely that the ECJ will recognize the Ombudsperson as independent enough for the claim disagreement to be resolved. Nevertheless, right-holders have largely shifted their litigation from European Courts to the Ombudsperson mechanism. This shift has helped to maintain the 1267 sanctions regime and the UNSC's prerogative. It has shown that both avenues for delisting—the Ombudsperson mechanisms and the court system—are claims that fall within the due process frame. Thus, the Ombudsperson mechanism persists and helps to manage norm contestation.

When it comes to contestation over the Iraqi threat, there was no such social pressure on the UNSC as threat perceptions unlike due process rights are not subject to trial in court. Furthermore, the lack of unity of the US's in-group on the matter and support from domestic audiences for military intervention lowered the cost of disagreement. Due to their shared culture and history, I treat the US and European states as in-group members in this study. As the contestation over the Iraqi threat took place in the UNSC, France and the UK are the most influential in-group members of the US due to their veto power. The US's in-group was divided: with France and the UK, critical in-group states, disagreed on the claim that military intervention is necessary to tackle the Iraqi threat. Hence, the main challenger of the pre-existing compromise to contain Iraq with inspections and sanctions did not face as many social and material costs for going through with a contested claim as it would have had its in-group united in its opposition.

Furthermore, given the uncertainty surrounding Iraq's cooperation with UN inspectors on WMD, there was a possibility that the US could *ex post* legitimate the intervention by showing that it was effective in tackling the substantive norm goal, namely the Iraqi threat. The effectiveness of military actions in counteracting a threat, and at the very least not contradicting its existence, are an essential aspect of output legitimacy.⁵⁸² The prospect of *ex post* legitimation and thus of lowering the social costs of France's objection explains why the reputational costs of dissent from an in-group member did not prevent intervention.

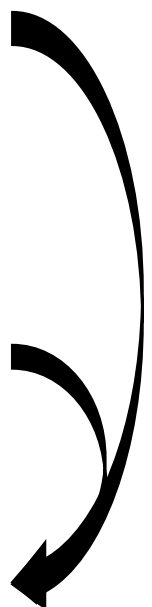
⁵⁸² Hurrell 2005.

Therefore, the different problem-structures affected the ability of the agents to provide feedback on the effectiveness of their work to critical audiences. The greater certainty involved in assessing their work and social pressures on the principal put the Ombudspersons in a more favorable position. The Ombudspersons have seized this opportunity and have played an important role in showing that the mechanism provides due process. Right-holders have shifted their litigation to the Ombudsperson mechanism because the office holders have built a reputation for it as credible and effective. They have shown the output legitimacy of the mechanism. The Ombudspersons have safeguarded the independence of the office, provided a fair and much faster process compared to court proceedings (months rather than years) and pressured the UNSC to improve the due process further with their advocacy. In particular, they effectively used their bi-annual reports to pressure the UNSC to make further improvements to due process and to reach out to rights-holders and supportive audiences. The weapons inspectors also relied on their reports as an important tool to provide information and to exercise influence. However, because Hans Blix's messaging was not clear and consistent, the P5 could not all be convinced of the effectiveness of the inspections regime.

Table 1 summarizes the differences in the two delegation relationships which explain why one agent was better able to manage norm contestation than the other.

Table 1: Differences in the delegation relationships

	Iraqi Inspectors	Ombudsperson Mechanism
(Un)certainty about output legitimacy	• Tangible evidence for effective norm implementation (Iraqi compliance) hard to come by (dual-use; ease of concealment) ↓ • UNSC members rely on pre-existing heterogenous preferences when assessing the agents' output legitimacy	• Tangible evidence for effective norm implementation available (number of cases) ↓ • UNSC members can assess the output legitimacy of the agent's norm implementation
Social pressure	• Weak social pressure: In-group disagrees on claim; US domestic audience supports military intervention ↓ • Heterogenous preferences of UNSC members persist	• Strong social pressure due to justiciability of due process rights, which potentially undermines the effectiveness of the sanction regime ↓ • Homogenous preferences of UNSC members to quell litigation in European Courts
Conduct of agents	• Unfavorable environment for the agent to build a reputation as credible and effective • Contradictory signals do not help to overcome pre-existing biases	• Favorable environment for the agent to build a reputation as credible and effective • Clear and consistent messaging and aims help to manage norm contestation



4. Comparing situations of norm recognition: Analysis of the role of weapons inspectors and of the Ombudsperson

The weapons inspectors and the Ombudsperson mechanism share sufficient similarities to allow for a meaningful comparison of their success in managing norm contestation. While they are different kinds of agents—one engages in fact-finding, the other in dispute-settlement—they have much in common. As described, both agents were delegated authority due to their expertise and the need for an independent agent to convince important audiences of a contested claim. In the UNSC, they had the same collective principal and both agents counted with significant independence: to prevent states from influencing the conduct of inspectors – as was the case with UNSCOM – the UNSC placed UNMOVIC under the umbrella of the UN and hired employees as

international staff of the UN rather than loaning them from their home countries as UNSCOM did.⁵⁸³ Similarly, the UNSC strengthened the independence of the Ombudsperson over time with the introduction of the reverse consensus rule.

Furthermore, despite being different kinds of agents, their tasks are ultimately very alike: The UN weapon inspectors and Ombudsperson were both charged with contributing to Chapter VII enforcement action. The UNSC set up the inspection regime to contain Iraq and the Ombudsperson mechanism to ensure the effectiveness of the 1267 sanctions regime. To achieve these goals, the agents had to secure cooperation from a third party. The inspectors had to convince Saddam Hussein's regime to cooperate in the verification and destruction of WMD, whereas the Ombudsperson had to convince listed individuals to use the mechanism. Their relative success in securing this cooperation would give an indication of the credibility of the contested claims to the principals and critical audiences such as the ECJ: whether Iraq's (non-)cooperation does (not) warrant military intervention and whether enough respect for due process rights was in place. However, to achieve their tasks, the agents sometimes had to walk a fine line: to secure cooperation of the third party, the agent may have to act or advocate for actions that are not in line with (one of) the principal's contested claim(s). For instance, the weapons inspectors' first report was critical of Iraq to pressure Saddam Hussein into cooperating more, but therefore the inspectors also risked giving the impression to some UNSC members that military action rather than inspections is called for. Similarly, the Ombudspersons openly criticized shortcomings of the mechanisms in their reports. This signaled their independence to the courts and potential claimants and put pressure on UNSC members to grant them more powers. While the public shaming bore the potential of convincing key audiences to use and accept the mechanism, the criticism also risked upsetting the principal.

Despite these similarities, the different problem-structure that both agents faced allowed the Ombudsperson to be more effective in managing norm contestation than the UN weapon inspectors: the availability of tangible evidence for the output legitimacy of the Ombudsperson and the social pressure on the principals to maintain the Office of the Ombudsperson due to the justiciability of due process rights have helped to keep norm

⁵⁸³ Tierney 2008, 303; Malone 2006, 167-169.

recognition alive. The Ombudspersons have seized this opportunity and built a reputation for the mechanism as credible and effective, which explains the persistence of norm recognition and of delegation. I illustrate this argument with an in-depth analysis of both cases.

4.1 Contestation over weapons inspections in Iraq

The UN Security Council recognized that Iraq constitutes a threat to the peace under Article 39 UN Charter and requires Chapter VII enforcement action, but individual members differed on what containment should look like: whether inspections are sufficient or if military action is required. This claim disagreement led to the ambiguous Resolution 1441 (2002) around which much of the discussion centered in the lead-up to the Iraq war. The UNSC delegated to UNMOVIC and IAEA the task to verify Iraq's WMD capabilities and to destroy prohibited weapons. The inspectors had an extraordinarily difficult task due to the uncertainty they faced: to make an assessment on the WMD threat, the inspectors had to make judgements on the veracity of claims that Iraq possessed or destroyed WMD. It is difficult to rule out WMD possession due to the ease with which they can be concealed, and thus it is also hard to prove their destruction. When faced with uncertainty, decision-makers rely on pre-existing beliefs. Hence, the principals' pre-conceptions as to what constitutes the best way of tackling the Iraqi threat influenced their interpretation of the inspectors' reports. UNMOVIC and IAEA therefore faced an uphill battle when trying to build a reputation for their inspection regime as credible and effective. Furthermore, there was not sufficient social pressure from critical audiences such as in-group members and domestic constituencies to give the US and UK an incentive to re-evaluate their pre-existing preferences and to continue to rely on inspections. Lastly, the cautious and shifting messages, in particular of Hans Blix, Executive Chairman of UNMOVIC, also contributed to the agents' failure to communicate the output legitimacy of the inspectors' work. These difficulties in selling the output legitimacy of the inspections led to the paradoxical outcome that despite of delegation success—the inspections retrospectively proved to be effective—the claim disagreement could not be resolved. In the following, I will discuss these points in turn.

Uncertainty about output legitimacy

There was a widespread belief that Iraq possessed WMD, and 9/11 added an urgency to this perception that made norm recognition possible. As Tony Blair recalls,

Saddam and weapons of mass destruction was not a counter-intuitive notion. You know, he had used them, he definitely had them. He was in breach of, I think, then United Nations Resolutions on them, and so, in a sense, it would have required quite strong evidence the other way to have been doubting the fact that he had this programme.⁵⁸⁴

Saddam Hussein had done little to counter this perception by using WMDs, by refusing to let UNMOVIC inspectors into the country, and by his half-hearted prior cooperation with UNSCOM. Hans Blix equally noted that he, like most people, believed that Iraq retains WMD capabilities:

I didn't say anything about it publicly. Privately, yes, I thought so. There was one particular type of weapons of mass destruction of which I was suspicious and that was the anthrax. [...] I thought it was plausible, because what UNSCOM has said in its report 1999 was these things are missing...⁵⁸⁵

Even France believed that Iraq was pursuing biological and chemical weapons. Jeremy Greenstock, Ambassador of the UK to the UN, recalls that France signaled “that they might join a military campaign if there was unequivocal proof, evidence, that Iraq possessed WMD and was lying through its teeth all along.”⁵⁸⁶

Despite these worries, after the withdrawal of UNSCOM and Iraq's refusal to let UNMOVIC inspectors into the country, Iraq was a low priority for the Security Council for a few years. However, 9/11 brought Iraq squarely back to the agenda and gave urgency to the threat perception. Neo-conservatives in the United States were quick to point to Saddam Hussein's past hostilities and use of WMDs and to argue that he could potentially provide terrorists with materials for building WMD.⁵⁸⁷ Iraq, after all, had a history of sponsoring terrorism, for example, of providing financial support to the families of

⁵⁸⁴ Blair 2010, 67.

⁵⁸⁵ Blix 2010, 30-31.

⁵⁸⁶ Greenstock 2009, 92.

⁵⁸⁷ Bluth 2004, 874; Malone 2006.

Palestinian suicide bombers.⁵⁸⁸ George W. Bush started as early as January 2002 to publicly portray Iraq as part of an axis of evil that threatens peace by seeking WMD, and to build the case for military intervention. Tony Blair and UK Foreign Minister, Jack Straw, soon after began to also frame Iraq as a threat and to claim that it had to disarm or be disarmed.⁵⁸⁹ As discussed earlier, Blair convinced Bush to go down the UN route, and the other Security Council members seized the opportunity to prevent unilateralism by agreeing to Resolution 1441 (2002).

The Security Council now agreed that Iraq constituted a threat to international security and to an inspection regime backed by the threat of military action in the event of non-compliance. However, due to the kind of norm they had to implement, the agents had difficulties providing tangible evidence for one claim or the other. Because of dual-use and the ease of concealment, it was difficult to conclusively prove the absence or presence of WMD. For instance, Iraq had in the past buried large items such as Russian jets in the sand. Winds not telemetry discovered this. If Iraq could bury such large items in the sand, it was conceivable that it could hide smaller items with ease.⁵⁹⁰ The dual-use problematic complicated matters further. As a French diplomat put it: “Three pots of yogurt in a basement can be developed into biological weapons with the right additives and know-how.”⁵⁹¹ Hence, the weapons inspectors faced much greater uncertainty and thus difficulty in providing tangible evidence for the effectiveness of their work. The Ombudspersons, on the other hand, could point to statistics such as the number of cases they received, and whether litigation had shifted from the courts to their office. Since the inspectors could not rely on such tangible evidence for their output legitimacy, they had to manage perceptions much more.

When faced with incomplete information and uncertainty, actors tend to fall back on existing beliefs.⁵⁹² Therefore, principals’ earlier beliefs of whether inspections or military action would be more effective in containing Iraq influenced their interpretation of evidence. Hence, the US and UK, on the one hand, and France, Russia and China, on the other, drew very different conclusions from intelligence information and UNMOVIC’s

⁵⁸⁸ Bluth 2004, 875.

⁵⁸⁹ Iraq Inquiry Committee 2016a. Executive Summary, 12.

⁵⁹⁰ Greenstock 2009, 85; Iraq Inquiry Committee 2016b. Section 4.3, 411.

⁵⁹¹ Unnamed French Diplomat: Malone 2006, 167.

⁵⁹² Thelen 1999; Legro 2000; Jupille, Mattli, and Snidal 2013.

and the IAEA's Security Council briefings on Iraq's WMD capabilities and cooperation. For one, the US and UK had become so convinced of the Iraqi threat that any evidence to the contrary was interpreted in a way to fit this perception.⁵⁹³ In a note to No. 10 officials, Tony Blair wrote, "We need to set out the WMD case generally; publish evidence of it; and have some high-profile interdiction of WMD material. People just totally underestimate the WMD threat."⁵⁹⁴ US Secretary of State Colin Powell indicated in his presentation to the UNSC in February 2003, amongst others, that Iraq developed mobile laboratories for making biological weapons, but acknowledged after the intervention that despite having made sure that the evidence was multi-sourced, it "appears not to be...that solid".⁵⁹⁵ Further, the US alleged that Iraq had imported yellowcake, that is raw uranium, from Niger, and Powell reiterated this in his presentation. The IAEA investigated these claims and ElBaradei reported in his Security Council briefing of 7 March that they had concluded that the documents on yellowcake import from Niger are not authentic.⁵⁹⁶ Blix stated,

that was perhaps the first occasion when I became suspicious about the evidence because I thought to myself, 'Why should Iraq now import raw uranium which is very far from a weapon. They have to refine it. It has to go through enrichment and all these things.' ... the Niger document was scandalous. If IAEA could conclude in a day's time that this was forgery and this document had been dancing between the Italians and to British and the Americans and to the French and they all relied upon it and Bush alluded to it ... I think that was the most scandalous part.⁵⁹⁷

Blix's criticism shows that in this uncertain environment the contestants relied heavily on pre-existing beliefs, which left them open to deception.

Pre-existing beliefs also affected Security Council members' reading of the inspectors' reports. In their second and third briefings, the heads of UNMOVIC, Hans Blix, and of IAEA, Mohamed ElBaradei, generally reported cooperation from Iraq, concerning access to sites, declaration of biological and chemical weapons material and destruction thereof. Blix reported more cooperation from Iraq on these matters and asked for more time for

⁵⁹³ Iraq Inquiry Committee 2016b. Section 4.3, 412.

⁵⁹⁴ Iraq Inquiry Committee 2016b. Section 4.3, 322 para 174.

⁵⁹⁵ BBC News 2004. April 3.

⁵⁹⁶ UNSC Doc. S/PV.4714. 2003.

⁵⁹⁷ Blix 2010, 33-34.

inspections.⁵⁹⁸ The US and UK, picking out the negatives, argued that the question marks, particularly in UNMOVIC's reports regarding chemical and biological weapons, showed that Iraq had not cooperated as actively, immediately or unconditionally as requested and that a second resolution which addressed the lack of cooperation was required.⁵⁹⁹ Other UNSC members did not share this perception. Not enough evidence could be found to convince them of the claim that a military solution was necessary. Their insistence on a diplomatic solution because of signs of Iraqi cooperation became stronger. Unlike the US and the UK, French Foreign Minister, Dominique de Villepin, for example, considered the inspections to count with output legitimacy. He pointed to “regular progress in the disarmament”, “progressive destruction of Al Samoud 2 missiles”, and asked “why smash instruments that have just proved their effectiveness?”⁶⁰⁰ Hence, each side picked out the aspects of the inspectors’ briefings that supported their respective claim.

Social pressure

There were not enough pressures on the US and UK from critical audiences to rely on delegation, which undermined the ability of inspectors to manage norm contestation. As explained earlier, in-group members are critical audiences because their dissent makes following through with a contested claim costly due to the greater social and material ties. However, since its two most influential in-group members, France and UK, were divided on the need for military intervention, the US did not face as many social and material costs for the intervention as it would have done without the UK’s support. What is more, there was a possibility to *ex post* legitimate the contested claim that military action was necessary by finding WMDs in Iraq. Support from the US public for the intervention further reduced the cost of dissent from part of the US’s and UK’s in-group. These factors reduced the social pressure and thus lowered the incentive for the US and UK to continue to rely on inspections.

The great lengths that the US went to to secure the support of one in-group member, the UK, by going down the UN route, shows that states value the support of their in-group

⁵⁹⁸ UNSC Doc. S/PV.4714. 2003, 5.

⁵⁹⁹ Ibid., 14-17 (Powell) and 25-27 (Straw).

⁶⁰⁰ UNSC Doc. S/PV.4714. 2003, 18.

for norm interpretations. The UK, in turn, insisted on the UN route to convince the British public and Labour Party, and “cooperation on the part of Paris was seen as vital in also securing possible (moral) support at the supranational (UN) level.”⁶⁰¹ However, France’s reluctance to approve a clearer authorization of military action after significant efforts to secure its vote did not deter military intervention. While this shows that states care about the opinion of their in-group and put effort into swaying it in their favor, they do not necessarily give up their contested claim when some in-group states continue to disagree. Two factors reduced the influence of dissent from in-group states: first, support from domestic audiences for the intervention, and second, the potential to *ex post* prove the output legitimacy of the intervention by finding large arsenals of WMD.

As we have seen in chapter 3, the pressure on the US to change its interpretation of the prohibition of torture was the greatest when both domestic audiences and in-group states voiced their objections. Here, the Bush administration was under less pressure because domestic audiences came to support military intervention. Roughly 60% of Americans favored military action in January and February 2003 before the decision to intervene was taken – a figure that rose to 72% short after the intervention had started in March 2003.⁶⁰² Furthermore, the most important in-group members did not have the same position on the intervention: the UK and France, critical in-group members due to their UNSC veto, disagreed on the claim.

An additional factor that reduced the social costs of in-group support was the potential to legitimate the intervention *ex post* by finding large arsenals of WMD. Even though the inspectors could not find conclusive evidence of WMD programs before the intervention, the UK remained confident that they would find evidence in the aftermath. Roughly two weeks after the intervention, Tony Blair told reporters that he has “absolutely no doubt that weapons of mass destruction will be found.”⁶⁰³ Roe argues that Blair believed that the British public, which opposed the Iraq war, would get behind the troops once the war started, and concludes that when there is some agreement on the threat (and thus on the frame), “potential damage done to governments can be limited through a successful

⁶⁰¹ Roe 2008, 628.

⁶⁰² Jones 2003. February 28; Newport 2003. March 24.

⁶⁰³ BBC Monitoring Europe 2003. April 7.

military campaign.”⁶⁰⁴ The effectiveness of military actions in counteracting a threat, and at the very least not contradicting its existence, is an essential aspect of output legitimacy.⁶⁰⁵

Hence, this observation further illustrates the importance of output legitimacy: though key audiences—in-group member France and/or domestic constituencies—disagreed with the claim, the US and UK followed through with military action because they believed that the success of their action would *ex post* legitimate it. There is some indication that France would indeed have changed its mind had there been large arsenals of chemical and biological weapons in Iraq. French ambassador, Jean-David Levitte told CNN right before the intervention that France “could assist an American-led military coalition if Iraq used biological or chemical weapons against United States troops.”⁶⁰⁶ Thus, the lack of sufficient social pressure on the US and UK to continue to resort to inspections rather than to military force made it more difficult for UNMOVIC and the IAEA to manage norm contestation.

Conduct of agents

Given this uncertain environment and the lack of sufficient social pressure, the cautious and shifting messages, in particular from Hans Blix, were not conducive to communicating the output legitimacy of the inspection regime to UNSC principals. When it became clear that providing tangible evidence of WMD was difficult, Blair, among others, “set out the position that the inspections should be given sufficient time to determine whether or not Saddam Hussein was co-operating fully. If he was not, that would be a sufficient reason for military action. A find of WMD was not required.”⁶⁰⁷ Since Saddam Hussein’s regime was built on deception, it was not necessarily easier to determine the extent of its cooperation. UNMOVIC’s and IAEA’s briefings provided information on whether Iraq followed the UNSC’s instructions in Resolution 1441 (2002) “to “cooperate immediately, unconditionally, and actively with UNMOVIC and IAEA”. The debate centered around Blix’s briefings on biological and chemical weapons since

⁶⁰⁴ Roe 2008, 631.

⁶⁰⁵ Hurrell 2005.

⁶⁰⁶ Bumiller 2003. March 19.

⁶⁰⁷ Iraq Inquiry Committee 2016a. Executive Summary, 23 para 154.

the IAEA had already been close to declaring Iraq free of nuclear weapons in 1998. ElBaradei had made clear early on that the inspectors had found no evidence to the contrary and “should be able within the next few months to provide credible assurances that Iraq has no nuclear weapons programme.”⁶⁰⁸

In order to secure the cooperation of Iraq, open criticism in the Security Council was the inspectors’ main tool to shame Iraq into compliance. As Blix states “this was our weapon, to report to the Security Council, ‘This is what they are doing’.”⁶⁰⁹ However, such open criticism was a double-edged sword, as it also risked giving the impression to Security Council members that inspections were not effective in securing cooperation and disarmament. This is exactly what happened after Hans Blix criticized Iraq’s lack of cooperation in no uncertain terms in his first report to the Security Council on 27 January 2002: “Iraq appears not to have come to the genuine acceptance – not even today – of the disarmament that was demanded of it and that it needs to carry out to win the confidence of the world and to live in peace.”⁶¹⁰ The US and UK saw this finding as confirmation of their views that Iraq was unwilling to cooperate and that military action was necessary.

In his second and third briefings to the Security Council on 14 February 2003 and 7 March 2003, Blix stressed that “there had been an acceleration of initiatives from the Iraqi side since the end of January”⁶¹¹ and detailed many areas in which progress had been made. For instance, the discovery and destruction of missiles that exceeded the permissible range of 150 kilometers. However, those who favored military intervention still referred back to the first critical briefing as evidence of Iraq’s lack of cooperation. UK Foreign Minister Straw remarked, “they have lied; they have concealed; they have played games – the game of catch as catch can, as Mr. Blix told us on 27 January.”⁶¹²

Hans Blix admitted regrets about this initial harsh statement:

evidently I wanted inspections to continue, and if there was anything today I would have liked to change, perhaps some formulations in the statement on 26 and 27 January 2002, when I said that the Iraqis seem not even today to

⁶⁰⁸ UNSC Doc. S/PV.4692. 2003, 12.

⁶⁰⁹ Blix 2010, 100.

⁶¹⁰ Blix: UNSC Doc. S/PV.4692. 2003, 3.

⁶¹¹ Blix: UNSC Doc. S/PV.4714. 2003, 5.

⁶¹² Straw: UNSC Doc. S/PV.4707, 17.

have come to terms with the idea of disarmament. That was fairly harsh. The only ulterior motive I had was to pressure the Iraqis and to warn them.⁶¹³

Hence, the need to both exercise pressure on Iraq to cooperate and to show the effectiveness of the inspections regime to the principals presented a conundrum for UNMOVIC when Iraq did not cooperate sufficiently at the outset. While the criticism led to better cooperation from Iraq, it did not help to convince key members of the Security Council of the inspection regime. Hans Blix tried to counteract this impression in private conversations with Tony Blair and Condoleezza Rice. He stated repeatedly and is often quoted as having remarked that “perhaps there was not much WMD in Iraq after all” and that “it would be paradoxical and absurd if 250,000 men were to invade Iraq and find very little.”⁶¹⁴

Blix’s warning turned out to come true. It also speaks to the finding that UNSC members are expected to show the output legitimacy of any military action they take. In fact, the intervenors’ failure to find large arsenals of WMD validated the claim of those who opposed military intervention and favored inspections and diplomacy. They could *ex post* show the output legitimacy of their claim and thus inflict reputational costs on the US and UK. Curiously those who had disagreed with military action, particularly in-group members France and Germany, did not very openly criticize the US and UK after the intervention but rather struck a conciliatory tone.⁶¹⁵ The lack of evidence for WMD and difficulties in reconstructing Iraq lowered domestic and international support for the Iraq war.⁶¹⁶ Hence, France and Germany did not have to further strain the relationship with their in-group members for the US and UK to incur costs and to learn their lessons. The US and UK indeed seem to have done so, at least for a while. One important consequence of the Iraq war was that the Obama administration relied on stronger inspections by the IAEA in its nuclear deal with Iran.⁶¹⁷ Furthermore, opinion polls indicate that the US public now places greater importance on a UNSC mandate when deciding whether to support military intervention.⁶¹⁸

⁶¹³ Blix 2010, 80-81.

⁶¹⁴ Iraq Inquiry Committee 2016a. Executive Summary, 24-25 para 168; Blix 2010, 43.

⁶¹⁵ CNN 2003. June 3; Deutsche Welle 2004. March 20.

⁶¹⁶ See, for example, the following Gallup poll on changes in US public opinion on the Iraq war: Gallup 2019. June 1. From 2005 onwards, a slight majority of survey respondents has considered the Iraq War a mistake.

⁶¹⁷ Dahl 2017. November 14; Tierney 2008, 308.

⁶¹⁸ Tierney 2008, 309.

In sum, several factors contributed to the paradoxical outcome that despite the agent's successful verification, the UNSC members could not agree to continue to rely on inspections and resolve norm contestation. The weapons inspectors could not sufficiently communicate the output legitimacy of their work as pre-conceptions are hard to override in conditions of uncertainty, there was not sufficient social pressure in support of inspections, and they had to communicate different things to different audiences.

4.2 Contestation over the Ombudsperson mechanism

Similar to the UN weapons inspectors, the Ombudspersons faced several pressures: Part of the UNSC's concerns regarding the Ombudsperson mechanism and due process rights stem from security concerns. To prevent terror attacks, the UNSC does not want delisting decisions, and the sharing of the (confidential) information they are based on, to be taken lightly. As second Ombudsperson, Catherine Marchi-Uhel, states, "this is a difficult area, sensitive, where you try to find a balance between security interests and fairness, and that's not an easy thing to do."⁶¹⁹ While there have been ups and downs in the delegation relationship, the Ombudspersons have handled these pressures well. Social pressures on UNSC members to rely on the agent due to the justiciability of due process rights and greater certainty in evaluating the output legitimacy of the Ombudsperson mechanism meant that the Ombudspersons faced a more favorable problem-structure for managing contestation than the weapons inspectors. The Ombudspersons have seized this opportunity and the mechanism continues to operate to this day.

Even after the litigation pressure from the European Courts broke away, the threat that rights-holders may choose to go to court rather than to the Ombudsperson, puts pressure on the UNSC to grant the Ombudsperson the necessary autonomy to exercise her mandate. For the Ombudsperson mechanism to be an alternative to going to court, it cannot be a fig leaf; listed individuals have to perceive it as fair and use it. It is of interest to Security Council members that rights-holders use the Ombudsperson mechanism rather

⁶¹⁹ Phone Interview with the second Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee Catherine Marchi-Uhel (27 July 2015 – 7 August 2017), 17 August 2018.

than courts to invoke their due process rights. Because the UNSC designed the Ombudsperson mechanism, this form of quasi-judicial review undermines the Council's authority less than external judicial review and UNSC members have more control over the process. Thus, rights-holders' quest for due process is an important check and balance to security concerns that puts pressure on the UNSC to maintain due process. What is more, it is relatively straightforward to get information on the performance of the Ombudspersons. Statistics on pending cases before courts and the Ombudsperson are readily available. Hence, UNSC members are able to evaluate with greater certainty whether the Ombudspersons effectively implement their mandate. Moreover, the Ombudspersons have built a reputation for the mechanism as credible and effective, which has convinced listed individuals to use the mechanism. As a result, the litigation pressure from regional and national courts has disappeared.⁶²⁰ The disappearance of legal challenges, in turn, improves the functioning and effectiveness of the targeted sanctions regime, which satisfies the principal.

Thus, as I will show in greater detail in the following, the greater certainty in evaluating the output legitimacy of delegation, social pressure on the UNSC due to the justiciability of due process rights as well as the conduct of the Ombudspersons have contributed to the longevity of norm recognition and of the delegation relationship. The analysis covers the time period up until 24 May 2018. I focus on the first two Ombudspersons, Kimberly Prost and Catherine Marchi-Uhel. The appointment of the third Ombudsperson, Daniel Kipfer Fasciati, on 24 May 2018, came too late to incorporate a meaningful analysis of his time in office into this project.

Certainty about output legitimacy

The Ombudsperson process appeals to the rights-holders and has diminished the litigation pressure, thereby fulfilling the purpose the UNSC had intended it for, despite the ECJ's lack of recognition. Information on the effectiveness of the Ombudsperson mechanism is readily available: since its establishment, the Office of the Ombudsperson has received 81 delisting requests, of which it completed 74, resulting in 17 retentions and 57 de-

⁶²⁰ Cockayne, Brubaker, and Jayakody 2018.

listings.⁶²¹ In comparison, in the same timeframe (2010-2018), domestic and regional courts only concluded 17 cases on the Islamic State of Iraq and the Levant (ISIL) and Al-Qaida sanctions regime,⁶²² some of which petitioners may have filed before the Ombudsperson's establishment, and three are still ongoing.⁶²³

What has made the Ombudsperson mechanism so effective? Certain design features of the mechanism as well as the criminal law background of the Ombudspersons helped to attract cases. In the words of the first Ombudsperson, Kimberly Prost, "I think everyone agrees, the amount of litigation on 1267 has just disappeared. I mean there is maybe one or two cases, but it's basically gone because the process is fast, it's efficient, and people just opt for it."⁶²⁴

As Kimberly Prost mentions, certain design features have given this mechanism credibility and output legitimacy. The process is fast and user-friendly in comparison to court proceedings. The possible timeframe from submission to the sanctions committee's decision ranges between 8 and 14 months and lasts nine months on average.⁶²⁵ In comparison, Mr Kadi's court proceedings with the ECJ took 12 years to conclude. In fact, Yassin Kadi was delisted through the Ombudsperson mechanism before the court proceeding concluded in October 2012. Further, petitioners do not require counsel to present a petition, and half of the petitioners have opted for the process without legal representation.⁶²⁶ Moreover, the reverse consensus rule gives the Ombudsperson's recommendations weight and lends credibility to the mechanism. Since the Ombudsperson needs to gain the trust of audiences with different preferences, what profile the Ombudsperson, appointed by the Secretary-General, has also contributes to the ability to attract cases and to make the judgments credible. Kimberly Prost states that her criminal law background convinced those states who were not so keen on the mechanism because it reassured them that she would understand the security aspect and

⁶²¹ UNSC Doc. S/2018/570. 2018. August 8. Fifteenth Report of the Ombudsperson, para 8-11.

⁶²² The UNSC removed the Taliban from Ombudsperson procedure in 2011, to facilitate the political peace process in Afghanistan, and added ISIL in 2015.

⁶²³ Cockayne, Brubaker, and Jayakody 2018, 39-42.

⁶²⁴ Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018.

⁶²⁵ UNSC Doc. S/2014/73. 2014. January 31. Seventh Report of the Ombudsperson, para 38.

⁶²⁶ UNSC Doc. S/2018/120. 2018. February 14. Update of the Office of the Ombudsperson, para 9. All reports from the Office of the Ombudsperson are available at: <https://www.un.org/securitycouncil/ombudsperson/reports> (accessed 1 June 2019).

look at criminal conduct. Someone with a human rights background may have struggled more to gain the confidence of states. Further, the legal background, particularly the judicial and prosecutorial experience that both she and Catherine Marchi-Uhel had, also convinced litigants, like Yassin Kadi, “that this is not someone that is just trying to make a compromise.”⁶²⁷ Notably, Daniel Kipfer Fasciati also worked as a criminal law judge beforehand.⁶²⁸

Social pressure

As discussed earlier, the litigation pressure from the European Courts led to the establishment and strengthening of the Ombudsperson Office. In particular, the UNSC’s decision to introduce the reverse consensus rule to satisfy the ECJ’s demand of an independent review mechanism improved the credibility and effectiveness of the Ombudsperson mechanism. The reverse consensus means that the Ombudsperson only needs the support of one sanctions committee, and thus UNSC, member for her recommendation on (de)listing to stand. Since before 2011, all sanctions committee members had to reach a consensus on (de)listing, this rule change significantly increased the independence of the Ombudsperson, while not wholly superseding the Council prerogative. Kimberly Prost credits this rule change for the persistence of the mechanism and her ability to attract cases: “If I had been unable to delist people when there were circumstances where one or two countries objected, then nobody would have come to the Ombudsperson.”⁶²⁹

Scholars and decision-makers concur that the pressure flowing from the *Kadi* case was the crucial impetus that facilitated this sea-change.⁶³⁰ ECJ Advocate General Bot also attributes the improvements that the UNSC made to the Ombudsperson mechanism to the external pressure from the European Courts: “[t]he judgment of the Court of Justice in

⁶²⁷ Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018.

⁶²⁸ Swiss Federal Department of Foreign Affairs. 2018. May 31.

⁶²⁹ Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018.

⁶³⁰ Phone Interview with Stefan Barriga, Legal Advisor and Deputy Permanent Representative to the Permanent Mission of the Principality of Liechtenstein to the United Nations (2002-2016), 3 May 2018; Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018; Phone Interview with Mark Lyall Grant, UK Permanent Representative to the United Nations (2009-2015), 16 May 2018.

Kadi led to the establishment of the Office of the Ombudsperson, which has made it possible to raise the quality of the list considerably. It would be paradoxical if the Court failed to take account of the improvements to which it has directly contributed.”⁶³¹

Fears that Council members may have decided to scale back some powers of the Ombudsperson after the ECJ’s *Kadi II* verdict also speaks to the importance of the pressure from the European Courts. Recall that in *Kadi II* the ECJ did not agree with the claim that the Ombudsperson mechanism sufficiently safeguards due process in spite of the UNSC strengthening the Ombudsperson mechanism with the reverse consensus rule and other measures. Former Ombudsperson Kimberly Prost noted that “even the most supportive countries said, these guys don’t care what we do, so why should we bother doing anything further... that original case was a big motivator and that second case became a became demotivator...”⁶³² When it comes to the Ombudsperson mechanism, the Council has to make the active decision to extend the mandate roughly every one and a half years.⁶³³ Several diplomats recall that there was a risk of backlash. Stefan Barriga reported that “after the Ombudsperson got her extended powers, I think not much has happened anymore afterwards, but at the same time, the Ombudsperson also hasn’t been ended. There was a danger, if I remember well, that they could be back-tracking on existing powers...”⁶³⁴ Former coordinator of the Al-Qaida Sanctions Monitoring Team, Richard Barrett, shared this impression: “There was opposition to the Ombudsperson. And I think the Ombudsperson wouldn’t have been doing her job very well if there had never been any opposition to what she was doing. And indeed, I think that at one point, there was some discussion of maybe not renewing her mandate. Because I think that her mandate was for a fixed term.”⁶³⁵

However, the Ombudsperson is still in operation and the claim disagreement between the UNSC and the ECJ on whether the Ombudsperson mechanism sufficiently safeguards due process rights or if an independent court is needed continues. Because of the

⁶³¹ European Advocate General 2012. March 19, para 83.

⁶³² Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018.

⁶³³ See, for example, UNSC S/RES/1904 (2009), para 20; UNSC S/RES/1989 (2011).

⁶³⁴ Phone Interview with Stefan Barriga, Legal Advisor and Deputy Permanent Representative to the Permanent Mission of the Principality of Liechtenstein to the United Nations (2002-2016), 3 May 2018.

⁶³⁵ Phone Interview with Richard Barrett, Coordinator of the Al-Qaida Sanctions Monitoring Team, 4 June 2018.

justiciability of due process rights, what matters is which mechanism the rights-holders, that is the terror suspects on the 1267 sanctions list, decide to use. Hence, the litigation pressure from listed individuals provides an important check and balance. In fact, one of the first Ombudsperson's initial concerns was whether listed individuals and entities would use the mechanism. As a result, she actively tried to attract cases: to achieve this, she established a website for the office, sent out notice letter to possible addresses of listed persons and enlisted the help of states to inform their citizens and encourage applications.⁶³⁶ The large number of cases of the Ombudspersons in comparison to European Courts indicate that the appeal of the mechanism to listed individuals is what has sustained it. The rights-holders' use of the mechanism has given it output legitimacy, and thus makes the UNSC willing to prolong and support it.

Despite of evidence of the output legitimacy of the Ombudsperson mechanism and social pressure from rights-holders to maintain the mechanism, the UNSC's contradictory preferences sometimes have stalled progress on due process: as delisting the wrong person carries serious security risks, the UNSC does not take delisting requests lightly. On the other hand, states not being able to implement the sanctions list because their courts find that the UNSC does not safeguard due process would also jeopardize the sanctions regime. Hence, while due process has to be strengthened to reduce litigation pressure and to ensure the effectiveness of the sanctions, it also implies less control over security issues for Council members. Though the Ombudsperson mechanism generally has done well over the years, we at times see some setbacks as the analysis of the contribution that the Ombudspersons themselves made to the persistence of norm recognition through their conduct shows.

Conduct of the agents

The post-holders of the Office of the Ombudsperson have developed a reputation for the mechanism as credible and effective through their work and outreach, which has given it legitimacy.⁶³⁷ In particular, the Ombudspersons' public reports to the Security Council

⁶³⁶ Prost 2015. March 20.

⁶³⁷ All interviewees, who closely followed the development of the Ombudsperson, stated that the two Ombudspersons' work and advocacy have been crucial to the success of the mechanism. Interview with US diplomat, New York, 6 October 2017; Phone Interview with Stefan Barriga, Legal Advisor and Deputy Permanent Representative to the Permanent Mission of the Principality of Liechtenstein to the United Nations (2002-2016), 3 May 2018; Phone Interview with Mark Lyall Grant, UK Permanent Representative at the UN (2009-2015), 16 May 2018 and with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018.

have contributed to the reputation of the office as independent and trustworthy and helped to mobilize like-minded actors to pressure the Security Council to maintain or further improve due process. The reports helped to reach out to key audiences and to overcome the lack of salience of the issue in public discourse.

Safeguarding due process rights of terror suspects is not a human rights issue that sells or attracts the attention of essential nodes in advocacy networks. Carpenter finds that these two aspects are the main reasons that prevent norms from catching on.⁶³⁸ As Jörn Eiermann, former legal advisor of the Permanent Mission of the Principality of Liechtenstein to the United Nations, put it, “it’s not exactly the issue where NGOs like human rights watch or others are jumping on, because it is more something technocratic and the average person doesn’t understand what sanctions are, what an Ombudsperson is, and what an Ombudsperson does”.⁶³⁹

Hence, finding a way to raise awareness and to spread information, particularly to those who supported the mechanism, was key for successful naming and shaming. One tool the Ombudspersons have relied on heavily to do so are the biannual reports to the Security Council on their activities, which they publish on their website:

I used very much, and I think my successor, Catherine, did as well, I used my six months reports to the Security Council to very publicly highlight any issues. Even though, you know, the mandate to do that report was more, I think, meant to be more technical, but to me, that was my one key political advantage, where I could publicly identify these issues. So, I used this very much as tool... that's a way that I could reach a broader audience because those reports were read by civil society, academics, the broader membership of the UN, the like-minded would have access to that.⁶⁴⁰

In these reports, the Ombudspersons describe their work and progress made. However, they also very frankly and publicly highlight outstanding issues that should be improved to guarantee the fairness of the process. The Ombudspersons thereby communicate their concern for due process rights to petitioners and mobilize like-minded audiences to put the Security Council under pressure to make improvements. Several diplomats of like-minded states on targeted sanctions, a relevant audience, mentioned that in their view the

⁶³⁸ Carpenter 2014.

⁶³⁹ Phone Interview with Jörn Eiermann, Legal Advisor, Permanent Mission of the Principality of Liechtenstein to the United Nations in New York (2011-2018), 8 May 2018.

⁶⁴⁰ Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018.

Ombudspersons' outreach activities, particularly the reports, successfully raised awareness among the UN membership. The reports are an essential source of information for their advocacy⁶⁴¹ and provide a public reference point and expose those that are reluctant to make changes, like the Secretariat or the UNSC.⁶⁴²

Second Ombudsperson, Catherine Marchi-Uhel, recalls that the reports were also an important advocacy tool vis-à-vis Security Council members:

While the Ombudsperson's reports to the Sanctions Committee in individual cases are not public and the Committee's consideration of their recommendations are held behind closed doors, the Ombudsperson's reports to the Security Council are public, and members of the Security Council happen to be the same states as in the Sanctions Committee. Reports to the Security Council offer an opportunity to state the position of the Ombudsperson on issues of principle, such as the guarantee of the independence of the Office. These reports also permit to continue engaging with the States on issues such as fairness to petitioners as part of the process. While a specific issue may have arisen in the context of a case whose details cannot be disclosed publicly, the principle issue at stake can be addressed in the reports to the Security Council ... then it is actually a good way to continue to engage with the states on this.⁶⁴³

A content analysis of the fourteen reports of Kimberly Prost and Catherine Marchi-Uhel to the Security Council and the Update from the Office of the Ombudsperson shows that these public reports had tangible effects: suggestions from the reports were picked up by the UNSC. However, compromises also often had to be made, and the UNSC has not addressed all the issues that the Ombudspersons raise in their reports.

For example, in several of their reports to the Security Council, the Ombudspersons criticize that the process is unnecessarily "shrouded in mystery"⁶⁴⁴. The Ombudspersons see the confidentiality of the comprehensive report to the sanctions committee that details their findings and recommendations on a case as an obstacle to transparency, fairness and cooperation. While the UNSC did not consent to the release of the comprehensive report

⁶⁴¹ Phone Interview with Jörn Eiermann, Legal Advisor, Permanent Mission of the Principality of Liechtenstein to the United Nations in New York (2011-2018), 8 May 2018.

⁶⁴² Phone Interview with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018.

⁶⁴³ Phone Interview with the second Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee Catherine Marchi-Uhel (27 July 2015 – 7 August 2017), 17 August 2018.

⁶⁴⁴ UNSC Doc S/2015/80. 2015. February 2. Ninth Report of the Ombudsperson, para 41; UNSC Doc. S/2015/533. 2015. July 14. Tenth Report of the Ombudsperson, para 40, UNSC Doc S/2016/96. 2016. February 2, Eleventh Report of the Ombudsperson, para 52.

to petitioners due to security concerns, it did approve that the sanctions committee provides reasons for its decisions.⁶⁴⁵ In terms of due process, this is particularly important when it comes to retention cases as it gives petitioners an opportunity to learn what they need to do for their delisting to be approved in the future. Reasons letters include a summary that the Ombudsperson writes of her comprehensive report on an individual case that details the reasons for her (de)listing decision. Before they are shared with the petitioner, the sanctions committee has to approve the letters and scrutinizes them to ensure no confidential information is included. A content analysis of the Ombudspersons' reports to the Security Council shows that the UNSC and Ombudspersons have often been at odds on how this process should be handled and what those reasons letters should contain.

The committee at first was not very forthcoming in approving and communicating these reasons promptly to petitioners. Hence, the Ombudsperson recommended that either she should provide and communicate these reasons to avoid delays and discrepancy between her comprehensive report and the reasons or that the UNSC should impose time constraints for the delivery of reasons as a partial solution.⁶⁴⁶ Subsequently, the Security Council resolution 2161 (2014) then provided for a 60-day deadline for transmitting reasons. While this deadline made the process timelier, the Ombudsperson reported that it reduced the substance and analytical quality of the reports.⁶⁴⁷ After criticism and shaming the sanctions committee in several of her public reports to the UNSC, Marchi-Uhel reports a positive trend towards the inclusion of substantial excerpts from the analysis in the comprehensive reports in the reasons provided to petitioners of both retention and delisting cases. This positive trend lasted for roughly one year before a setback occurred.⁶⁴⁸

According to one official, Russia started to block the provision of more extensive reasons and to impose arbitrary page limits. Russian officials voiced concern that if a terror suspect was retained on the list, and would receive extensive reasons, then they could

⁶⁴⁵ UNSC S/RES/2083 (2012).

⁶⁴⁶ UNSC Doc. S/2014/73. 2014. January 31. Seventh Report of the Ombudsperson, paras 39–48.

⁶⁴⁷ UNSC Doc S/2015/80. 2015. February 2. Ninth Report of the Ombudsperson, para 43.

⁶⁴⁸ UNSC Doc S/2016/96. 2016. February 2, Eleventh Report of the Ombudsperson, para 41, and UNSC Doc. S/2016/671. 2016. August 1. Twelfth Report of the Ombudsperson, para 30.

learn what to do to get delisted and could fake their deradicalization.⁶⁴⁹ These concerns reflect a markedly different understanding and prioritization of due process rights and security concerns, as well as a lack of trust in the Ombudsperson to identify genuine disassociation. Perhaps in response to these concerns, the Ombudsperson in her thirteenth report explains in detail that “the practice of transmitting extensive reasons may be beneficial in encouraging and guiding the disassociation process undertaken by certain petitioners.”⁶⁵⁰ She notes that the Ombudsperson, which petitioners perceive as authority, can facilitate deradicalization in retention cases by informing petitioners about any additional steps necessary to complete the disassociation process. The Ombudsperson then goes on to list several of these criteria, thereby giving some indication to petitioners.⁶⁵¹

Catherine Marchi-Uhel confirms that the reports were an important tool for her to increase transparency and to persuade the Security Council to approve the provision of more extensive reasons letters:

As part of my legacy, I’ve tried to include as much in my public reports as I could on the process and give visibility as to why it is important for petitioners to be given reasons... why in a number of instances there is really no reason why you would not share relevant parts of the reasoning as long as no security interest is at stake. I’ve also, for instance, explained ... the benefit of giving reasons in cases of retention which would actually place the petitioner on the right track... If this person has no idea of the basis on which the retention has been made, how can he/she really use his/her right to make a new petition with some chance of success?⁶⁵²

The dispute over the provision of reasons shows that (some) UNSC members’ security concerns at times have led to due process elements such as transparency and fairness not being as fully realized as the Ombudspersons would have wanted. The Ombudspersons found their public reports to be an important tool to persuade and pressure UNSC members, and to provide more transparency to petitioners and thereby contribute to due process.

⁶⁴⁹ Phone Interview with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018.

⁶⁵⁰ UNSC Doc. S/2017.60. 2017. January 23. Thirteenth Report of the Ombudsperson, para 30.

⁶⁵¹ Ibid., para 30-33.

⁶⁵² Phone Interview with the second Ombudsperson to the ISIL (Da’esh) and Al-Qaida Sanctions Committee Catherine Marchi-Uhel (27 July 2015 – 7 August 2017), 17 August 2018.

To further increase the transparency of the criteria they apply, Prost published statements on the review standard and assessment of information, which Marchi-Uhel updated and expanded by providing information on the Office of the Ombudsperson's approaches to inference and to analysis of association and disassociation.⁶⁵³ All of these documents are available on the website of the Office of the Ombudsperson. Catherine Marchi-Uhel describes the publication of the approach to assessment of information on the website as

something that is really a step forward. my predecessor had already published some guidance but going into less details And of course, an easy way out would have been to say we can't do anything because we can't share the reports and therefore we can't share any information that could potentially be associated with them. Or you actually look at it from the point of view, well I can't share any specifics but maybe I can share some of the approaches, and if I do that, how do I do that in a way that is acceptable to the committee.⁶⁵⁴

Marchi-Uhel's statement shows that she sought to find ways to improve due process but was also aware that the principal's support is important for these improvements to persist. Marchi-Uhel stated that being open with the committee as to approaches on outreach helped to make this important step forward. While not as detailed as case law, the Ombudspersons therefore found a way to address the reluctance of the UNSC and to improve transparency vis-à-vis the broader public and the petitioner. Greater transparency increases credibility and fairness. Hence, these activities have contributed to building a reputation of the Ombudsperson mechanism as credible and effective.

Furthermore, with help from supportive states on the Security Council, paragraph 16 of annex II to UNSC resolution 2368 (2017) included the language proposed by the Ombudsperson on the provision of reasons.⁶⁵⁵ The resolution provides for the Ombudsperson to submit a summary of her comprehensive report that accurately reflects the principal reasons for her recommendation to the sanctions committee. The sanctions committee then reviews the summary to address security concerns such as to corroborate the exclusion of confidential information. This language was introduced to prevent "cuts so as not to exceed a set number of pages" and to guarantee that the sanctions committee would not omit key arguments, which would be an intrusion into the Ombudsperson's

⁶⁵³ UNSC Doc S/2016/96. 2016. February 2, Eleventh Report of the Ombudsperson, para. 36.

⁶⁵⁴ Phone Interview with the second Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee Catherine Marchi-Uhel (27 July 2015 – 7 August 2017), 17 August 2018.

⁶⁵⁵ Phone Interview with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018; UNSC Doc. S/2017/685. 2017. August 7. Fourteenth Report of the Ombudsperson, para 25.

independence.⁶⁵⁶ The verdict is still out whether the formalization of these requirements will have an impact. The legal officer notes some improvements in her 2018 update, but also the omission of a key argument in one case.⁶⁵⁷ The official mentioned above stated that Russia announced that it would disregard any language in the resolution.⁶⁵⁸ It remains to be seen how the new Ombudsperson interprets and advocates for the requirement to provide reasons.

While generally progress has been made on issues such as the transparency of the process, this progress has not been linear, reflecting the, at times, complicated relationship with the Security Council and Secretariat. According to Kimberly Prost, once she could not rely on the *Kadi* case anymore as driving force, she shifted her argumentation strategy towards “there being bigger principles at play: credibility of the Security Council, effectiveness of the sanctions”.⁶⁵⁹ This argumentation strategy confirms the importance of linking norms that are not shared by all parties to output legitimacy, that is the impact and effectiveness of sanctions. The fact that there is an agent that seeks to maintain and drive the due process mechanism forward has been crucial in keeping norm recognition alive. In Kimberly Prost’s words, “the fight continues, because as long as you have a strong Ombudsperson in there... well, you are an irritant, they sometimes just want to put you away. So, there is still room for improvement, although the European Court of Justice, is no longer of help to us.”⁶⁶⁰ While the UNSC has not been receptive to extending the Ombudsperson process to other targeted sanctions regimes without litigation pressure (although it is slowly accumulating), the Security Council has retained the Ombudsperson mechanism for the ISIL and Al-Qaida sanctions regime.⁶⁶¹

The Ombudspersons, by being an “irritant” thus have contributed to the output legitimacy of the mechanism, which appeals to key audiences, rights-holders and the Security Council. However, for the process to be effective, the principal has to give the agent autonomy. As the word “irritant” implies, the Ombudsperson irritates and inconveniences

⁶⁵⁶ UNSC Doc. S/2017/685. 2017. August 7. Fourteenth Report of the Ombudsperson, para. 27.

⁶⁵⁷ UNSC Doc. S/2018/120. 2018. February 14. Update of the Office of the Ombudsperson, para 25–26.

⁶⁵⁸ Phone Interview with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018.

⁶⁵⁹ Phone Interview with the first Ombudsperson to the Al-Qaida Sanctions Committee Kimberly Prost (14 July 2010 – 14 July 2015), 19 March 2018.

⁶⁶⁰ Ibid.

⁶⁶¹ Cockayne, Brubaker, and Jayakody 2018.

some UNSC members as they have to share information, justify their listings and decisions, amongst others. This seems to have contributed to some setbacks in terms of the Ombudsperson's autonomy. While there has been no undue interference in the process, it is noticeable that the threat of backlash has been greatest in (the lead up to) transition periods, from one Ombudsperson to the next. This pattern may indicate that tensions in the principal-agent relationship increase over time.

The contractual and administrative status of the Office was an explosive issue towards the end of Prost's tenure. Both Prost and Marchi-Uhel stated that *de facto* no interference resulted from these contractual terms, which amongst others stipulated a performance review and prevented them from participating in hiring decisions of staff. Some informal improvements to these terms were made later.⁶⁶² However, they did lead to practical inconveniences. Prost seemed most worried about the Secretariat's insistence on the five-year limitation of her consultancy contract and the UNSC's reluctance to grant a two-week extension to her contract to ensure a smooth handover. In her ninth report to the Security Council, she wrote that "it raises issues as to its autonomy if it can be rendered non-functional by actions of the Secretariat in circumstances where that result was foreseeable and preventable."⁶⁶³ While the transition period does not seem to have been negatively affected,⁶⁶⁴ the inability to reach a compromise on this administrative issue, which seems relatively minor, shows that towards the end of Prost's tenure tensions ran high.

The last year of Catherine Marchi-Uhel's tenure and the transition period reflect even more that greater autonomy can be a double-edged sword. The setback to the positive trend on reasons coincided with the European General Court's *Al Ghabra* judgment that implied that petitioners should resort to the Ombudsperson mechanism as a first remedy, indicating rapprochement of the European Courts on the claim. She noted that "[i]t would also be ironic that such a setback would occur at a time when the perception that regional and domestic courts have of the mechanism is starting to improve."⁶⁶⁵

⁶⁶² See reported difficulties and improvements in the Seventh to Fourteenth Reports of the Ombudsperson.

⁶⁶³ UNSC Doc S/2015/80. 2015. February 2. Ninth Report of the Ombudsperson, para 82.

⁶⁶⁴ UNSC Doc S/2016/96. 2016. February 2, Eleventh Report of the Ombudsperson, para 33.

⁶⁶⁵ UNSC Doc. S/2017.60. 2017. January 23. Thirteenth Report of the Ombudsperson, para 30.

However, rather than an ironic coincidence, these at first sight contradictory trends reflect the contradictory preferences of the Security Council towards the Ombudsperson. While due process has to be strengthened to reduce litigation pressure and to ensure the effectiveness of the sanctions, it also implies less freedom of action for Council members. In fact, the lack of willingness to approve substantive reasons was not the only setback that occurred at the time. Catherine Marchi-Uhel reports that several states expressed concern that their opinions on delisting requests were not given full consideration, which she criticized as “misunderstanding of the role and independence of the Ombudsperson.”⁶⁶⁶ Most significantly, after Marchi-Uhel left her position to become the Head of the newly created Syria mechanism on 7 August 2017, the Office of the Ombudsperson remained vacant for ten months. As a result of divisions among UNSC members, which prevented consensus on her successor, Daniel Kipfer Fasciati was only appointed on 24 May 2018. The Secretary-General is only required to consult the Council when nominating the Ombudsperson and thus could have theoretically appointed a successor without Security Council approval.

There is speculation that the Secretary-General, in the political landscape of the time, did not want to risk his relationship with the Council over this issue, and that he may have been aware that the Ombudsperson required cooperation from the P5 regarding information-sharing on cases, for example.⁶⁶⁷ However, not only the Secretary-General but also Council members were reluctant to invest political capital into this issue. Some reported differences between the US and Russia over what background the Ombudsperson should have, but there was a general sense, that the lack of willingness from Council members to push for a solution was the actual reason for the deadlock. Next to the general tensions between the US and Russia, officials also pointed to Council members’ perception of the Ombudsperson and that not having an Ombudsperson may be convenient. One of them remarked, “we know that the Russians are trying to get at the Ombudsperson as they can. So, of course, that’s a perfect situation, when an Ombudsperson leaves.”⁶⁶⁸ The diplomat, however, notes in the same breath that the lack of an Ombudsperson may increase litigation pressure and come back to bite the

⁶⁶⁶ UNSC Doc. S/2017/685. 2017. August 7. Fourteenth Report of the Ombudsperson, para 33.

⁶⁶⁷ Phone Interviews with diplomats from the group of like-minded states on targeted sanctions, 8 May 2018 and 2 May 2018 B.

⁶⁶⁸ Phone Interview with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018.

Council.⁶⁶⁹ The justiciability of due process rights and the threat of litigation, I wager, also contributed to the breaking of the deadlock and the nomination of an Ombudsperson. It is not only what has sustained delegation and norm recognition, but also what contributes to both progress and sometimes setback in the advancement of due process rights in the context of targeted sanctions.

Thus, the contradictory trends that Marchi-Uhel observed in her report to the Security Council may not be a coincidence, but instead point to why the disagreement over the claim, and thus norm recognition, persists: two audiences, with different preferences, petitioners and UNSC members, have to perceive the mechanism as credible and legitimate. Petitioners have to use the Ombudsperson and the UNSC has to make the active decision to extend and collaborate with the mechanism. Hence, satisfaction with the Ombudsperson's work is key to keeping norm recognition alive.

5. Conclusion

This chapter provided insights into norm recognition by comparing the persistence and effects of norm recognition in the context of the 2003 Iraq war and the 1267 targeted sanctions regime. Regarding Iraq, Security Council members agreed on the ambiguous Resolution 1441 (2002) because the concern over the Iraqi threat was sufficiently shared to facilitate consensus on the frame. However, all sides believed that they could show the output legitimacy of their respective claim, namely that intervention or inspections would be better suited to tackle the Iraqi threat. Since norm clarification (frame and claim agreement) preceded this norm recognition (frame agreement/claim disagreement), the claim disagreement weakened the contested Chapter VII norms and reduced normative certainty.

Regarding due process rights in the context of the 1267 sanctions regime, the frame of the Security Council prerogative clashed with the due process frame. In response to pressure from the ECJ, the UNSC created an Ombudsperson mechanism with significant autonomy to provide an avenue for delisting. As the ECJ failed to recognize the Ombudsperson, and right-holders use both the courts and the Ombudsperson for delisting,

⁶⁶⁹ Ibid.

claim disagreement, despite agreement on the due process frame, persists. Since here a norm impasse (frame and claim disagreement) preceded norm recognition (frame agreement/claim disagreement), the frame agreement strengthened due process rights and normative certainty.

Further, I have shown that the delegation relationships between the UNSC and the Ombudsperson and between the UNSC and UN weapons inspectors influenced the duration of norm recognition. The delegation relationship played an important role in both cases because agents—weapons inspectors and the Office of the Ombudsperson—were tasked with tackling the norm contestation. A couple of factors made delegation more meaningful than delegation in other instances discussed in this study: first, the agreement of the UNSC members on the applicable norm frame reduced the range of claims that the agent could propose, and thus lowered the risk of unwanted norm interpretations and sovereignty costs. Second, in both cases specialist resources—knowledge on weapons and legal analysis—were required to lend credibility to the contested claims.

Differences in the problem-structure have made it easier for the Ombudspersons to show the output legitimacy of their work than for the UN weapons inspectors in Iraq: UNSC members faced greater social pressures to maintain the Ombudsperson mechanism, and it was easier for the Ombudspersons to provide evidence of the output legitimacy of their work. Regarding Iraq, the US did not face enough pressure from its in-group to rely on inspections because the two most critical in-group members due to their UNSC veto, France and UK, were divided on military intervention. Furthermore, the possibility to legitimate the contested military action *ex post* by finding WMDs in Iraq and support from the US public for the intervention further reduced the cost of dissent from parts of the US's and UK's in-group. The lack of social pressure lowered the incentive for the US and UK to continue to rely on inspections. Moreover, the uncertainty over the output legitimacy of the inspections was high, as the ease with which they can be concealed makes it difficult to rule out WMD possession. This uncertainty made it difficult for the inspectors to build a reputation as credible and effective as it increased the P5's reliance on pre-existing beliefs when interpreting the inspectors' reports. The cautious and shifting messages of Hans Blix also did not help with changing perceptions of the output legitimacy of the inspections.

When it comes to the Ombudsperson mechanism, in turn, tangible evidence of the output legitimacy of their work is readily available: statistics show that litigation has almost completely shifted to the Ombudsperson mechanism. The clear and consistent messaging of the Ombudspersons in their public reports to the UNSC to safeguard and strengthen due process as well as their outreach activities to attract more cases and their efforts to increase transparency have helped to build a reputation for the mechanism as credible and effective. The Office of the Ombudsperson, and thus norm recognition, persists to this day because of the social pressure that emanates from the justiciability of due process rights: the rights-holders can move their litigation elsewhere if they are no longer satisfied with the Ombudsperson mechanism. At the same time, it is unlikely that the UNSC would consent to independent judicial review that the ECJ demands because of concerns about the authority of the Council and about (inter)national security.

Chapter 5: Norm neglect: Claim agreement despite frame disagreement on the no-fly zone over Libya and maritime entitlements in the South China Sea

1. Introduction

In early 2011, the situation in Libya rapidly deteriorated. Protests and demonstrations that grew out of the Arab Spring soon led to government crackdowns and violent clashes between Libyan President Muammar Gaddafi's troops and rebel forces. When Gaddafi began to conduct and announce atrocities against civilians, the UNSC sprang into action.⁶⁷⁰ The P5 had often been deadlocked in the face of mass atrocities before. Russia's and China's emphasis of sovereignty and territorial integrity clashed with the idea of the UNSC's responsibility to protect populations from mass atrocities. Hence, when the UNSC agreed to establish a no-fly zone over Libya to protect civilians with Resolution 1973 (2011), some saw this as a sign that R2P is "alive and well."⁶⁷¹ However, a closer look at the justifications that the P5 provided and at Resolution 1973 reveals persistent disagreement over the norm frame that guided the claim agreement on the no-fly zone. We therefore see norm neglect rather than norm clarification. Consequently, almost as soon as Resolution 1973 was passed, contestation started again, as the ongoing disagreement over how to tackle the mass atrocities committed in Syria demonstrates.

We can observe similar dynamics in the dispute over maritime rights and entitlements in the South China Sea between the Philippines and China. Both countries lay claim to islands and rocks in the South China Sea such as Scarborough Shoal and Mischief Reef, as well as associated fishing grounds and energy resources. China refers to historic rights based on the "nine-dash line", whereas the Philippines argue that these territories fall within its EEZ under UNCLOS.⁶⁷² The norm impasse has led to tensions and stand-offs in the past. The Philippines brought this dispute to the Permanent Court of Arbitration (PCA). China refused to participate in the proceedings. The arbitral tribunal's ruling found in favor of the Philippines on almost all points. It found China's "nine-dash line" incompatible with UNCLOS and that China had unlawfully prevented the Philippines from accessing resources in its EEZ and continental shelf, and Filipino fishermen from

⁶⁷⁰ Bellamy and Williams 2011, 838.

⁶⁷¹ Weiss 2011, 287.

⁶⁷² Buszynski 2012, 140; Ortuoste 2013; Hebert 2018, 289-292.

accessing Scarborough Shoal.⁶⁷³ China angrily dismissed the verdict, but soon started to make some concessions on its claim and allowed Filipino fishermen to access Scarborough Shoal.⁶⁷⁴ The frame disagreement, however, persists, and the claim agreement on access to Scarborough Shoal has been volatile.

In sum, both are cases of long-standing disputes over the well-established sovereignty and territorial integrity norms and end with one dispute party making concessions on the claim, despite persistent disagreement on the frame. Whereas in the case of Libya the more powerful states (US, UK, and France) were the ones that secured concessions on their preferred claim, in the South China Sea dispute the Philippines, and thus the less powerful state, prevailed. Hence, differences in material power do not tell the full story of what led to norm neglect in these situations. This raises the questions: what explains claim agreement despite frame disagreement? And, what have the implications of norm neglect been?

I find that social dynamics played a significant role in bringing about those claim agreements. The request of LAS to establish a no-fly zone went a long way in persuading reluctant P5 to let Resolution 1973 pass. As a regional organization (RO) of the Global South, LAS forms part of China's and Russia's in-group. Thus, the LAS request exercised considerable social pressure on these UNSC members. Even though China only faced mild criticism from other states after the PCA's verdict, the clear victory of the Philippines spoke for itself and mobilized domestic constituencies in the Philippines. Since China's reputation suffered because of the verdict, the Philippines's decision to tone down its criticism and to instead find pragmatic solutions facilitated the compromise on Scarborough Shoal. Domestic pressures ensure that Philippine President Rodrigo Duterte keeps insisting on access to Scarborough Shoal. We soon see tensions over the implementation of the no-fly zone and access to Scarborough Shoal emerge, precisely because the dispute parties had not agreed on a normative basis for the claim agreement in either situation. Interestingly, despite this norm neglect, the claim agreements came with transformations of the contested norm frames. Since the "nine-dash line" failed to convince, China has started to make an effort to include more UNCLOS concepts as, for

⁶⁷³ Permanent Court of Arbitration. 2016. "Award."

⁶⁷⁴ Hayton 2017, 104-105.

example, the so-called “four sha” argument indicates. The blending of the concepts of R2P and PoC in Resolution 1973 also reflects the search for a more acceptable frame. Furthermore, it shows that the dispute parties prioritized finding a pragmatic solution to the situation in Libya over a norm-guided one. Hence, while these adapted—but still contested—frames indicate that states find it important to use the language of the law, they also show that in situations of norm neglect finding a situation-specific compromise tends to be more important than legal consistency.

I begin by providing an overview of the contested norms and the events that led to norm neglect in both cases. I show that the claim concessions have been volatile since there is no clear normative basis for them despite of the frames undergoing some transformations. I then conceptualize these changes in the justificatory discourse and the importance of in-group/out-group dynamics and explain why clear rulings of dispute-settlement bodies can help to keep an issue on the agenda and norm neglect alive. In the fourth section, I then draw on content analysis of official statements and elite interviews to illustrate these social influences. I show that in-group support for the no-fly zone over Libya played a decisive role in bringing about claim agreement and frame adaptation. In the context of the South China Sea, we can see that when there is clear evidence in favor of the norm interpretation of one party, rapprochement rather than criticism can help to generate claim concessions in the short-run but might diminish prospects for norm clarification in the long-run. Section five concludes.

2. Norm Neglect: Context, Contested Norms and Consequences

Norm neglect occurs when the contesting parties agree on the claim while continuing to disagree on the frame. This scenario is best described as norm neglect since normative uncertainty persists despite tangible action. Krebs and Jackson argue that the outcomes that involve acceptance of the claim are “(at least temporary) terminuses” that are “relatively stable outcomes in the short and medium run.”⁶⁷⁵ I contend that when it comes to norm contestation, frame agreement provides more stability because it signals normative commitment and narrows the range of claims that states consider appropriate. As we saw in chapter 4, the P5’s agreement on the frame that Iraq constituted a “threat to

⁶⁷⁵ Krebs and Jackson 2007, 44.

the peace” according to Article 39 UN Charter ruled out doing nothing. Norm recognition is a relatively stable outcome when neither claim blatantly contradicts the frame as the contestation over targeted sanctions demonstrated. The agreed-upon “due process”-frame could accommodate both the Ombudsperson mechanism, proposed by the UNSC, and the ECJ’s insistence on an independent court, and hence norm recognition persists to this day.

The opposite applies to norm neglect. The absence of a clear norm frame that guides the claim agreement renders this partial agreement more circumstantial. As claim agreement leads to joint actions, it is more visible than words. Hence, norm neglect is likely to require explanations from the action’s supporters when a similar situation arises in the future. This makes norm neglect an unstable outcome: it produces a temporary and partial consensus that can be explained away with reference to the situation-specific particularities because no commitment to a particular frame was made. The context, contested norms and consequences of the compromises on the no-fly zone over Libya and on access to Scarborough Shoal illustrate this volatility of norm neglect.

Before illustrating this volatility, it is important to note that norm neglect does not necessarily undermine the contested norm. Since norm neglect is a volatile outcome, the implications for the contested norm depend entirely on the dispute parties’ take-aways from their claim agreement. As discussed in chapter 1, the implementation of a hitherto contested claim may trigger socialization processes that can lead to frame agreement and thereby strengthen the norm. For instance, after some contestation, China’s implementation of the WHO’s claims helped to contain the SARS crisis and as a result made China agree to a strengthening of global health norms and of the WHO’s authority.⁶⁷⁶

In the two case studies in this chapter, which I selected in order to control for the role of material power, we do not see norm clarification as a result of norm neglect. After the no-fly zone over Libya, the debate over whether R2P has a higher priority than sovereignty and over how to react to situations of mass atrocities has returned to a norm impasse as the subsequent contestation over humanitarian intervention in Syria shows. The

⁶⁷⁶ Huang 2010; Kreuder-Sonnen 2016, 213-241.

Philippines' and China's claim agreement in the South China Sea is fragile and China stops complying with it from time to time, but it continues to this day. In these cases, norm neglect has not increased clarity over which norm applies in similar situations but only provided a situation-dependent compromise. Interestingly, while we continue to see frame disagreement, in each case one dispute party has adapted the norm frame it proposes. These frame adaptations acknowledge that there is a social expectation to rely on legal arguments or that other, less contested, norms might fare better in the justificatory discourse.

Libya

After mass atrocities were committed in Rwanda and Yugoslavia while the international community stood idly by, the concept of “Responsibility to Protect” (known as “R2P” or “RtoP”) gained currency in the early 2000s. It is the latest expression of the idea of humanitarian intervention to protect individuals from egregious and widespread human rights violations and crimes by their own state.⁶⁷⁷ The International Commission on Intervention and State Sovereignty (ICISS) formulated this concept in 2001. The UN Secretary-General's High-level Panel on Threats, Challenges and Change accepted in 2004 that there is an emerging norm of R2P:⁶⁷⁸ when states fail to protect their citizens, but engage in mass atrocities, the UNSC has a responsibility to step in and to provide this protection. R2P challenges traditional notions of state sovereignty and broadens the circumstances under which the UNSC can authorize force as last resort “to maintain or restore international peace and security.”⁶⁷⁹ The UNGA World Summit Outcome Document endorsed R2P if authorized by the UNSC.⁶⁸⁰

The sovereignty and territorial integrity norms are firmly established in the UN Charter and thus considered hard law,⁶⁸¹ whereas R2P and the documents it is enshrined in are at best described as soft or emerging law.⁶⁸² In addition, R2P contains several layers and

⁶⁷⁷ Hannum 2009, 135–36.

⁶⁷⁸ High-level Panel Report. 2004, UNGA Doc. A/59/465, para 203.

⁶⁷⁹ UN Charter, Article 39.

⁶⁸⁰ World Summit Outcome Document. 2005. UNGA Doc.A/RES/60/1, para 138–139.

⁶⁸¹ UN Charter, Articles 2 (1) and 2 (4).

⁶⁸² Sheeran and Kent 2016, 41.

responsibilities fall to different actors: each state has a duty to prevent mass atrocities and to protect its population (pillar I), the international community should assist states in these efforts (pillar II), and has a duty to respond in a timely and decisive manner when there are (risks of) atrocity crimes (pillar III).⁶⁸³ The tension between pillar I and III – and in particular ambiguity as to what triggers the international community’s response and what it should look like – make the norm prone to contestation, when the UNSC seeks to apply it to a concrete situation.⁶⁸⁴ Thus, while there has been agreement on R2P in the abstract, when applied to a particular case such as Darfur, this frame has been much more controversial and support more equivocal, in particular from Russia and China, who tend to show more concern for sovereignty.⁶⁸⁵

Therefore, the UNSC’s agreement to react to (the threat of) Gaddafi’s atrocities came as a surprise. It has also surprised scholars that a third norm – PoC – was invoked in the context of the no-fly zone.⁶⁸⁶ The UNSC has traditionally invoked PoC in the context of peacekeeping operations with the consent of the host state. In its most robust form, PoC gives peacekeepers the right to use force to protect civilians from physical harm that any dispute party might inflict.⁶⁸⁷ While R2P and PoC thus have a similar aim – to protect vulnerable groups from violence, they display important differences: PoC relies on host-state consent and impartiality and is not limited to mass atrocities. Resolution 1973 (2011) blurred the lines between R2P and PoC, thereby increasing uncertainty over already vague frames. This frame adaptation reflects the prioritization of pragmatic solutions over legal correctness that is characteristic of norm neglect.

Before the Libyan case, Russia and China—whose affirmative vote or abstention is necessary for UNSC enforcement action—had a track record of rejecting or preventing Security Council resolutions that authorize humanitarian intervention. They emphasized the sovereignty and territorial integrity of states in these situations. Even Western states, who have more often promoted R2P, e.g. in the case of Kosovo, have been careful to

⁶⁸³ UN Doc A/63/677. Secretary-General Ban-Ki-Moon’s 2009 report to the UNGA introduced these three pillars, and he subsequently focused on promoting the least contested pillar I.

⁶⁸⁴ Paddon Rhoads and Welsh 2019.

⁶⁸⁵ Johnstone 2015, 75–76.

⁶⁸⁶ Welsh 2011; Bellamy and Williams 2011; Hehir 2013; Sheeran and Kent 2016.

⁶⁸⁷ Welsh 2011; Sheeran and Kent 2016.

avoid a legal obligation to that effect.⁶⁸⁸ Hence, for more than a decade, we have seen a norm impasse over whether R2P or sovereignty prevail (frame disagreement) and over whether the UNSC should take military action to prevent or stop mass atrocities (claim disagreement). Therefore, it came as a surprise to many that the UNSC passed the Chapter VII Security Council Resolution 1973, which authorizes military action in Libya.

The following events occurred before the UNSC passed Resolution 1973 on 17 March 2011: after demonstrations turned into an uprising against Gaddafi, rebel forces enjoyed significant successes and captured major cities such as Benghazi and Tobruk. However, in late February and early March, Gaddafi reclaimed many of these territories, using excessive and indiscriminate force.⁶⁸⁹ His public speeches indicated that he would not shy away from committing mass atrocities to stay in power: he announced that officers had been deployed to “purify all decisions from these cockroaches” and that “[a]ny Libyan who takes arms against Libya will be executed.”⁶⁹⁰

Gaddafi’s behavior prompted a flurry of activity from IOs, ROs and senior UN officials. The UN Human Rights Council began to investigate the situation in Libya and as a result suspended the country; LAS also suspended Libya for as long as the violence continued, the AU condemned Gaddafi’s “indiscriminate and excessive use of force and lethal weapons against peaceful protestors”, and the UN Secretary-General reminded the UNSC of its responsibility to protect.⁶⁹¹ The British and French missions at the UN pushed hard for the UNSC to take action. Next to the actions and statements from ROs, high-profile defections played a role in securing the approval of other Security Council members. On 21 February 2011, Libya’s Deputy Permanent Representative to the UN, Ibrahim Dabbashi, defected. He denounced Gaddafi for committing “crimes against humanity and crimes of war” and called on the UNSC to assume its responsibility to protect, to refer the case to the ICC and to install a no-fly zone.⁶⁹² The Libyan Permanent Representative, Mohamed Shalgam, followed suit and gave an emotional speech in the UNSC on 25 February 2011, saying “Al-Qadhafi, leave the Libyans alone... Please United Nations, save Libya. No to bloodshed. No to the killing of innocents. We want a swift, decisive

⁶⁸⁸ Johnstone 2011, 64-65.

⁶⁸⁹ Bellamy and Williams 2011, 838.

⁶⁹⁰ Miller 2011. February 23.

⁶⁹¹ Bellamy and Williams 2011, 839.

⁶⁹² See video of Ibrahim Dabbashi’s press conference: Moynihan 2011. February 21.

and courageous resolution.”⁶⁹³ A US diplomat recalls that this speech moved many of those present to tears.⁶⁹⁴ A former British diplomat who was closely involved in the process also stressed that the Libyan representatives “were themselves calling for a no-fly zone... was again incredibly important” and noted that “we ran a couple of interference operations basically that stopped Gaddafi replacing his people” so that they could continue to stay at the UN, walk around and attend open UNSC briefing sessions.⁶⁹⁵ One day later, on 26 February 2011, the UNSC unanimously passed Resolution 1970 (2011) that refers the situation in Libya to the ICC, issues an arms embargo, a travel ban and an asset freeze for key individuals in Gaddafi’s regime.⁶⁹⁶

Almost as soon as Resolution 1970 was passed, France and Britain started to work on a stronger resolution as 1970 did not change Gaddafi’s behavior.⁶⁹⁷ In early May, several IOs – the GCC, OIC and LAS – called for a no-fly zone to protect civilians. The Arab League’s call for a no-fly zone from 12 March 2011, as most representative organization of the region, is particularly often mentioned as a decisive factor for Russia’s and China’s decision to let Resolution 1973 pass, and for the US’s decision to get more actively involved in passing the resolution.⁶⁹⁸ Furthermore, Gaddafi’s radio announcement that soldiers would search every house in Benghazi for arms and rebels made clear that a potentially devastating attack on Benghazi was imminent: “It’s over... We are coming tonight... We will find you in your closets... We will show no mercy and no pity to them.”⁶⁹⁹ Gaddafi’s rhetoric thus lent urgency to the matter.

On 17 March 2011, the UNSC narrowly passed Resolution 1973. Of the P5, France, the UK and the US voted in favor, while Russia and China abstained. A closer look at the

⁶⁹³ Mohamed Shalgham: UNSC Doc. S/PV.6490. 2011, 5.

⁶⁹⁴ Interview with US diplomat, New York, 6 October 2017. See also Besheer 2011.

⁶⁹⁵ Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017. For a similar view, see Adler-Nissen and Pouliot 2014.

⁶⁹⁶ UNSC S/RES/1970 (2011).

⁶⁹⁷ Adler-Nissen and Pouliot 2014, 900.

⁶⁹⁸ Bellamy and Williams 2011; Hehir 2013; Adler-Nissen and Pouliot 2014; Fung 2016. My interviewees also all cited the LAS request for a no-fly zone as a key factor for the passing of Resolution 1973 (2011). Interview with US diplomat, New York, 6 October 2017; Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017; Phone Interview with Mark Lyall Grant, UK Permanent Representative to the United Nations (2009-2015), 16 May 2018; Interview with Nawaf Salam, Permanent Representative of Lebanon to the United Nations (2007-2017), New York, 12 October 2017, and Interview with an Expert from the Russian Permanent Mission to the United Nations, New York, 13 October 2017.

⁶⁹⁹ Reuters, 17 March 2011. See also Hehir 2013.

resolution and at the accompanying statements of UNSC members reveals agreement on the claim but persistent disagreement on the frame. The UNSC agreed on the action to take as Resolution 1973 authorizes member states to “take all necessary measures... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi”⁷⁰⁰ and “establishes a ban on all flights in the airspace of the Libyan Arab Jamahiriya”⁷⁰¹. However, the norm frame that underpins this claim agreement is less clear. The resolution makes no reference to the UNSC’s responsibility to protect; merely the “responsibility of the Libyan authorities to protect the Libyan population” is mentioned in a preambular paragraph. Instead, the authorization to “take all necessary measures”, the code words for the use of force, is put under the header of “protection of civilians”.⁷⁰² However, the application of PoC to protect “civilian populated areas” clashes with the norm’s requirements of host-state consent for the use of force and of impartiality as this mandate removed certain areas from Gaddafi’s reach.⁷⁰³ This shows a lack of agreement on the frame that underpins the agreement on the claim to establish a no-fly zone.

Furthermore, UNSC members displayed notable disagreement on the frame in the justifications of their vote. This becomes especially clear in the statement of China’s Permanent Representative, Li Baodong: “China has always emphasized that ... the Security Council should ... respect the sovereignty independence, unity and territorial integrity of Libya ... China is always against the use of force in international relations.”⁷⁰⁴ The statement reflects persistent disagreement with the frame of R2P or PoC. Li rather cites the “special circumstances” in Libya and LAS’ endorsement of a no-fly zone as reasons for China’s decision to let the resolution pass by abstaining.⁷⁰⁵ Similarly, when justifying its abstention, Russia cited the request of LAS to establish a no-fly zone and the unacceptability of attacks against civilians as explanations, but also voiced concerns over whether the use of force would be as limited as it wanted it to be.⁷⁰⁶ Furthermore, while France, the US and the UK cited humanitarian concerns and the goal to protect civilians, they did not explicitly mentioned R2P in their public statements as legal

⁷⁰⁰ UNSC S/RES/1973 (2011), para 4.

⁷⁰¹ Ibid., para 6.

⁷⁰² Ibid., 3, para 4.

⁷⁰³ Welsh 2011, 259.

⁷⁰⁴ Li (China): UNSC Doc. S/PV.6498. 2011, 10.

⁷⁰⁵ Ibid.

⁷⁰⁶ Churkin, Vitaly, Russian Permanent Representative to the UN: Ibid., 8.

justification.⁷⁰⁷ This avoidance of R2P language casts doubt on the assertion that the UNSC's decision on Libya shows that R2P is "alive and well"⁷⁰⁸. These contrasting justifications are a sign of norm neglect: the P5 continued to disagree on the frame despite agreeing on the claim to install a no-fly zone.

This compromise turned out to be volatile. Because of the lack of frame agreement, states can refer to the special circumstances surrounding the Libya case to explain why a similar case is different. We can see this dynamic in the discussions surrounding the mass atrocities committed by President Assad in Syria. Russia and China resisted UNSC resolutions on Syria by arguing that the toppling of the Libyan regime went beyond the claim (no-fly zone) they had agreed to.⁷⁰⁹ This assessment, in turn, is linked to the lack of agreement on a norm frame – how to balance humanitarian considerations and Libya's sovereignty, that could give guidance on how to implement the claim. Therefore, the claim agreement on Libya was a temporary concession in a long-standing norm impasse.

South China Sea

We observe similar dynamics in the South China Sea dispute. The South China Sea is a fertile fishing ground, believed to be rich in gas and oil resources, and an important commercial shipping lane. Several states bordering the South China Sea, especially China, the Philippines, Malaysia, Vietnam and Brunei, have overlapping claims to sovereignty over islands and reefs, and thus, natural resources adjacent to them.⁷¹⁰ These conflicts intensified with China's proposition of a "nine-dash line" in 2009 that delineates its maritime rights and entitlements in the South China Sea.⁷¹¹ I focus on the territorial dispute between China and the Philippines because it has been the most contested one and it has culminated in norm neglect. Furthermore, the dispute between China and the Philippines could potentially have world-wide consequences due to the mutual defense treaty between the Philippines and the US. This treaty, however, is ambiguous on whether it applies to the South China Sea.⁷¹²

⁷⁰⁷ See UNSC Doc. S/PV.6498. 2011.

⁷⁰⁸ Weiss 2011, 287.

⁷⁰⁹ China: Fung 2016, 44; Russia: Johnstone 2015, 243.

⁷¹⁰ Permanent Court of Arbitration. 2016. "Award", 1 para 3.

⁷¹¹ Zhang 2017, 442; Hebert 2018, 290.

⁷¹² Ortuoste 2013.

UNCLOS is the international treaty that regulates maritime rights and entitlements and the use of the oceans. Both China and the Philippines are parties to UNCLOS. It stipulates that coastal states have a 12 nautical mile (nm) territorial sea, a 24nm contiguous zone and a 200nm Exclusive Economic Zone (EEZ). Beyond that are the high seas, where all states enjoy such freedoms as the freedom of navigation, overflight and fishing.⁷¹³ The coastal states' rights decrease with distance, but crucially in the EEZ, coastal states still have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living".⁷¹⁴ The same applies to continental shelves or "seabed and subsoil of the submarine areas that extend beyond its territorial sea ... to a distance of 200 nautical mile" but that "shall not exceed 350 nautical miles".⁷¹⁵ Furthermore, islands have all of these three zones and they can have a continental shelf (CS), whereas rocks that "cannot sustain human habitation or economic life of their own" can have no EEZ or CS.⁷¹⁶ Thus, islands provide greater access to natural resources. Reefs and low-tide elevations can affect the starting point for measuring the territorial sea, and thus only marginally extend it.⁷¹⁷ When determining whether a state has sovereign rights over natural resources adjacent to maritime features and how far they reach, it thus matters whether these maritime features are classified as islands (with EEZ or CS) or as other formations. Islands give the most access to resources.

Unlike the Philippines, China has mainly based its territorial claims in the South China Sea on historic rights rather than on UNCLOS. States have to notify the Commission on the Limits of the Continental Shelf, when they set the outer limit of their continental shelf beyond 200nm.⁷¹⁸ In 2009, China stated its objections to Vietnam and Malaysia's joint submission to the Commission and to Vietnam's individual submission:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese government, and is widely known by the international community.⁷¹⁹

⁷¹³ UNCLOS, Art. 87.

⁷¹⁴ UNCLOS, Art. 56.

⁷¹⁵ UNCLOS, Art. 76.

⁷¹⁶ UNCLOS, Art. 121.

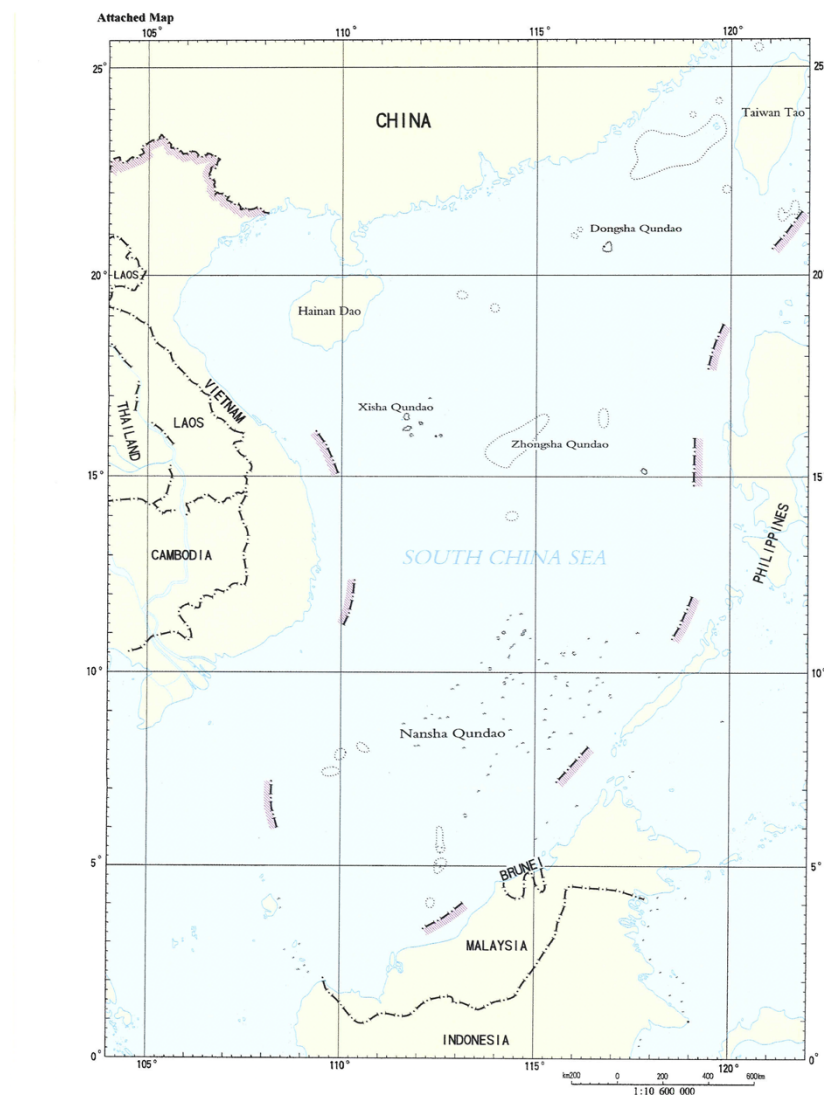
⁷¹⁷ UNCLOS, Art. 6 and 13.

⁷¹⁸ UNCLOS, Art. 76 and Annex II.

⁷¹⁹ PRC Permanent Mission to the UN. 2009a; PRC Permanent Mission to the UN. 2009b.

The attached map contained the “nine-dash line” that lays claim to 80% or more of the South China Sea (see figure 1).⁷²⁰ While Chinese maps with dotted lines (albeit with varying numbers of dashes) date back to 1935, these two *notes verbales* are the first time that China officially used the “nine-dash line” as a frame to justify its sovereignty claims in the South China Sea. Notably, China did not clarify the map’s legal status or meaning and used vague terms such as “adjacent” and “relevant” waters rather than UNCLOS terminology.⁷²¹

Figure 1: Map of Nine-Dash Line contained in China’s 2009 *notes verbales*



⁷²⁰ Analysts differ in their assessment of how much territory of the South China Sea the nine-dash line covers; they usually talk of 80% or higher. Since China’s map does not contain very precise measurements, it is difficult to give an accurate assessment. United States Department of State 2014; Zhang 2017; Hebert 2018.

⁷²¹ United States Department of State 2014, 1-8; Feng 2017, 443-444.

Vietnam, Indonesia and the Philippines subsequently protested against China's *notes verbales*. The Philippines rejected the nine-dash line frame and the sovereignty claims in April 2011, using UNCLOS as a frame for its sovereignty claims over the Kalayaan Island Group (KIG) or Spratlys and other contested maritime features:

the claim as well by the People's Republic of China on the "relevant waters as well as the seabed and subsoil thereof" (as reflected in the so-called 9-dash line map...) would have no basis under international law, specifically UNCLOS. With respect to these areas, ... sovereign rights ... necessarily appertain or belong to the appropriate coastal or archipelagic state – the Philippines – ... , either in the nature of Territorial Sea, or 200 M Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles, 3, 4, 55, 57, and 76 of UNCLOS.⁷²²

China responded a few days later with its own *note verbale*. China repeated the ambiguous first sentence of the 2009 *note verbale*, stated that the contents of the Philippines' *note verbale* "are totally unacceptable to the Chinese Government" and referred to "abundant historical and legal evidence" for its position.⁷²³ China argued that its claims to the Spratlys (or Nansha Islands in Chinese) pre-date the Philippine's claims and that the Spratlys were islands with the corresponding maritime zones.⁷²⁴ This *note verbale* did not include a map of the "nine-dash line", but China has repeatedly used this frame since then. For instance, on 12 May 2016, the Director-General of the Department of Treaty and Law of the Chinese Ministry of Foreign Affairs stated in the context of the dispute with the Philippines:

The 'nine-dash line' ... is called by China the dotted line. I want to stress that China's sovereignty and relevant rights in the South China Sea were formed throughout the long course of history and have been maintained by the Chinese Government consistently... we have noted that the dotted line came into existence much earlier than the UNCLOS, which does not cover all aspects of the law of the sea.⁷²⁵

Thus, the two states reached a norm impasse over whose sovereignty claims in the South China Sea prevail, what norm frame applies (historic rights vs. UNCLOS) and over how to interpret UNCLOS provisions.

⁷²² Philippine Permanent Mission to the UN. 2011.

⁷²³ PRC Permanent Mission to the UN. 2011.

⁷²⁴ Ibid.

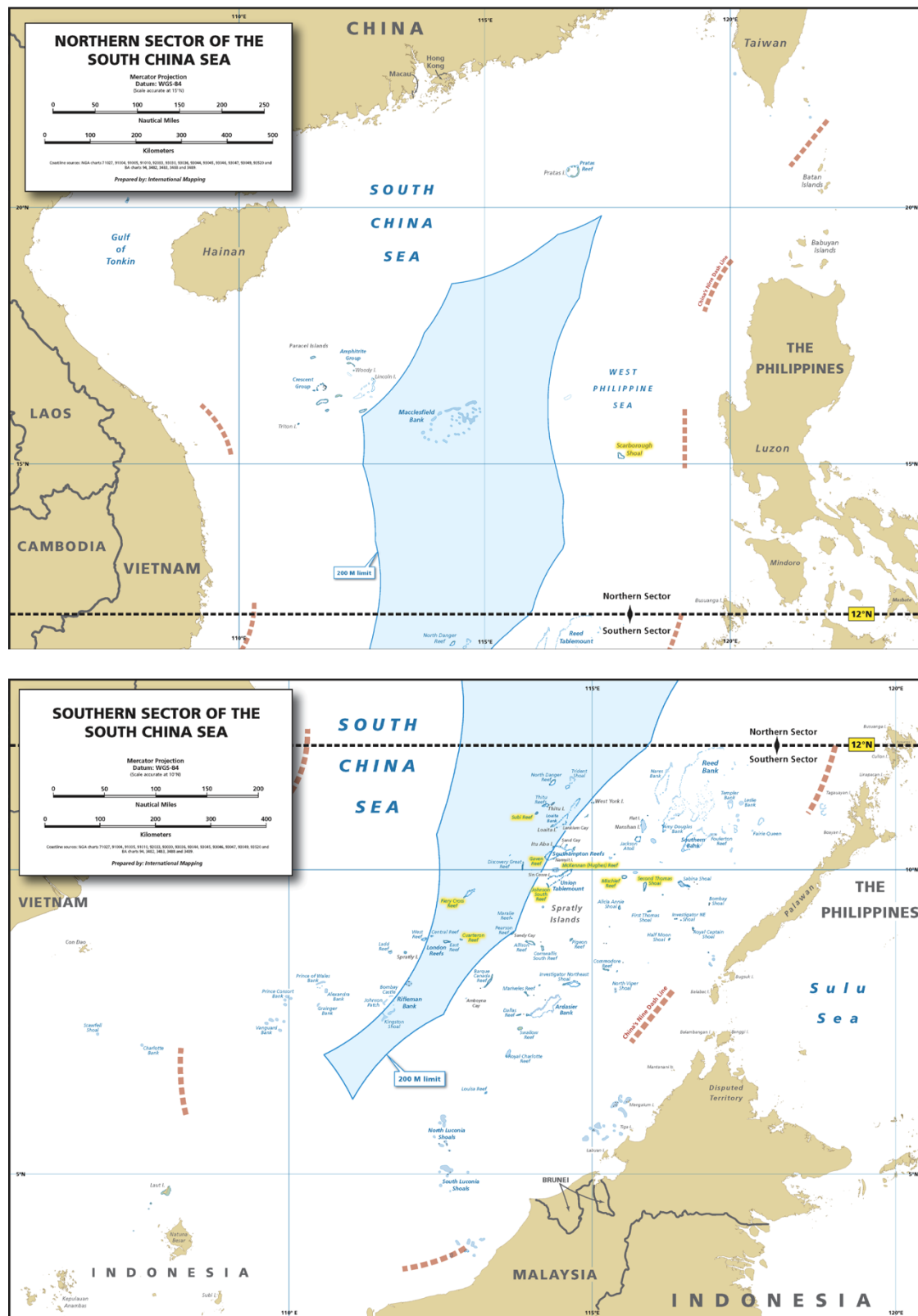
⁷²⁵ Permanent Court of Arbitration. 2016. "Award", 84 para 200.

China subsequently matched its words with deeds, which increased tensions in the South China Sea, and ultimately led the Philippines to bring the dispute to arbitration. Since 2009, China has ramped up efforts to consolidate its claims: it deployed military ships, the coast guard and maritime militia to harass foreign ships in contested areas and has constructed military and civilian assets on maritime features, trying to turn them into artificial “islands”.⁷²⁶ Two areas are particularly contested between the Philippines and China: Mischief Reef (Chinese name: Meiji Jiao; Filipino name: Panganiban) and Scarborough Shoal (Chinese name: Huangyan Dao; Filipino names: Panatag Shoal or Bajo de Masinloc).

⁷²⁶ Hebert 2018.

Figure 2: Contested areas in the South China Sea⁷²⁷

(The Philippines' submissions to arbitration regarding the status of contested maritime features are highlighted in yellow)



⁷²⁷ Permanent Court of Arbitration. 2015. “Award on Jurisdiction and Admissibility”, 7 and 9.

Scarborough Shoal is an important fishing ground for Filipino fishermen and prior to April 2012, despite competing sovereignty claims, the Philippines exercised *de facto* control over it. The situation turned tense on April 10, 2012, when the Philippines sent a frigate to Scarborough Shoal to disrupt what it saw as illegal fishing by Chinese fishermen. China retaliated by sending two unarmed marine surveillance vessels to the mouth of the Shoal, blocking access to the Chinese fishing vessels.⁷²⁸ A standoff ensued. The Philippines claim the Shoal as part of its EEZ, whereas China frames the area as having appeared on maps of China's territory as early as the 13th century.⁷²⁹ The Chinese embassy to the Philippines "reiterated China's sovereignty over Huangyan Island, urged the Philippine side to stop immediately their illegal activities and leave this area."⁷³⁰

Initially, both sides sought to diffuse tensions – the Philippines demilitarized the situation by replacing the frigate with a coast guard vessel and diplomatic talks began. However, the talks broke down and the situation escalated: China imposed unofficial sanctions on banana imports from the Philippines and curtailed tourism to the Philippines, and at one point had roughly twenty ships (cutters and fishing trawlers) face off against two Filipino vessels.⁷³¹ The US tried to mediate, and as a result the Philippines withdrew their two ships from the Shoal, but China did not honor the commitment it had allegedly made to do the same. As a result, by July 2012, China had established control over Scarborough Shoal and prevented Filipino fishermen from accessing it.⁷³² The Philippines sought to gain support from the Association of South East Asian Nations (ASEAN). When an ASEAN summit in July 2012 failed to pass a joint communiqué criticizing China due to Chinese pressure, the Philippines decided to resort to international arbitration.⁷³³

Mischief Reef is another source of contention. The Philippines claim that it is a low-tide elevation not capable of having maritime zones of its own and frames it as "part of the exclusive economic zone and continental shelf of the Philippines."⁷³⁴ Mischief Reef falls within China's "nine-dash line" and China cites "historical and jurisprudential bases for

⁷²⁸ Green, Michael, Kathleen Hicks, Zack Cooper, John Schaus and Jake Douglas. 2017. May 22.

⁷²⁹ Whaley 2012. April 12.

⁷³⁰ Chinese embassy to the Philippines: Ibid.

⁷³¹ Ortuoste 2013; Perlez 2012. July 13; Green et. al 2017. May 22.

⁷³² Green et. al 2017. May 22. Annex 1, p. 8-9.

⁷³³ Perlez 2012, July 13; Green et. al 2017. May 22.

⁷³⁴ The Philippines' Final Submissions cited in: Permanent Court of Arbitration. 2016. "Award", 41 para 112 B (5).

its claim.”⁷³⁵ China has prevented Filipino fishermen from using it as a shelter and occupied the reef to construct a huge artificial island base on it, trying to turn it into an island with a 200nm EEZ or CS, which would provide the right to exploit resources in that area.⁷³⁶

As a result of these and other tensions over contested territories in the South China Sea, but in particular due to the Scarborough Shoal incident, the Philippines decided to trigger the automatic dispute-settlement clause in UNCLOS on 22 January 2013.⁷³⁷ Paul S. Reichler, legal counsel to the Philippines in the South China Sea arbitration dispute, explains why the Scarborough Shoal incident was the “last straw” for the Philippines that prompted them to resort to arbitration:

the question of timing is significant, that was in 2012, when they had the incident there with the Chinese ultimately prohibiting Filipino fishermen [access], and that made it a very public dispute with serious political consequences... There were real Filipino people who were getting really hurt, experiencing real harm. It wasn't just a theoretical question, important as they are, the maritime rights and jurisdictions, they were stopping Filipino communities from being able to earn their livelihoods. So, I think that made the issue more urgent for them.⁷³⁸

China refused to accept or participate in the arbitration proceedings. In a 2014 Position Paper, China claimed that the tribunal lacked jurisdiction because sovereignty disputes fall outside the scope of the convention, agreements between the Philippines and China exist to settle their disputes through negotiation and because China excluded “disputes concerning maritime delimitation from arbitration” with a 2006 declaration.⁷³⁹ While China did not participate in the proceedings, the PCA treated the 2014 Position Paper as if it constituted a plea.⁷⁴⁰ The PCA rejected all three of China's objections and found that it had jurisdiction to hear the case on 29 October 2015: the Philippines' submissions concern disputes about the interpretation and application of UNCLOS; the agreements between the two states on settling disputes through negotiation are political rather than legal documents and the Philippines made reasonable efforts to negotiate before resorting to arbitration; half of the Philippines' submissions do not concern maritime delimitation

⁷³⁵ The Philippines. 2014. Volume VI. March 30.

⁷³⁶ Ibid.; Hayton 2017, 105.

⁷³⁷ UNCLOS, Art. 286 and Art. 287 (5). Annex I.

⁷³⁸ Phone Interview with Paul S. Reichler, Legal Counsel to the Philippines in the South China Sea arbitration dispute, 22 March 2019.

⁷³⁹ The People's Republic of China. 2014. “Position Paper.” December 7.

⁷⁴⁰ Permanent Court of Arbitration. 2015. “Press Release.” October 29.

and an analysis of the merits of the other half is necessary to evaluate whether China's 2006 declaration applies.⁷⁴¹

The PCA issued its ruling on 12 July 2016. The Philippines had made 15 submissions to the tribunal. The Philippine submissions required the tribunal to determine whether the "historic rights" encompassed by China's "nine-dash line" were compatible with UNCLOS, the status of contested maritime features in the South China Sea and to determine whether some of China's activities (prevention of fishing, extraction of resources, etc.) violated the Philippines' rights under the convention. The tribunal found in favor of the Philippines in 14 out of 15 issues – a resounding win.

Most notably, the tribunal found that UNCLOS supersedes any historic rights to resources in the South China Sea that China might have had, and that there is no evidence that China's control over the waters or their resources had been exclusive throughout history.⁷⁴² Hence, the tribunal concluded that China's sovereignty claims "with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention" when "they exceed the geographic and substantive limits of China's maritime entitlements under the Convention."⁷⁴³ It thus rejected the contested "nine-dash line" frame. Furthermore, the tribunal found that none of the disputed "islands" are islands, but at most rocks, which are only entitled to a 12nm territorial sea. Since none of the features claimed by China generate an EEZ, there are no overlapping claims between China and other states, so that the tribunal could declare certain areas as part of the Philippine's EEZ without delimiting boundaries.⁷⁴⁴

Consequently, the tribunal supported the Philippines' claims that China violated its rights in its EEZ by "(a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands and (c) failing to prevent Chinese fishermen from fishing in the zone."⁷⁴⁵ The Tribunal also held that fishermen from the Philippines (like those from China) had traditional fishing rights at Scarborough Shoal and that China had interfered

⁷⁴¹ In October 2015, the Tribunal found that it had jurisdiction regarding seven submissions of the Philippines and that it would consider its jurisdiction of the other matters together with the merits (the tribunal eventually found that it had jurisdiction to hear all submissions). See *Ibid*.

⁷⁴² Permanent Court of Arbitration. 2016. "Press Release." July 12.

⁷⁴³ Permanent Court of Arbitration. 2016. "Award". July 12, 117 para 278.

⁷⁴⁴ Zhang 2017; Permanent Court of Arbitration. 2016. "Press Release." July 12, 2.

⁷⁴⁵ Permanent Court of Arbitration. 2016. "Press Release." July 12, 2.

with these rights in restricting access.⁷⁴⁶ This verdict therefore casts doubt on China's "nine-dash line" frame and its claims to the Spratlys and activities in Mischief Reef and Scarborough Shoal.

Thus, it comes hardly as a surprise that China angrily rejected the verdict. Vice-Foreign Minister Liu Zhenmin called it "just a piece of waste paper" that "will not be enforced."⁷⁴⁷ Chinese Foreign Minister Wang Yi stated that "[t]he award given by the Arbitral Tribunal violates China's lawful rights. It challenges the norms of international law, including respect for sovereignty and territorial integrity" and reiterated that "[t]hese [rights], including the dotted line, have been formed in the long course of history, and have been upheld by the successive Chinese governments."⁷⁴⁸ President Rodrigo Duterte of the Philippines, on the contrary, stated that "[w]ith regard to the West Philippine Sea otherwise known as [South] China Sea, we strongly affirm and respect the outcome of the case before the Permanent Court of Arbitration"⁷⁴⁹. Thus, initially the ruling seemed to do little to ease tensions.

President Duterte, who had been elected just before the ruling, was keen to form better relations with China and hence held back from strong criticism. He instead focused on finding a negotiated solution with China. Only four months after the ruling was issued, China made a significant concession to Duterte and allowed Philippine fishermen to return to Scarborough Shoal.⁷⁵⁰ China therefore did not agree to all of the Philippines' claims as a result of the ruling and its aftermath. For example, China's occupation of Mischief Reef continues.⁷⁵¹ However, given that the standoff in Scarborough Shoal triggered international arbitration and increased tensions, the significance of this claim agreement should not be underestimated. While the two countries thus reached an agreement on fishing claims regarding Scarborough Shoal, the frame disagreement has persisted as China continues to reject the tribunal's ruling, whereas the Philippines support it. "We have title, despite China's contrary statements," a Duterte spokesman said

⁷⁴⁶ Ibid., 2.

⁷⁴⁷ Zhenmin. 2016. July 13.

⁷⁴⁸ Wang. 2016. July 13.

⁷⁴⁹ President Rodrigo Duterte: ABS-CBN News. 2016. July 25.

⁷⁵⁰ Hayton 2017, 105; Mogato 2016. October 28; Lema and Blanchard 2018. June 11; Santos and Pierson 2019. April 15; Ku and Mirasola 2016. October 31.

⁷⁵¹ Hayton 2017, 105.

in 2018.⁷⁵² Duterte's decision to de-emphasize the ruling and to improve relations with China have led to the claim agreement rather than a genuine acceptance of the arbitration tribunal's finding.

Similar to the no-fly zone over Libya, the claim agreement has been a situation-dependent, volatile compromise. From time to time, there have been reports of Chinese coast guards seizing the catch of Filipino fishermen in Scarborough Shoal,⁷⁵³ and deciding over the movement of ships.⁷⁵⁴ When differences over the norm frame persist, this uncertainty can affect the implementation of the claim agreement. There is no common normative reference point that could be invoked to mobilize social pressures but only situation-dependent political compromises. This lack of normative guidance turns claim agreements into fragile compromises.

However, as we also saw in the Libya case, despite the persistent frame disagreement, the contested norm frame has undergone transformations. While China initially primarily rejected the arbitral tribunal's ruling on procedural grounds, it has begun to advance substantive legal arguments. When doing so, China has relied less on references to the "nine-dash line" frame and instead has increasingly used UNCLOS terminology. A new frame that builds on China's sovereignty claims over the "four sha" serves as example: the Pratas Islands, Paracel Islands, Spratly Islands, and the Macclesfield Bank. China seems to argue that each island group is a single geographical unit with archipelagic baselines that generate all maritime zones.⁷⁵⁵ The "four sha" frame does not extend as far as the "nine-dash line", but "it would still result in China claiming legal entitlements over most of the waters in the South China Sea."⁷⁵⁶ While the arbitral tribunal's ruling indicates that these island groups would not qualify as archipelagos, analysts point out that China's decision to bring its rhetoric more in line with UNCLOS may reflect the realization that the "nine-dash line" failed to convince and a desire to shape maritime law.⁷⁵⁷ At a minimum, I see this adaptation of the frame as a sign of growing Chinese acceptance that the international community considers UNCLOS to be the primary legal

⁷⁵² Romero 2018. January 23.

⁷⁵³ Lema and Blanchard 2018. June 11; Placido 2018. June 8.

⁷⁵⁴ Placido 2018. June 11.

⁷⁵⁵ Hayton 2017, 106; Ku and Mirasola 2017. September 25.

⁷⁵⁶ Ku and Mirasola 2017. September 25.

⁷⁵⁷ Hayton 2017, 106; Ku and Mirasola 2017. September 25.

instrument governing maritime affairs. Hence, norm neglect has led to some frame rapprochement, albeit not to frame agreement.

There is, however, also an important difference between the outcomes in both cases: China did not agree on all claims as its continuing occupation of Mischief Reef shows, but only on making a concession regarding Scarborough Shoal. Hence, while the South China Sea case demonstrates that smaller states can turn norm contestation into norm neglect, it also indicates that more powerful states are better able to resist pressures to (fully) agree to contested claims. Thus, material power has some influence on the outcome, but it does not determine it since China had to make some concessions.

I will examine in the next section, what factors if not power differentials, led to the concessions on the contested claims that we see in these two cases, and to their volatility.

3. Pathways to norm neglect

Many scholars who study norm contestation and change assume that states act strategically but that social dynamics intervene in the process and influence the outcome.⁷⁵⁸ I share this assumption because contestation implies that actors prefer different norm interpretations and seek to uphold them. However, as norms are intersubjective principles, the reactions of other states influence whether contestation is sustainable or if contestation negatively affects the contestants' standing in the community and generates too many social and material costs.⁷⁵⁹ As discussed in chapter 2, social dynamics such as in-group dissent can pressure states into making concessions on the claim.

Studying how the norm impasses over mass atrocities and over maritime entitlements in the South China Sea turned into norm neglect reveals that when states prioritize finding pragmatic solutions over resolving their normative differences, claim agreement becomes possible. The kind of justificatory discourse that states engage in indicates their priorities. Social dynamics such as the reactions of key groups of states to norm applications and their perceptions of the result of delegation influence these priorities.

⁷⁵⁸ Finnemore and Sikkink 1998; Schimmelfennig 2003; Bower 2015; Bloomfield 2016.

⁷⁵⁹ Schimmelfennig 2003; Johnstone 2011; Bower 2015.

We can distinguish between states seeking generally applicable norm change, and those who prefer to engage in exceptionalism to avoid making long-term commitments.⁷⁶⁰ Exceptionalism occurs when states propose interpretations that try to keep the consensus norm frame intact but at the same time implement a claim that others would consider illegal under that frame. This exceptionalism can take different forms: as the Bush administration's contestation of the prohibition of torture in chapter 3 showed, it can be covert to avoid reputational costs. However, when it is not possible to hide contested practices such as the recognition of Kosovo's statehood in chapter 6, states can engage in overt exceptionalism and explicitly state that a norm interpretation is an exception to a rule to prevent a redefinition of the existing consensus.

However, exceptionalism can also be more implicit. Such exceptionalism occurs when a particular claim to action is not explicitly framed as an exception but also no clear-cut norm frame is advanced as justification. We can see such implicit exceptionalism in the South China Sea and Libyan cases. China did not clarify the legal status and meaning of the "nine-dash line" nor cite any norm frame to explain its claim agreement on Scarborough Shoal. Similarly, Resolution 1973 that authorized the no-fly zone by blurring the lines between R2P and PoC left open what norm frame the claim agreement is based on. Implicit exceptionalism is characteristic of norm neglect: the dispute parties prioritize finding a pragmatic solution to a joint problem over resolving their normative differences. Hence, ambiguous norm frames are advanced.

The two cases show that social expectations to justify actions in legal terms continue to leave a mark. In both cases, we see states adapting contested frames after agreeing on the claim. The blending of the PoC and R2P frames and the increasing substitution of the "nine-dash line" with UNCLOS concepts and justifications such as the "four sha" frame illustrate this. These adaptations recognize that other states are more receptive to different norm frames or that there is a social expectation to invoke those frames.

However, since the disagreement on the norm frame persists, these social pressures are not strong enough to generate frame agreement. Short-run considerations interfere, and

⁷⁶⁰ See Byers 2003 for different strategies of legal interpretation that hegemons pursue. His definition of exceptionalism also involves seeking special rights but it differs somewhat from my definition as Byers focuses more on treaty negotiation than legal interpretation.

at best allow for claim agreement: next to material considerations, states may have a preference for preventing the implementation of an undesirable frame or to remain flexible as to when to implement a norm. China seeks to prevent the application of UNCLOS maritime zones in the South China Sea which would diminish its access to natural resources, and therefore disagrees with the PCA's ruling. Russia and China have traditionally insisted on state sovereignty when the UNSC discussed taking action to prevent mass atrocities, whereas the P3 are selective in their application of R2P. In fact, since both the contestation over R2P and over maritime entitlements in the South China Sea had been protracted norm impasses, it is surprising that the dispute parties reached a claim agreement regarding Libya and Scarborough Shoal.

Thus, albeit social pressures may not be sufficient to override states' short-run considerations and generate frame agreement, they can propel states to make concessions on the claim. The reactions of some members of the audience matter more than those of others. The more states have in common in terms of culture, values and commitments, the more close-knit they are as a community and the stronger their influence on each other.⁷⁶¹ Hence, when in-group members urge states to implement a particular claim, the (cognitive, social or material) costs of upholding a contested claim may simply become too high. This effect becomes stronger, the more ties in-group members share.

As discussed in chapter 2, IOs are a good indicator of in-group membership: states establish them "to act as a representative or embodiment of a community of states."⁷⁶² This effect is strongest for IOs that are selective in their membership criteria as this implies that members have to share similar values and goals. Hence, a regional organization such as the EU is a tighter knit in-group than the UN, which has almost global membership.

This explains why the request of the Arab League to establish a no-fly zone was deemed so important. As it is a regional organization, its members are a close-knit in-group, and thus LAS disowning one of its own members, sent a particularly clear message and isolated Gaddafi. Furthermore, LAS is a regional organization of the Global South, which tends to prioritize sovereignty and territorial integrity over other principles. Therefore,

⁷⁶¹ Johnston 2001, 497; Krebs and Jackson 2007, 56; Schimmelfennig 2001, 62-63.

⁷⁶² Abbott and Snidal 1998, 24.

LAS shares many similar characteristics with Russia and China, which makes its opinion influential for those two permanent Security Council members.⁷⁶³

The South China Sea case also shows that the reactions of other states to norm interpretations matter. China actively lobbied other states not to endorse the tribunal's ruling and it was particularly important for China that the pertinent regional organization, ASEAN, did not reference the arbitral tribunal's verdict nor China in a joint communiqué issued shortly after the ruling.⁷⁶⁴ China's activities show an acknowledgment that social pressures can make norm frames and claims unsustainable and lead to entrapment.

Some argue that Duterte's decision to set aside the ruling to improve relations with China and achieve concessions, as well as a lack of sustained pressure from the US and other powerful out-group members, has prevented more concessions on the norm frame and claim.⁷⁶⁵ Zhang, on the other hand, argues that the problem is rather that "the Philippines has won too much"⁷⁶⁶ as accepting the ruling would mean losing face for China, and thus China has little room for negotiation. I maintain that the verdict's clear message made it unnecessary for Duterte to be overly critical of China because it spoke for itself, and thus he could gain concessions on the claim despite of China's objections to the tribunal's findings on the frame. This is similar to the dynamics in the aftermath of the Iraq war, when the US and UK found no WMD (see chapter 4). When tensions run high and when one of the disputing parties' reputation and preferred interpretation has clearly suffered, there is no need to further damage relations to gain concessions as the situation speaks for itself. Furthermore, domestic pressures ensure that Duterte keeps holding up the verdict and insists on access to Scarborough Shoal despite of his preference for better relations with China. This domestic pressure keeps norm neglect alive and helps to maintain the concession. However, at the same time, the lack of sustained criticism from key audiences might explain why China has been able to continue to disagree on the frame and thus why we do not see norm clarification.

⁷⁶³ Fung 2016; Bellamy and Williams 2011; Hehir 2013.

⁷⁶⁴ Zhang 2017, 451.

⁷⁶⁵ Phone Interview with Paul S. Reichler, Legal Counsel to the Philippines in the South China Sea arbitration dispute, 22 March 2019.

⁷⁶⁶ Zhang 2017, 453.

These dynamics also indicate that delegation had an impact due to the clarity of the tribunal's ruling. Regarding Libya, delegation did not play a role in the lead up to norm neglect, but in its aftermath. The NATO-led coalition's implementation of the no-fly zone was criticized as well as the unsuccessful post-conflict reconstruction. Hence, Russia and China could point to the lack of *ex post* legitimacy of their claim agreement to avoid having to make similar concessions on Syria. Unlike in chapter 4, the conduct of the agents was not as important for managing norm contestation as how states reacted to the findings or activities of the agents, however, because the agents' involvement was more limited in time.

4. Comparing situations of norm neglect: Analysis of the contestation over responding to atrocities committed in Libya and over maritime entitlements in the South China Sea

Comparing the norm neglect in the UNSC's response to atrocities committed in Libya and in the Philippine's and China's handling of their South China Sea dispute allows us to gain insights into what contributes to norm neglect and to its volatility. Both cases share several similarities: both cases revolve around interpreting what sovereignty and territorial integrity means, concern matters of security and were preceded by longstanding norm impasses. Therefore, they involve entrenched conflicts and fall into an area where many scholars consider political considerations to prevail over normative or legal ones. The fact that the dispute parties could reach agreement on the claim is puzzling in both cases as claim agreement provides a clear reference point and thus holds the risk of undesirable future obligations. Furthermore, since in one case the less materially powerful state (the Philippines) secured concessions on the claim, we can control for the role of material power.⁷⁶⁷ Studying those two cases allows us to identify how delegation, social support and justificatory discourse work together to facilitate norm neglect.

Both situations of norm neglect have turned out to be fragile compromises. This allows us to gauge what prevents norm neglect from turning into norm clarification. However, norm neglect can also trigger learning and socialization processes that lead to norm clarification.⁷⁶⁸ It is a matter for future research to identify what factors determine

⁷⁶⁷ Slater and Ziblatt 2013.

⁷⁶⁸ Risse and Sikkink 1999; Huang 2010; Kreuder-Sonnen 2016.

whether norm neglect culminates in norm clarification or a norm impasse. The priority of this study is to identify dynamics other than power politics that can generate consensus on norm elements, which influenced the choice of cases.

Table 1 provides an overview of my findings.

Table 1: Overview of factors that contributed to norm neglect

	Norm neglect Libya	Norm Neglect South China Sea
Norm conflict	R2P vs. Libya's sovereignty (contested frames) → should a no-fly zone be established (contested claim)?	"Nine-dash line" vs. UNCLOS maritime zones (contested frames) → which states do contested areas in the South China Sea, and thus fishing grounds and natural resources, belong to (contested claim)?
Social Support	In-Group's stance is crucial: LAS request for no-fly zone unblocks UNSC	The Duterte administration's muted criticism of China after the PCA's award eased tensions and led to the concession on access to Scarborough Shoal. Domestic pressures on the Duterte administration ensure that officials insist on continued access
Justificatory discourse	UNSC's discursive strategy: implicit exceptionalism: unclear under what frame mandate is issued Frame adaptation: Blending of R2P and PoC	The Philippines' and China's discursive strategy: implicit exceptionalism: unclear under what frame China granted Filipino fishermen access to Scarborough Shoal Frame adaptation: China's increasing use of UNCLOS terminology
Delegation	Perceived lack of <i>ex post</i> output legitimacy of the NATO-led coalition's implementation of the no-fly zone → UNSC members revert back to norm impasse regarding how to respond to mass atrocities committed in Syria	Clarity of the arbitral tribunal's ruling exposes China's norm frame and claims as illegal, and thus inflicts reputational damage → exercises pressure on China to make concessions
Outcome	Agreement on no-fly zone over Libya (claim) and disagreement over R2P vs. sovereignty (frame)	Agreement on access to Scarborough Shoal (claim) and disagreement over historic rights vs. UNCLOS rights (frame)
Reputational costs	Low (frame disagreement less visible than frame agreement)	High (the clarity of the PCA's award makes China's disagreement very visible)

4.1 Contestation over responding to atrocity crimes committed in Libya

Diplomats and analysts agree that the LAS' request to the UNSC to establish a no-fly zone put pressure on hitherto reluctant members of the P5 (China, Russia and the US) to agree to this claim. It was difficult to go against the wishes of states from the region that had traditionally upheld the norms of sovereignty and territorial integrity, and since Gaddafi was not a popular or important leader, there was little reason to do so. However, this social support was not enough to bring about frame agreement, too. Those involved in the negotiations focused on finding pragmatic solutions to stop mass atrocities rather than on solving normative differences. The justificatory discourse – ranging from the language that negotiators felt strongly about including in the UNSC mandate to statements made about the claim agreement on the no-fly zone – reflects different priorities regarding the frame. The LAS statement, too, was ambiguous about the frame, and the fact that another regional organization – the AU – criticized Gaddafi but invoked sovereignty and territorial integrity did not help to bring about consensus. Lastly, norm neglect did not lead to norm clarification. UNSC members reverted back to a norm impasse over R2P. The agreement on the no-fly zone over Libya did not entrap Russia and China to do the same regarding Syria. They could portray the military actions in Libya as overreaching the mandate of Resolution 1973 (2011) and point to unsuccessful post-conflict reconstruction efforts to delegitimize the prior claim agreement. As this argument resonated with many countries – particularly global South countries from Russia's and China's in-group, Russia and China could avoid future obligations. Hence, perceptions of *ex post* output legitimacy can decide over whether norm neglect turns into a norm impasse or norm clarification when a similar situation arises.

Social Support

On 12 March 2011, the Arab League called on the Security Council to take “the necessary measures”—code words for the use of force—to install a no-fly zone and to establish safe areas to protect civilians in Libya.⁷⁶⁹ This resolution put pressure on UNSC members to agree to these claims. A former British diplomat who was closely involved in the process at the UN described the LAS statement as “absolutely essential from beginning to end”⁷⁷⁰.

⁷⁶⁹ League of Arab States. 2011. Res. No.: 7360. March 12.

⁷⁷⁰ Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017.

Scholars agree with this assessment. Bellamy and Williams argue that “Resolution 1973 would have been unthinkable without the LAS resolution,”⁷⁷¹ and Adler-Nissen and Pouliot describe it as “[o]ne of the key turning points.”⁷⁷² The LAS statement pushed China and Russia towards abstention, brought African UNSC members on board and convinced the intervention-wary Obama administration to lobby for military action together with France and the UK.⁷⁷³

China’s and Russia’s agreement to the “no-fly zone” claim is most puzzling as they have traditionally been the most outspoken critics of humanitarian intervention in the Security Council. Stephen Hickey, political co-ordinator for the UK mission to the UN, states that “I wasn’t here at the time, I was in Syria – but the fact that the Arab League asked the Council to take action, that was very powerful. And that made it very difficult for China and Russia not to acquiesce.”⁷⁷⁴ While scholars agree that the positions of regional organizations were a “game changer”,⁷⁷⁵ they do not go into detail about why the LAS request was so crucial.⁷⁷⁶

I find that social support provides a powerful explanation: when in-groups denounce one of their own members, this sends a strong signal. It is one that is especially hard to ignore for members of the wider in-group with similar characteristics and preferences. Because of their selective membership criteria, regional organizations are tight-knit in-groups with similar characteristics and preferences. Thus, the LAS decision to position itself against one of its own members isolates that member and exerts pressure on others to do the same: “when the region through a body like the Arab League decides that one of their own, they are going to come down on them, that weighs very heavy on the Council.... It becomes very difficult to resist, it is very difficult to say to the region, ‘no you are doing the wrong thing’,” according to the former British diplomat who was closely involved in the process.⁷⁷⁷

⁷⁷¹ Bellamy and Williams 2011, 843.

⁷⁷² Adler-Nissen and Pouliot 2014, 901. Hehir 2013, 153-155, and Welsh 2011, 258, also emphasize the importance of the LAS resolution.

⁷⁷³ Bellamy and Williams 2011, 846; Welsh 2011, 258; Hehir 2013, 153-155.

⁷⁷⁴ Interview with Stephen Hickey, political co-ordinator at the United Kingdom Mission to the United Nations, New York, 3 October 2017.

⁷⁷⁵ Bellamy and Williams 2011, 841.

⁷⁷⁶ Fung 2016 is an exception. She analyzes why the opinions of regional organizations matter to China.

⁷⁷⁷ Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017.

Resisting the LAS call was particularly difficult for China and Russia as members of a wider in-group of states from the global South. This goes back to shared values and prior normative commitments. A US diplomat stated that the LAS request raised the political costs as countries with aligned preferences for sovereignty and against foreign intervention supported the no-fly zone. This made it harder to call the no-fly zone a “Western thing.”⁷⁷⁸ Fung concurs that China’s concern for the opinion of regional organizations is linked to its concern for sovereignty, as China feels that regional organizations “have the primary right to speak on the issues that directly concern them.”⁷⁷⁹ This commitment to regional organizations as authoritative interpreters of what is going on in their region contributed to rhetorically entrapping China.⁷⁸⁰ In Hickey’s words: “it has been a trend for some members of the Council to argue we should work more with the African Union, ASEAN and to encourage countries of the region to solve their own problems. And I mean this is an argument that the Chinese and Russians themselves make... China is always saying: African solutions to African problems. So it’s then a bit hard for China to say I don’t like this particular African solution...”⁷⁸¹

Not only normative but also interest-based considerations made the LAS request consequential. This request brought Russian and Chinese relationships on the table and “they have to balance, do they care more about that or about Libya.”⁷⁸² Diplomats and analysts concur that Gaddafi not being a popular figure helped tip the balance in this case – it is also seen as a decisive factor in bringing about the LAS request.⁷⁸³ Gaddafi’s insults of Arab and African leaders did not help his standing in the region.⁷⁸⁴

⁷⁷⁸ Interview with US diplomat, New York, 6 October 2017.

⁷⁷⁹ Fung 2016, 33.

⁷⁸⁰ Schimmelfennig 2001.

⁷⁸¹ Interview with Stephen Hickey, political co-ordinator at the United Kingdom Mission to the United Nations, New York, 3 October 2017.

⁷⁸² Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017.

⁷⁸³ See, e.g., Bellamy and Williams 2011; Hehir 2013. See also Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017; Interview with Nawaf Salam, Permanent Representative of Lebanon to the United Nations (2007-2017), New York, 12 October 2017; Phone Interview with Mark Lyall Grant, UK Permanent Representative to the United Nations (2009-2015), 16 May 2018.

⁷⁸⁴ Bellamy and Williams 2011, 842.

The more uniform the verdict of in-group members, the stronger the social pressure to conform (see also chapter 4). The lack of a unanimous position of all ROs on the claim and frame may have contributed to China's and Russia's position to abstain rather than to vote in favour of Resolution 1973. Fung finds that China's willingness to agree to the terms of regional organizations from the global south depends on their judgment being as unanimous as possible. Criticism of Gaddafi was relatively uniform from the GCC, LAS and OIC, who all were in favour of a no-fly zone, whereas the AU criticized Gaddafi but rejected military intervention. This lack of unanimity may have led to China's decision to abstain rather than to cast an affirmative vote.⁷⁸⁵ China's justification of its vote supports this finding:

China attaches great importance to the relevant position by the 22-member Arab League on the establishment of a no-fly zone over Libya. We also attach great importance to the position of African countries and the African Union. In view of this, and considering the special circumstances surrounding the situation in Libya, China abstained from voting on resolution 1973 (2011).⁷⁸⁶

Most notably, all P5 highlighted the LAS request in the UNSC meeting that passed Resolution 1973. Russia stated that “[w]e gave that request our full attention” and almost excused its abstention by saying that “the draft was morphing before our very eyes, transcending the initial concept as stated by the League of Arab states. Provisions were introduced into the text that could potentially open the door to large-scale military intervention.”⁷⁸⁷ The UK cited the LAS request for its decision to have “pressed for the early adoption of today’s resolution”, together with France and Lebanon.⁷⁸⁸ The US called the resolution a “powerful response to that call” from the Arab League and France also mentioned forceful expressions from ROs, “[f]irst and foremost, the League of Arab States”.⁷⁸⁹

What further speaks to the importance of regional organizations and in-group dynamics is that the Permanent Representative of Lebanon to the UN, Nawaf Salam, who represented the Arab position on the UNSC as only Arab member, could use his position as voice of the region to shape the text of Resolution 1973. Including the language of

⁷⁸⁵ Fung 2016.

⁷⁸⁶ Li (China): UNSC Doc. S/PV.6498. 2011, 10. See also Fung 2016.

⁷⁸⁷ Churkin (Russia): UNSC Doc. S/PV.6498. 2011, 8.

⁷⁸⁸ Lyall Grant (UK): Ibid., 4.

⁷⁸⁹ Rice, Susan, US Ambassador to the UN: Ibid, 2 and 5.

“excluding a foreign occupation force of any form on any part of Libyan territory”⁷⁹⁰ was important to him: “it was not about sending foreign troops, but about the use of military force to stop Gaddafi and to protect civilians, but not to go beyond this. What was important to us was the protection of Libya’s sovereignty, territorial integrity, unity. These were the three things we had in mind when we insisted on ‘no occupations’.”⁷⁹¹ Excluding a foreign occupation force is an unusual wording for the Security Council. However, Lebanon’s standing as voice of the region made it difficult for other UNSC members to reject this request – Nawaf Salam was aware of this social dynamic and used it to improve his bargaining position: “Americans had no appetite for sending people and without an Arab endorsement of the resolution, let alone sponsorship of the resolution, it won’t fly with the wider membership. So, we knew that our vote was a valuable one.”⁷⁹²

Justificatory Discourse

The Lebanese Permanent Representative’s success in lobbying for language intended to protect Libya’s sovereignty and territorial integrity not only shows that Lebanon’s identity as representative of the region provided him with social influence. It also shows that UNSC members had very different normative priorities, which made agreement on the frame difficult. Given the P5’s long-standing disagreement on whether sovereignty or R2P should be the priority when mass atrocities are committed, it is remarkable that they could agree on the “no-fly zone” claim.

As I have illustrated in this study, perceptions of output legitimacy are likely to influence whether we see consensus on a norm interpretation. Since showing output legitimacy does not require a shared identity but only a common interest in finding an effective solution to a joint problem, such arguments are more likely to transcend in-group/out-group divides.⁷⁹³ Showing output legitimacy involves showing that there is a normative problem with the status quo and offering an effective solution for it.⁷⁹⁴ Those two criteria – perceptions of necessity to react to a normative problem and the effectiveness of the solution – are good indicators of output legitimacy of a norm interpretation. When looking

⁷⁹⁰ UNSC S/RES/1973 (2011), para 4.

⁷⁹¹ Interview with Nawaf Salam, Permanent Representative of Lebanon to the United Nations (2007-2017), New York, 12 October 2017.

⁷⁹² Ibid.

⁷⁹³ Jones 2009, 1086.

⁷⁹⁴ See chapter 2. For a similar definition see Bloomfield 2016, 323.

at the justificatory discourse that accompanied Resolution 1973, we see that while UNSC members agreed (or at least chose not to veto) on the practical necessity to address the mass atrocities and on the no-fly zone as effective solution, there was no agreement on a normative need to do so. Unlike when the Bush administration gained support for its reinterpretation of the right to self-defense after 9/11, there was no comparable crisis to 9/11 that prompted states to rethink what self-defense—or here responsibility to protect—means.⁷⁹⁵ There had been similar, if not even more grave, situations where mass atrocities were perpetrated before such as in Rwanda and Darfur, where the UNSC took no action. Hence, Gaddafi's actions were unlikely to change the long-term normative preferences of intervention-sceptics on the Security Council, but the social support of LAS for a no-fly zone at least pushed them to accept the claim.

Because norm change was unlikely, diplomats focused on finding a practical solution to the problem, rather than a normative one: Lebanese Permanent Representative, Nawaf Salam, states that “we had no problems with the legal implications, it is more of political dynamics... we had much more discussions about the ICC and referral to ICC [in Resolution 1970 (2011)] than on how to phrase the protection of civilians or responsibility to protect sentence.”⁷⁹⁶ The US diplomat also recalls that they were less focused on R2P and more on preventing an impending situation of mass atrocities and on getting a resolution with broad language that would allow the US to do all it needed to do to prevent these atrocities.⁷⁹⁷ This focus on finding effective solutions to practical problems is characteristic of norm neglect and a form of implicit exceptionalism as the normative basis for agreement is left unclear.

As a result, Resolution 1973 (2011) contained ambiguous language that blended the concepts of R2P and PoC. It officially authorized the no-fly zone and the use of force under the heading of “Protection of civilians”. However, the authorization to use force for the “protection of civilian populated areas”⁷⁹⁸ meant that the UNSC was “putting certain cities out of bounds for Qaddafi and his forces” and thus moved “the international

⁷⁹⁵ Most norm contestation scholars argue that exogenous shocks open norms up for debate. Wiener 2009; Wiener and Puetter 2009; Liese 2009; Dunne 2007; Müller 2013. See also chapter 3.

⁷⁹⁶ Interview with Nawaf Salam, Permanent Representative of Lebanon to the United Nations (2007-2017), New York, 12 October 2017.

⁷⁹⁷ Interview with US diplomat, New York, 6 October 2017.

⁷⁹⁸ UNSC S/RES/1973 (2011), para 4.

community towards aiding one side in a conflict”.⁷⁹⁹ Hence, this framing goes against the requirement of impartiality and host-state consent of PoC, but reflects the idea of R2P that the UNSC can authorize force to protect populations from mass atrocities without actually referencing R2P. Therefore, the resolution leaves it somewhat ambiguous under which frame the military actions in Libya were authorized. This ambiguity is compounded by the fact that not all states invoked PoC in their justifications of their votes – China instead emphasized the “sovereignty, independence, unity and territorial integrity of Libya” and the LAS vote as well as “special circumstances” in Libya.⁸⁰⁰ Furthermore, none of the P5 referred to the Security Council’s responsibility to protect when explaining their vote after Resolution 1973 (2011) was passed.⁸⁰¹ R2P language also did not figure in the joint letter published by US President Obama, British Prime Minister Cameron, French President Nicolas Sarkozy in the *New York Times* nor in individual statements by Obama and Cameron after the resolution was passed.⁸⁰² They talk about the need to protect civilians rather than about the UNSC’s responsibility to protect.

When talking to diplomats about this frame adaptation, they all voiced surprise that the UNSC’s R2P was not mentioned in the resolution or in speeches and played down differences between R2P and PoC. UK Permanent Representative at the time, Mark Lyall Grant, for example, said that “I think protection of civilians was the basis on which action was taken ... I think I would recall if we were deliberately avoiding the responsibility to protect, I don’t think we were.”⁸⁰³ Nawaf Salam opines that R2P and PoC “were sort of synonymous.”⁸⁰⁴ The former British diplomat closely involved in the process concurs: “protection of civilians, that sounds like responsibility to protect... But nobody defines those things... In this case, it was so crystal clear what you we were doing and authorizing, you didn’t really need to fish around.”⁸⁰⁵

⁷⁹⁹ Welsh 2011, 259.

⁸⁰⁰ Li (China): UNSC Doc. S/PV.6498. 2011, 10.

⁸⁰¹ See UNSC Doc. S/PV.6498. 2011.

⁸⁰² Obama, Cameron and Sarkozy 2011. April 14; Obama 2011. March 28; Cameron 2011, March 19; Cameron 2011, March 29.

⁸⁰³ Phone Interview with Mark Lyall Grant, UK Permanent Representative to the UN (2009-2015), 16 May 2018.

⁸⁰⁴ Interview with Nawaf Salam, Permanent Representative of Lebanon to the United Nations (2007-2017), New York, 12 October 2017.

⁸⁰⁵ Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017.

However, as those diplomats had a political rather than legal role, they were primarily focused on finding pragmatic solutions that would allow them to effectively tackle the mass atrocities in Libya. The US diplomat stated that Obama requested not only a no-fly zone but something more to be able to stop Gaddafi, and that their goal was to implement this request.⁸⁰⁶ Jennifer Welsh attributes the unusual PoC language in Resolution 1973 (2011) to this US preference.⁸⁰⁷ The British diplomats' statements also speak to the focus on finding effective pragmatic solutions that is characteristic of norm neglect and necessary to show the output legitimacy of the claim.

However, there are good reasons to believe that the wording of Resolution 1973 (2011) was carefully chosen. Diplomats and observers reported that there was significant coordination and back-and-forth with the capitals and legal advisors on Resolution 1973 (2011), which indicates that UNSC members cared about the frames that were used.⁸⁰⁸ Furthermore, an expert from the Russian Permanent Mission to the UN stated that while he did not think that the language was the main issue with Resolution 1973 (2011), “[w]e are very cautious about the term [R2P] itself”. “Of course, we fully agree with the need to protect civilians, and there is an established term in UN Security Council Resolutions, protection of civilians, PoC. Responsibility to protect is a little bit of another, you know, because we proceed from the assumption that the main responsibility to protect is civilians carries the host state...”⁸⁰⁹ Thus, the Russia expert emphasizes pillar I of R2P, the host government's R2P, rather than pillar 3, the UNSC's R2P, but considers PoC an uncontroversial concept. This indicates that the term PoC might have been included because it is a less controversial concept that more countries could agree on.

What is more, the LAS resolution from 12 March 2011 might have inspired the PoC language in Resolution 1973 (2011). LAS called on the Security Council to “bear its responsibilities towards the deteriorating situation in Libya”—notably not “its responsibility to protect”—, and emphasizes the need to establish a no-fly zone and safe

⁸⁰⁶ Interview with US diplomat, New York, 6 October 2017.

⁸⁰⁷ Welsh 2011, 259.

⁸⁰⁸ Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017 and Interview with a staff member of a think tank that follows the Security Council, New York, 11 October 2017.

⁸⁰⁹ Interview with an Expert from the Russian Permanent Mission to the United Nations, New York, 13 October 2017.

areas for “the protection of the Libyan people and foreign nationals residing in Libya”⁸¹⁰. Thus, the LAS request neither explicitly spoke of R2P nor PoC but blended the concepts somewhat. Nawaf Salam opines that the British, who presented the first draft of Resolution 1973 (2011) stuck to the Arab League text because “they wanted the legitimacy that the Arab League would bring. That was important also to have the Africans on board.”⁸¹¹

Lastly, some of the diplomats explained their surprise that R2P was not in the resolution with the aftermath of the military action in Libya: as I will discuss next, Resolution 1973 (2011) now has a reputation of quelling the UNSC’s use of the R2P norm because many states share the perception that the NATO-led implementation of it has lacked output legitimacy.

Delegation

As the P5 did not invoke the same frames to justify their claim agreement, this claim agreement is best described as “acculturation” or “outward conformity with a social convention without private acceptance.”⁸¹² Since the actions that states take as a result of the claim agreement are more visible than words, they can serve as a reference point to shame or socialize those states into compliance in similar situations in the future. In their spiral model, Risse and Sikkink regard tactical concessions as an important step towards internalization of a norm.⁸¹³ Thus, claim agreement bears the risk of setting a precedent and having to accept an unwanted norm frame in the future.

Because the claim agreement is not rooted in normative consensus, however, states can refer to the reasons for and effects of the claim agreement to escape such entrapment. Perceptions of output legitimacy of the implementation of the claim can play an important role. The UNSC delegated implementation to a NATO-led coalition, whose actions have generated much controversy. Russia and China portrayed the military action, and

⁸¹⁰ League of Arab States. 2011. Res. No.: 7360. March 12.

⁸¹¹ Interview with Nawaf Salam, Permanent Representative of Lebanon to the United Nations (2007-2017), New York, 12 October 2017.

⁸¹² Goodman and Jinks 2004, 643.

⁸¹³ Risse and Sikkink 1999, 25.

resulting regime change, in Libya as an overreach of the Security Council mandate that was ineffective in generating lasting peace. They refer to the lack of *ex post* output legitimacy of the claim agreement on Libya to avoid taking action on Syria. In the words of an expert from the Russian Permanent Mission:

It's not a problem of the resolution, it is a problem of how the members of the Security Council read it. Because the no-fly zone in itself, it was probably a necessity, and Russia supported this idea to establish a no-fly zone. But then forward, it was not an implementation of a no-fly zone, it was just bombings by the coalition of Libyan non-military and military objects and of course it has nothing to do with a no-fly zone because there was also 'all necessary measures'. It was, by the way, one of the reasons why we didn't support a Western draft resolution on Syria. Because, you know, we supported the Western initiative on Libya, and it led to the destruction of the country, and even now after six years, we see consequences of that.⁸¹⁴

While recognizing the necessity of the norm neglect on Libya, he questions the effectiveness of the implementation, and therefore the output legitimacy of the claim agreement. China used similar arguments: "[t]he original intention of resolutions 1970 (2011) and 1973 (2011) was to put an end to violence and to protect civilians. We are opposed to any attempt to willfully interpret the resolutions or to take actions that exceed those mandated by the resolutions."⁸¹⁵

Stephen Hickey agrees that the perception by some states that the NATO-led coalition's implementation of Resolution 1973 (2011) went further than some had expected has helped other states to avoid any commitment to R2P or action in Syria:

had Libya turned out to be an amazing success story, then it would have been a boost for R2P. The fact that the post-conflict reconstruction and political rebuilding failed has allowed the enemies of R2P to use it as an example for why R2P is dangerous and shouldn't be applied; they use it all the time, particularly Russia.⁸¹⁶

Thus, not all dispute parties considered the implementation of the "no-fly zone" claim that they had agreed on, despite of their frame disagreement, as necessary and effective. This perceived lack of output legitimacy had negative repercussions for the contested

⁸¹⁴ Interview with an Expert from the Russian Permanent Mission to the United Nations, New York, 13 October 2017.

⁸¹⁵ Li (China): UNSC Doc. S/PV.6531. 2011, 10.

⁸¹⁶ Interview with Stephen Hickey, political co-ordinator at the United Kingdom Mission to the United Nations, New York, 3 October 2017.

frame and meant that the dispute parties reverted back to a norm impasse (frame and claim disagreement) in a similar situation - the mass atrocities committed in Syria.

The argument that the NATO-led coalition's implementation of Resolution 1973 (2011) lacked output legitimacy has resonated with many states, particularly with members of the global South and thus Russia's and China's in-group. It has turned out to be a "convenient argument to knock down everything else in the Council. Again with Syria, that's played very heavily, they really have used it exceptionally well... What they say is that 1973, we used it specifically to overthrow Gaddafi."⁸¹⁷ This argument, for example, resonated with Lebanon, a key driver of Council action on Libya: "they went for regime change, they toppled Gaddafi, and then they left Libya to rot; you cannot do that... of course, the way the Libya situation got derailed negatively influenced the possibility of Security Council action on Syria."⁸¹⁸ It also resonated with Brazil. In the wake of the Global South's lack of trust in the Security Council after the Libya intervention, Brazil proposed the concept of a responsibility while protecting (RwP).⁸¹⁹ The idea behind it is that the UNSC should act responsibly when implementing protection mandates. While the RwP failed to gain enough traction to legalize, the fact that it was brought into the discussion and gained significant interest,⁸²⁰ shows the extent to which the Libya intervention was considered unsuccessful.

It is also worth mentioning that unlike regarding Libya, regional organizations did not appeal to the UNSC to take military action in Syria but many were internally divided on how to tackle the situation.⁸²¹ Hence, there was less social pressure on Russia and China to acquiesce to humanitarian intervention. Hickey concurs: "On Syria it hasn't had the same impact because the region has been split."⁸²²

Because of the lack of *ex post* output legitimacy and of similar social pressures, Russia's and China's claim agreement on Libya did not entrap them to do the same regarding

⁸¹⁷ Interview with former British diplomat who was closely involved in the process, New York, 10 October 2017.

⁸¹⁸ Interview with Nawaf Salam, Permanent Representative of Lebanon to the United Nations (2007-2017), New York, 12 October 2017.

⁸¹⁹ Kenkel and Stefan 2016, 45.

⁸²⁰ Ibid.

⁸²¹ Fung 2016.

⁸²² Interview with Stephen Hickey, political co-ordinator at the United Kingdom Mission to the United Nations, New York, 3 October 2017.

Syria. Rather, in Stephen Hickey's words, "the narrative among some states now 6 years on is that that was the death nail for R2P, because some people feel that the concept was taken too far."⁸²³ Hence, UNSC members have reverted back to a norm impasse. The norm neglect on Libya turned out to merely be a temporary concession.

4.2 Contestation over maritime entitlements in the South China Sea

The Philippines' resort to compulsory dispute-settlement under UNCLOS was the spark that set off the social dynamics that eventually led to claim agreement. Because of the impact of the arbitral tribunal's verdict, I first discuss the role of delegation. The clear finding of the arbitral tribunal in favor of the Philippines was a double-edge sword: on the one hand, China's reputation for law-abidance suffered as a result, but on the other hand, China could not agree to all points without losing face.

The actions and considerations of Chinese and Filipino decision-makers show an awareness that the effect of the ruling ultimately depends on how others react to it. China was keen on other states toning down their criticism or openly supporting the Chinese objections to the tribunal's findings. China initially mainly criticized the verdict on procedural and fairness grounds.⁸²⁴ The Aquino administration had planned to use the verdict to rally together its in-group, ASEAN states, and powerful states in the region such as the US, Australia and Japan to mobilize shame and exercise pressure on China. However, the Duterte administration that assumed office short before the tribunal's award was issued changed course in an effort to improve the Philippines' relationship with China. President Duterte and other officials refrained from repeatedly insisting on the implementation of the ruling but instead relied on backroom diplomacy. As a result, China made concessions on access to Scarborough Shoal and provided economic benefits for the Philippines but without clarifying how the claim agreement on Scarborough Shoal relates to its legal interpretations or the tribunal's findings. Such implicit exceptionalism is characteristic of norm neglect, where the focus is on finding situation-dependent, pragmatic solutions. The claim agreement on Scarborough Shoal has been volatile: repeatedly, there have been reports of harassment of Filipino fishermen by Chinese Coast

⁸²³ Ibid.

⁸²⁴ Zhenmin. 2016. July 13; Ministry of Foreign Affairs of the People's Republic of China 2016. July 12.

Guards. However, domestic pressures on the Duterte administration to keep insisting on access to Scarborough Shoal have kept the claim agreement more or less alive.

The tribunal's ruling also left a mark on the justificatory discourse: we see China increasingly relying on legal arguments based on UNCLOS terminology rather than on historic rights. Furthermore, while China initially mainly resorted to questioning the legitimacy and credibility of the tribunal, it has begun to engage in a substantive discussion of the award. These frame adaptations acknowledge that there is a social expectation to rely on legal arguments and that other, less contested, norms might fare better in the justificatory discourse.

Delegation

In chapter 4, I showed that agents can contribute to managing norm contestation when they are able to build a reputation as credible and effective. I found that agents are better able to do so, when there is clear information available that allows for the assessment of the agents' work, when there are social pressures on principals to continue to rely on delegation, and when the dispute parties agree on the frame.

Unlike in chapter 4, the agent was not tasked with ongoing norm implementation but with issuing a one-off verdict. Hence, the impact of delegation depends on the perception of the ruling as the ruling is the output of the agent's work that the international community bases its judgement on. Certainty and social pressures influence perceptions of the verdict.

Certainty here refers to how much the ruling clarifies the contested norm(s). Ambiguity of legal rules is a common reason for non-compliance: states can reach different conclusions on how to implement norms as a result.⁸²⁵ Thus, by clarifying what norms apply (historic rights or UNCLOS maritime boundaries) and how to interpret them in the context of the South China Sea (e.g. which rock formations constitute islands), the tribunal made it easier to determine what actions conform with the law. The arbitral tribunal clearly found in favor of the Philippines' frames and claims, amongst others, by

⁸²⁵ Chayes and Chayes 1993, 188-193.

rejecting the “nine-dash line” frame and agreeing with the claim that China had unlawfully prevented Philippine fishermen from accessing Scarborough Shoal. Thus, the award left little doubt as to the illegality of China’s frames and claims.⁸²⁶ States care about maintaining a reputation for respecting international law whether to remain a community member in good standing or due to more instrumental reasons such as better cooperation opportunities.⁸²⁷ Since the arbitral tribunal so clearly rejected China’s norm interpretations and actions, China’s non-compliance was exposed and its reputation for honoring legal commitments suffered.

However, honing a reputation for law-abidance is not the only reputation that states are concerned with: “[p]owerful states also have a stake in preserving a reputation for vigorously pursuing their interests, for helping their allies, and punishing their enemies.”⁸²⁸ This includes a preference for not appearing to succumb to pressure from weaker actors. Accepting the PCA’s award would therefore allow China to restore its reputation for law-abidance but damage its reputation as a powerful state. The *Wall Street Journal* reports that China was aware of these competing pressures:

Daniel Fung, a Hong Kong-based lawyer who co-wrote a submission to the tribunal arguing that it lacked jurisdiction, said ignoring the ruling could cut both ways. On the one hand, it would show China acting like a traditional superpower, capable of resisting international pressure and criticism...But it could be viewed negatively for the same reasons.⁸²⁹

Because of these competing pressures, how the ruling would affect China’s willingness to make concessions to the Philippines depended on the international community’s reaction. In particular, the Philippines’ reaction to the verdict and whether it would use it to mobilize shame would play a significant role. I now turn to discussing how social pressures affected the decision-making process and contributed to claim agreement.

⁸²⁶ Permanent Court of Arbitration. 2016. “Press Release.” July 12.

⁸²⁷ Johnstone 2011, 45-46.

⁸²⁸ Johnstone 2011, 46.

⁸²⁹ Page 2016b. July 7.

Social Pressures

It is noticeable that President Duterte's stance toward China changed over time. He maintained a tough stance in his election campaign, such as pledging to jet ski to contested maritime features in the Spratly Islands or Scarborough Shoal and to plant the Philippines' flag there.⁸³⁰ However, Duterte quickly changed course once elected as he decided to seek better relations with China, amongst others to boost the economy and to finance his war against drugs.⁸³¹ The statement Secretary of Foreign Affairs Perfecto Yasay issued in response to the PCA's award reflects these changed priorities. It was not triumphant but rather sought to calm tempers. While Yasay stated that the "Philippines strongly affirms its respect for this milestone decision as an important contribution to ongoing efforts in addressing disputes in the South China Sea," he also maintained that "[o]ur experts are studying the Award with the care and thoroughness that this significant arbitral outcome deserves. In the meantime, we call on those concerned to exercise restraint."⁸³² Thus, the Philippines refrained from explicitly urging China to comply with the award and instead struck a conciliatory tone.

Concern over how China would react played a significant role in the Philippines' decision to de-emphasize the verdict. Philippine Secretary of Defense Delfin Lorenzana revealed that upon hearing that the arbitral ruling would be in the Philippines' favour, he "was thinking for Scarborough Shoal, maybe we can drive away the Chinese there and recover Scarborough Shoal."⁸³³ However, he reports that in a cabinet meeting with President Duterte, it was decided to rather do a "soft-landing" and that "[w]e should not be overly celebrating because we might offend China."⁸³⁴ Interestingly, Lorenzana also revealed that his US counterpart, Secretary of Defense Ash Carter, called him to urge him to "exercise restraint" in response to the ruling. These concerns speak to the high stakes involved in the dispute, including the risk of a military confrontation, and to fears that China prefers to safeguard its reputation as great power that is able to withstand criticism over its reputation as law-abiding state.

⁸³⁰ Santos and Pierson 2019. April 15; BBC News 2016. October 20.

⁸³¹ Ibid.

⁸³² Yasay 2016. July 12.

⁸³³ Lorenzana: Philippines Daily Inquirer 2018. November 23.

⁸³⁴ Ibid.

At the same time, because of the clarity of the ruling, the Philippines did not have to expend political capital by publicly criticizing China but could let the ruling speak for itself. The PCA's award so clearly rejected China's interpretations that it was not necessary for the Philippines to underline this fact for China to incur reputational costs. Instead of risking a confrontation by publicly criticizing China, the Philippines resorted to backroom diplomacy and used the silence on the ruling to improve relations with China and to achieve concessions on access to Scarborough Shoal. Similarly, Kreuzer concludes: "the PCA-award was important as it imposed serious and rising reputational costs on China... The threat of worsening reputational costs was one important precondition for China to respond positively to the Duterte initiative."⁸³⁵ Counsel of the Philippines, Paul S. Reichler, shares the view that the PCA's award contributed to the claim agreement on Scarborough Shoal:

So, from their standpoint, they were not giving anything up, but they were also not going to insist, they were also not going to embarrass China ... and they hoped that they would get economic and commercial benefits from China. And my understanding is that China has invested a huge amount in the Philippines, and the commercial ties have improved... In that sense, there has been a successful approach to China. And a critical issue, at least the highly public issue of Scarborough Shoal, China has allowed Philippine fisherman to come back. So that has been like a physical manifestation of some progress as a result of the award.⁸³⁶

It is doubtful that without the ruling, China would have made the concessions on granting Filipino fishermen access to the contested Scarborough Shoal after Duterte's state visit to China in October 2016, four months after the ruling was issued.⁸³⁷

As is characteristic of norm neglect, since the normative basis for the claim agreement was left unclear and its exact terms are unknown, this compromise on access for Filipino fishermen to Scarborough Shoal has been fragile ever since. What has upheld the claim agreement are domestic pressures on the Duterte administration: Duterte administration officials might not have pressed the issue given the goal to improve relations with China, but domestic pressure to uphold the ruling have made them insist on access to Scarborough Shoal, when China has tried to curtail it.

⁸³⁵ Kreuzer 2018. Summary.

⁸³⁶ Phone Interview with Paul S. Reichler, Legal Counsel to the Philippines in the South China Sea arbitration dispute, 22 March 2019.

⁸³⁷ Santos and Pierson 2019. April 15.

For instance, in May 2018 video footage of Chinese coast guards seizing the catch of Filipino fishermen appeared. Following public outrage over the harassment of Filipino fishermen, a spokesperson for President Duterte told the media in early June 2018 that “[w]e have addressed this issue with the Chinese and we are demanding that the Chinese take steps to stop the Coast Guard from doing these acts.”⁸³⁸ A Chinese foreign ministry spokesman replied that “[o]ut of friendship, China has made proper arrangements for Filipino fishermen” and that the “Chinese coast guard always abides by the law”⁸³⁹ but also that China would carry out a “conscientious investigation”.⁸⁴⁰ Note that China frames the claim agreement as an act of friendship rather than as an effort to comply with the PCA’s award. The Philippines’ public criticism is reported as a “rare public rebuke.”⁸⁴¹ President Duterte then backtracked on the criticism later in June 2018 saying that the Chinese Coast Guard’s actions were not an “outright seizure” but just “barter”; however, a presidential spokesman soon felt compelled to clarify that even though Duterte referred to the incident as “barter”, this did not mean that it was acceptable to the president as the valuation was not equal.⁸⁴²

These reactions to the harassment of Filipino fishermen show that the public expects the Duterte administration to stand up to China but also that the administration is hesitant to do so. Duterte officials openly stated that they are taking “all diplomatic action” to insist on the Philippines’ claims in the South China Sea, but that they would not offend China by resorting to “megaphone diplomacy.”⁸⁴³

Administration officials have felt domestic pressures to justify their response to the PCA’s award and their decision to use quiet diplomacy rather than public criticism to uphold it. Presidential spokesman Roque’s words reveal as much: “Every time China does something that is against our sovereignty, we air our protest, but we do it quietly. It is not true that President Duterte is not doing anything.”⁸⁴⁴ Foreign Minister Alan Peter Cayetano justified the policy by arguing that access to Scarborough Shoal was a

⁸³⁸ Lema and Blanchard 2018. June 11.

⁸³⁹ South China Morning Post 2018. June 11.

⁸⁴⁰ Lema and Blanchard 2018. June 11.

⁸⁴¹ South China Morning Post 2018. June 11.

⁸⁴² Andolong 2018. June 18.

⁸⁴³ South China Morning Post 2018. June 11.

⁸⁴⁴ Philippines News Agency 2018. July 16.

significant improvement: “[t]here is still slight harassment, but in the past, it was total harassment. Before, our ships cannot enter but now they can access the maritime environmental protection area.”⁸⁴⁵ He thus justified the administration’s resort to quiet diplomacy with its output legitimacy: this approach has been effective in bringing about improved access to Scarborough Shoal, a hitherto very contested issue.

The South China Sea dispute is an issue of great public concern. A survey conducted in September 2018 revealed that 89% of survey respondents were aware of the South China Sea, or as the Philippines call it, West Philippine Sea, conflict. The issue therefore has high saliency in the Philippines. 65% of survey respondents report awareness of China’s harassment of Filipino fishermen and 84% oppose the government’s inaction on China’s intrusions in areas of the South China Sea that the Philippines claims.⁸⁴⁶ Opponents of Duterte’s rapprochement with China made their views public on the two year anniversary of the arbitration tribunal’s ruling. That day red banners with the English words “Welcome to the Philippines, Province of China” appeared on footbridges across Manila and in other cities. The banners refer to Duterte’s remarks in February 2018, when he jokingly offered the Philippines to Beijing as a province of China and display the dissatisfaction of many Filipino’s with the Duterte administration’s decision not to insist more vigorously on Chinese compliance with the arbitral tribunal’s verdict.⁸⁴⁷

Furthermore, officials of the Aquino administration that brought the dispute to arbitration filed a complaint with the ICC in March 2018 arguing that China’s constructions on the maritime features in the South China Sea caused irrevocable environmental damage and therefore are a crime against humanity.⁸⁴⁸ Two days later the Philippines withdrew from the ICC which was investigating extrajudicial killings in Duterte’s war on drugs.⁸⁴⁹

In the wake of the 2019 midterm elections, the Duterte administration has become more responsive to public dissatisfaction with the administration’s South China Sea policy: Duterte’s rhetoric towards China has become more critical and in April 2019 the

⁸⁴⁵ Cayetano: Viray 2018. June 8.

⁸⁴⁶ Social Weather Stations. 2018. November 20.

⁸⁴⁷ Deutsche Welle 2018. July 12.

⁸⁴⁸ Santos and Pierson 2019. April 15.

⁸⁴⁹ Ibid.

Philippines engaged in the biggest show of force since Duterte took office in 2016 with a joint military exercise with the US in the South China Sea.⁸⁵⁰

The pragmatic approach of the Duterte administration – combined with the domestic pressures to keep the claim agreement alive – might have helped to bring about concessions on Scarborough Shoal in the short-run. However, at the same time, it is possible that the failure to mobilize more social pressure on China prevents frame agreement and norm clarification. At least, there is significant evidence that both the Aquino administration when filing the case and China after the verdict was issued saw the reactions of the Philippines’ in-group, in particular, and the wider international community, in general, as decisive for the impact of the PCA’s ruling.

The Counsel of the Philippines states that Philippines originally brought the case to arbitration because the Aquino administration hoped that a favorable ruling would allow them to build a regional bloc within ASEAN in support of their position, and then to collectively oppose China:

it was a very very eminent, knowledgeable, really impeccable tribunal. And the Philippines was hoping for that, and that it would be a strong and unanimous award. And this would help not only strengthen the Philippines’ position in ongoing discussion with China but it would also encourage other states with coasts on the South China Sea that were opposed to Chinese claims, particularly Indonesia and Vietnam, to join together. So, you might have a group of countries within ASEAN who then collectively would face China and all would benefit from the same ruling. Because if the “nine-dash line” is ruled unlawful as applied against the Philippines, it is equally unlawful as applied against Vietnam, Indonesia and others. But the idea was to create a regional block of support, and then beyond that to get the international community to put pressure on China: the EU, the United States, Latin American states, Japan, Australia, India ... China is a great power, China can ignore everybody if they want to, but there is a cost, there is a cost, to being labelled an international law breaker ... it affects the way you proceed, it affects your influence.⁸⁵¹

These considerations of the Aquino administration show that states consider in-group support for their position to improve their ability to oppose the norm interpretations of powerful adversaries. As regional organization, ASEAN is a good proxy for the Philippines’ in-group and thus the states it shares important cultural, social and material

⁸⁵⁰ Ibid.

⁸⁵¹ Phone Interview with Paul S. Reichler, Legal Counsel to the Philippines in the South China Sea arbitration dispute, 22 March 2019.

ties with. The Aquino administration's considerations also speak of the need to mobilize widespread social support to achieve agreement on a norm interpretation.

As described, the Duterte administration's preference for collaboration with China made the Philippines refrain from such a confrontational course. China, however, has made efforts to prevent other states from criticizing it and, in particular, to prevent ASEAN from mentioning the arbitration tribunal's ruling.⁸⁵² These actions acknowledge that it matters whether the PCA's award receives social recognition by regional actors and the reputational damage that criticism from other states can inflict.

While China claimed that sixty countries support its rejection of the PCA's award, analysts only have identified seven to eight countries that publicly oppose the ruling, mainly on procedural grounds.⁸⁵³ The most important supporter is fellow permanent UNSC and in-group member Russia. Vladimir Putin stated,

We stand in solidarity and support of China's position on this issue – not to recognize the decision of this court... This is not a political position, but purely legal. It lies in the fact that any arbitration proceedings should be initiated by the disputing parties, while the arbitration court should hear the arguments and positions of the disputing parties. As you know, China did not address the Hague arbitration and no one listened to its position there. How can you recognize these decisions as fair? We support China's position on this issue.⁸⁵⁴

Russia's statement echoes China's rejection of the verdict that will be discussed below, namely that the PCA lacked jurisdiction and that the arbitration was not a fair proceeding.

However, only eight countries openly called on China to respect the ruling. Those countries are significantly more influential than China's supporters: the US, UK and regional powers Australia, Japan and New Zealand are among them. The US, Australia and Japan issued a trilateral statement, declaring that:

The ministers expressed their strong support for the rule of law and called on China and the Philippines to abide by the Arbitral Tribunal's award of July 12 in the Philippines-China arbitration, which is final and legally binding on both parties.⁸⁵⁵

⁸⁵² The Nation 2017. January 7.

⁸⁵³ Page 2016a. June 17; Asia Maritime Transparency Initiative 2016. June 16.

⁸⁵⁴ Putin: Sputnik International 2016. September 5.

⁸⁵⁵ Ministry of Foreign Affairs of Japan 2016. July 25.

However, several factors prevented this social pressure from being strong enough to force China to accept the PCA's ruling: the US Secretary of State John Kerry soon struck a more conciliatory tone towards his Chinese colleagues,⁸⁵⁶ a large number of states refrained from explicit criticism,⁸⁵⁷ and the Philippines' did not put effort into mobilizing sustained social pressure.⁸⁵⁸ The Philippines' decision not to insist on the ruling may have lowered the chances for sufficient social pressure to emerge. To say it in Reichler's words again:

And if the Philippines wasn't going to invoke the award, what could the United States do? I think the United States made a very helpful statement in the first day or days, as did many other states. But when the Philippines didn't push it, what was left for the United States to do?⁸⁵⁹

On the other hand, as discussed, China's competing reputational concerns for law-abidance and great power would have probably always made it preferable for China to suffer the reputational costs for non-compliance than to appear susceptible to pressure from international tribunals and weaker states.⁸⁶⁰ Seen in this light, China granting the Philippines access to Scarborough Shoal has already been a very significant concession given how contested access to the fishing grounds has been since 2012.

Undoubtedly, China's status as a great power helped to dissuade countries from criticising it. Some European states like Greece and Hungary, for example, blocked a stronger consensual EU statement on the PCA's ruling because of their reliance on Chinese investments.⁸⁶¹ Material power therefore makes it easier for states to maintain norm contestation, but it does not put them above the law: while China has not faced strong and clear public criticism, China has also not received significant support for its norm interpretations such as the "nine-dash line".

⁸⁵⁶ Zhang 2017, 451-452.

⁸⁵⁷ Asia Maritime Transparency Initiative 2016. June 16.

⁸⁵⁸ Phone Interview with Paul S. Reichler, Legal Counsel to the Philippines in the South China Sea arbitration dispute, 22 March 2019.

⁸⁵⁹ Ibid.

⁸⁶⁰ Zhang 2017, 453; Kreuzer 2018. Summary..

⁸⁶¹ Emmott 2016. July 15.

Justificatory Discourse

We can see visible changes in China's justifications for its rejection of the arbitral tribunal's ruling over time. Shortly after the award was issued, China mainly questioned the credibility of the tribunal and its authority to rule over the matter and did not thoroughly engage with the ruling on its merits. However, two years later, the Chinese Society of International Law, which is closely linked to the government, published a comprehensive rebuke of the PCA's awards.⁸⁶² This change in the justificatory discourse shows that there is an expectation for states to provide substantive legal arguments. Furthermore, China has relied less on references to the "dotted line" or "nine-dash line" frame and instead has increasingly used UNCLOS terminology to justify its position. This change in discourse also shows that there are social pressures to use the language of the law.

Regarding China's change in emphasis from procedural to substantive aspects, on the day that the award was published, "the Ministry of Foreign Affairs of the People's Republic of China solemnly declares that the award is null and void and has no binding force."⁸⁶³ When rejecting the verdict, the Ministry of Foreign Affairs (MFA) mainly relied on arguments that questioned that the tribunal had jurisdiction to issue a ruling and that questioned its credibility. The following sentence in the MFA's statement epitomizes this criticism: "By unilaterally initiating the arbitration, the Philippines violates UNCLOS and its provisions on the application of dispute settlement procedures, the principle of '*pacta sunt servanda*' and other rules and principles of international law."⁸⁶⁴ In addition, Vice Foreign Minister Liu Zhenmin openly called the composition of the tribunal an act of "political manipulation" because the President of ITLOS who nominated four judges of the tribunal due to China's non-participation was Japanese. He also insinuated that since most judges were European, they were not sufficiently "familiar with Asian culture or the South China Sea issue."⁸⁶⁵

⁸⁶² Chinese Society of International Law 2018. In an email exchange with the author, the Press Office of the Chinese Embassy to the UK referred the author of this study to the Chinese Society of International Law's publication as a source of information.

⁸⁶³ Ministry of Foreign Affairs of the People's Republic of China 2016. July 12.

⁸⁶⁴ Ibid.

⁸⁶⁵ Zhenmin 2016. July 13.

However, since China felt the need to publish a comprehensive rebuke of the substantive findings, decision-makers apparently came to the conclusion that it was not sufficient to reject the verdict by primarily questioning the credibility of the agents and the fairness of the procedures. This may have been due to the difficulty of questioning the impartiality and credibility of the judges. As Reichler states, this was an “extremely prestigious arbitral tribunal of recognized law of the sea experts”:

I mean you couldn't get a better tribunal than this one. You had former ITLOS presidents, Rüdiger Wolfrum and Jean-Pierre Cot were presidents of ITLOS, Fred Soons is one of the most respected people in the world in terms of law of the sea ... and Judge Pawlak, a Polish judge on the ITLOS court and with a distinguished diplomatic career during which he had very close relations with the Chinese... So it was a very very eminent, knowledgeable, really impeccable tribunal.⁸⁶⁶

Next to the Chinese Society of International Law's roughly 500-page long rebuke of the PCA's award, there have also been other signs that China is increasingly relying on UNCLOS terminology. The MFA in talks with US State Department Officials de-emphasized the “nine-dash line” frame and instead claimed straight baselines around the “four sha” island groups. This new frame still means that China claims sovereignty over most of the South China Sea. It also has practically been dismissed by the arbitral tribunal but it is closer to UNCLOS terminology.⁸⁶⁷ Legal experts Julian Ku and Chris Mirasola state that this shift in argumentation strategy means that “China may have concluded that it can better shape (or undermine, depending on your point of view) the law of the sea by adopting UNCLOS terminology.”⁸⁶⁸

We can conclude from these changes in China's justificatory discourse that at a minimum, there is a social expectation for states to use legal language when justifying their claims.

There is evidence that China's increased reliance on (quasi-)legal arguments was a deliberate decision. The Diplomat reports a “government-sponsored boom in South China Sea issues in China's academic and policymaking community... [t]he goal is to have Chinese experts who can argue for China's claims based not only on history, but on

⁸⁶⁶ Phone Interview with Paul S. Reichler, Legal Counsel to the Philippines in the South China Sea arbitration dispute, 22 March 2019.

⁸⁶⁷ Ku and Mirasola. 2017. September 25.

⁸⁶⁸ Ibid.

international law.”⁸⁶⁹ Paul Reichler also reports that China has “hired a number of international lawyers around the world to be mouth pieces for them.”⁸⁷⁰ All these activities indicate that China takes legal argumentation seriously.

5. Conclusion

This chapter provided insights into norm neglect by comparing the UNSC’s decision to establish a no-fly zone over Libya with China’s concession to grant Filipino fishermen access to Scarborough Shoal. As is characteristic of norm neglect, while the dispute parties reached agreement on these claims, they disagreed on the frame. UNSC members have long disagreed over whether R2P or sovereignty should be prioritized when responding to mass atrocities, whereas China and the Philippines disagree over whether historic rights such as the “nine-dash line” or UNCLOS maritime rights and entitlements apply in the South China Sea. It is therefore noteworthy that dispute parties reached claim agreement.

I have shown that social dynamics go a long way in explaining these claim agreements and their effects. When it comes to the no-fly zone over Libya, the request of LAS to establish a no-fly zone went a long way in convincing reluctant P5. As LAS forms part of Russia’s and China’s in-group and both often emphasize the need for regional solutions to regional problems, the LAS request was difficult to ignore for these intervention sceptics. Nevertheless, the claim agreement on the no-fly zone over Libya did not entrap Russia and China to respond to the mass atrocities committed in Syria in a similar way. Not only were regional organizations more divided, but Russia and China could also point to the lack of *ex post* output legitimacy of the NATO-led coalition’s implementation of the no-fly zone. Post-conflict reconstruction has not been very successful.

Regarding the South China Sea dispute, the Philippines’ decision to bring the dispute to arbitration set off the social dynamics that led to claim agreement. The clarity of the arbitral tribunal’s ruling in favor of the Philippines clearly exposed China’s “nine-dash line” frame and associated claims as illegal. This was a double-edged sword: while

⁸⁶⁹ Tiezzi 2014. February 25.

⁸⁷⁰ Phone Interview with Paul S. Reichler, Legal Counsel to the Philippines in the South China Sea arbitration dispute, 22 March 2019.

China's reputation for law-abidance suffered as a result, accepting the ruling would negatively affect China's reputation as great power. Due to his preference for closer ties with China, President Duterte has relied on diplomacy rather than on public criticism and insistence on the ruling. In response, China granted Filipino fishermen access to Scarborough Shoal. This claim agreement has been volatile as Chinese Coast guards have repeatedly harassed Filipino fishermen and curtailed their access. However, domestic pressures on the Duterte administration to keep insisting on access to Scarborough Shoal have kept the claim agreement more or less alive. Furthermore, it is worth noting that it was important for China that other states would not openly insist on the implementation of the ruling, which indicates that states are concerned about their reputation for law-abidance.

Another important finding of this comparison is that while frame disagreement persisted in both cases, the frames have undergone transformations. We see China increasingly relying on justifications based on UNCLOS terminology rather than on historic rights, and on substantive rather than procedural arguments for its rejection of the arbitral tribunal's verdict. The UNSC, in turn, blurred the lines between R2P and PoC in its justification for the no-fly zone and thus left open what norm frame the claim agreement is based on. China has also been silent on the legal basis for granting the Philippines access to Scarborough Shoal. Such implicit exceptionalism is characteristic of norm neglect, where the dispute parties prioritize finding pragmatic solutions to joint problems over resolving their normative differences. However, the resulting normative uncertainty makes the claim agreements fragile compromises: the renewed contestation over how to address mass atrocities committed in Syria and the sporadic access to Scarborough Shoal show as much.

Chapter 6: Norm Impasse: Protracted contestation over the status of Kosovo, South Ossetia and Abkhazia

1. Introduction

Kosovo as well as South Ossetia and Abkhazia declared independence from Serbia and Georgia respectively within short succession of each other in 2008. These declarations of independence brought tensions between the rights to sovereignty and to self-determination to the fore and triggered a norm impasse between the United States and European countries, on the one side, and Russia on the other that lasts to this day. In this chapter, I analyze the interplay of law and politics that led to this norm impasse and the strategies that have sustained it.

Kosovo unilaterally declared independence from Serbia on 17 February 2008 after a long period of negotiations over its status following a NATO air campaign that halted Serb atrocities in 1999. The United States and most European states accepted Kosovo's claim to independence and framed Kosovo as a *sui generis* or special case that requires an exception to the right to territorial integrity and sovereignty. Russia, Serbia and many other states disagreed with this assessment and emphasised Serbia's territorial integrity and sovereignty.

Half a year later, South Ossetia and Abkhazia pronounced their independence from Georgia after a short war between Russia and Georgia in August 2008. Russia was quick to recognise these territories as states and framed this decision as necessary due to Georgia's aggression and atrocities towards these people, effectively invoking a right to remedial self-determination. Now, the United States, the European Union and most other states insisted on Georgia's territorial integrity and sovereignty and rejected South Ossetia's and Abkhazia's claims to independence.

Hence, both situations ended in frame and claim disagreement between critical states and thus in a norm impasse. As we see an interesting reversal of interpretations from the dispute parties in two similar situations within a short timeframe, these episodes of norm contestation raise the following questions: What has made these norm impasses so persistent? And, what effect has this reversal of arguments had on international law?

Because the US and Russia adopted contradictory stances in two similar situations in the same year, scholars use these reactions as an example of international law's negligible influence on politics. While this episode of contestation illustrates the limits of rhetorical "entrapment" with prior interpretations, I see little indication of norm disregard. My analysis of statements by senior politicians and diplomats reveals that international law matters and has structured the debate. The US's explicit exceptionalism, and thus careful framing of the Kosovo case as a *sui generis* case, shows respect for international law and acknowledges that setting a precedent could lead to unwanted future obligations. Similarly, Russia's reliance on legal arguments— sometimes very detailed ones—to justify its recognition of South Ossetia and Abkhazia indicates that Russia considers international law as a persuasive tool of argumentation.

Furthermore, I show that these norm impasses have been so persistent because each side received social support from key audiences or at least only muted criticism for their interpretations: key European states joined the US in accepting Kosovo's independence claim due to the special nature of the case. This mitigated the social and material costs of dissent from Russia and other out-group members. Russia, on the other hand, only received lacklustre support, if at all, for its "remedial self-determination" frame and "independence" claim for South Ossetia and Abkhazia from its in-group. However, domestic support and the fact that out-group members soon toned down their criticism have made this norm interpretation sustainable.

Lastly, I find that delegation played a negligible role in both cases. It mattered only in so far as the final effort of a "Troika" of negotiators to reach consensus on the status of Kosovo helped to convince European states to support the US's norm frame and claim regarding Kosovo.

This chapter proceeds as follows. First, I provide background information on the contested norms, the lead-up to Kosovo's, South Ossetia's and Abkhazia's independence claims, and the implications of the norm impasses that we see in these cases. Second, I provide an overview of the impact these norm impasses had on international law and what has made them so persistent. Lastly, I engage in more fine-grained case study analysis to illustrate my argument that social support from key audiences or muted criticism has

made these norm impasses so persistent, and that the US's explicit exceptionalism and Russia's quasi-legal arguments show respect for international law rather than disregard. Section 4 concludes.

2. Norm impasse: Context, Contested Norms and Consequences

Legal ambiguities facilitated this norm contestation. Sovereignty is considered the guiding principle of international relations.⁸⁷¹ This right to self-governance and territorial integrity of each state is well-established and enshrined in Article 2 of the UN Charter. Similarly, the right to self-determination features in the UN Charter and human rights treaties. Particularly since Woodrow Wilson proposed the right to self-determination after the First World War, who holds this right and what it entails has been a subject of debate. In the 1960s, it has become clear that colonies hold this right and that it extends to secessionist claims,⁸⁷² but when it comes to the rights of minorities matters are more complicated. Given the right to territorial integrity of states, minorities primarily have the right to internal self-determination and thus to protection and minority rights within a state. However, in case of repeated and extreme human rights violations, the Friendly Relations Declaration, which the International Court of Justice (ICJ) recognises as customary international law, is often interpreted as giving minorities the right to external self-determination and thus to remedial secession.⁸⁷³ However, state practice has so far not supported such a right to “remedial self-determination” and the framers of the Friendly Relations Declaration may not have intended to give rise to it.⁸⁷⁴ In any case, what triggers this right to remedial secession, e.g. what threshold of abuse has to be reached, is not well-defined and the subject of much debate among lawyers and politicians as the secessionist claims of Kosovo, South Ossetia and Abkhazia illustrate.⁸⁷⁵

All three territories share a similar history: they are regions within Serbia or Georgia with large ethnic minority populations. During the Soviet era, Kosovo, South Ossetia and Abkhazia were granted significant autonomy. After the break-up of the Soviet Union,

⁸⁷¹ Hurd 1999, 393.

⁸⁷² Borgen 2009, 6–10.

⁸⁷³ Mullerson 2009, 18–21; Ryngaert and Sobrie 2011, 485–487.

⁸⁷⁴ Weller 2009, 272–275.

⁸⁷⁵ Borgen 2009; Ryngaert and Sobrie 2011; Mullerson 2009; Weller 2009.

Serbia and Georgia scaled back those entitlements to self-governance, which led to tensions, and eventually declarations of independence.

Kosovo

In 1998, the Serb government initiated large scale atrocities against Kosovar Albanians, which were eventually halted by a NATO air campaign. The UNSC subsequently vested a UN mission, the United Nations Mission in Kosovo (UNMIK), rather than Serbia with the authority to govern Kosovo in the interim and set out a framework for gradual delegation of power and status negotiations.⁸⁷⁶ These negotiations over Kosovo's statehood remained inconclusive, and the UNSC failed to adopt a resolution endorsing UN Special Envoy Martti Ahtisaari's plan for Kosovo's independence after a period of international supervision.⁸⁷⁷ Eventually, on February 17, 2008, the Assembly of Kosovo proclaimed "Kosovo to be an independent and sovereign state" and to "accept fully the obligations for Kosovo contained in the Ahtisaari Plan."⁸⁷⁸ The parliament only vaguely referenced the self-determination frame by justifying the claim to independence as "[a]nswering the call of the people to build a society that honours human dignity and affirms the pride and purpose of its citizens."⁸⁷⁹ Within a month, the United States and most European states, including France and the UK, accepted Kosovo's claim to statehood. When doing so, they framed Kosovo as a "*sui generis*"⁸⁸⁰, "special"⁸⁸¹ or "unique"⁸⁸² case, referring to the human rights abuses and UNMIK administration. The US and EU were also quick to point out that this *sui generis* case does not call into question the principles of sovereignty and territorial integrity,⁸⁸³ and that they "have not, do not and will not accept the Kosovo example as a precedent for any other conflict or dispute."⁸⁸⁴

⁸⁷⁶ UNSC S/RES/1244.

⁸⁷⁷ See speech of Zalmay Khalilzad, US ambassador to the UN: UNSC Doc. S/PV.5839. 2008, 18.

⁸⁷⁸ Republic of Kosovo. Assembly 2008. February 17, 2 para. 1 and 3.

⁸⁷⁹ Ibid., 1.

⁸⁸⁰ See, e.g. Council of the European Union 2008. February 18, 7; Sir John Sawers, UK Representative to the UN: UNSC Doc. S/PV.5839. 2008, 14.

⁸⁸¹ See, e.g. US Secretary of State, Condoleezza Rice's statement on the recognition of Kosovo. Rice 2008. February 18.

⁸⁸² Khalilzad: UNSC Doc. S/PV.5839. 2008, 18.

⁸⁸³ Council of the European Union 2008. February 18, 7.

⁸⁸⁴ Khalilzad: UNSC Doc. S/PV.5839. 2008, 19.

Serbia, Russia and China, however, disagreed with both the claim to independence and the frame. Russia, the staunchest opponent within the UNSC, stated that it “continues to recognize the Republic of Serbia within its internationally recognized borders” and considers the declaration of independence “a blatant breach” and “illegal act” that “is an open violation of the Republic of Serbia’s sovereignty”⁸⁸⁵. Hence, the dispute parties reached a norm impasse: whether Kosovo belongs to Serbia or is an independent state (claims) and whether its declaration of independence violates Serbia’s sovereignty and territorial integrity or not due to its uniqueness (frames) remains contested. This norm impasse increases normative uncertainty in similar situations in the future and thus weakens these norms, but it also affects Kosovo’s ability to enter into relations with other states. As of today, roughly half of all states—104—have recognised Kosovo’s statehood.⁸⁸⁶ Due to Russia’s veto power and willingness to block Kosovo’s UN membership, its ability to function as a member of the international community is limited.⁸⁸⁷

South Ossetia and Abkhazia

What is more, after Kosovo’s declaration of independence, South Ossetia and Abkhazia’s calls for independence grew stronger.⁸⁸⁸ After the break-up of the Soviet Union, civil war within Georgia erupted. With Russian support South Ossetia and Abkhazia have effectively been separated from Georgia since 1992 and 1993 and Russia has held a military presence in both regions.⁸⁸⁹ In 2008, tensions between Georgia and South Ossetia and Abkhazia were on the rise again. These tensions culminated in a war between Russia and Georgia in August 2008. Both Georgia and South Ossetia claim that the other side fired the first shot. Russian military forces made in-roads into Georgia and came within close distance of the Georgian capital, Tbilisi, before withdrawing after a cease-

⁸⁸⁵ Vitaly Churkin, Russian Permanent Representative to the UN: UNSC Doc S/PV.5839. 2008, 6.

⁸⁸⁶ Note that reports of the number of recognitions differ. In a parliamentary question, the European Parliament reports 104 recognitions, European Parliament 2018. December 20, whereas Kosovo reports 116. Republic of Kosovo. Ministry of Foreign Affairs. 2019. June 1.

⁸⁸⁷ MEP Dominique Bilde writes in her question on the Withdrawal of recognition of Kosovo to the Commission: “Incidentally, Kosovo is still finding admission to leading international organisations difficult; its application to join Interpol was refused on 20 November 2018.” European Parliament 2018. December 20.

⁸⁸⁸ Borgen 2009, 4.

⁸⁸⁹ Ibid., 4-5.

fire was brokered.⁸⁹⁰ South Ossetian and Abkhazian leaders and demonstrators appealed to Russian President Medvedev and the Federal Assembly to recognise their territories' independence and statehood. On August 26, 2008, Medvedev accepted these claims and signed decrees that recognise Abkhazia and South Ossetia as independent states.⁸⁹¹ Russia framed this decision by referring to the Friendly Relations Declaration and the right to self-determination, saying that "in accordance with the Declaration, every State must refrain from any violent actions that might deprive people of their right to self-determination, freedom and independence"⁸⁹² and that Georgian President "Saakashvili left them [South Ossetia and Abkhazia] with no other choice but to provide for their own security and to seek to exercise the right to self-determination as independent States."⁸⁹³ Georgia, the United States, European countries and many others condemned this recognition and "Russia's disregard for Georgia's territorial integrity."⁸⁹⁴ While countries such as Belarus initially expressed support for Russia's position,⁸⁹⁵ currently only five states formally recognise South Ossetia's and Abkhazia's statehood.⁸⁹⁶ However, Russia's backing of South Ossetia and Abkhazia's statehood de facto limits Georgia's reach over these territories, whereas the low number of recognitions limits South Ossetia's and Abkhazia's ability to function as members of the international community. Hence, here again we see a norm impasse with an interesting reversal of sides compared to Kosovo: now the US and Europe emphasize territorial integrity and sovereignty (frame) and reject independence (claim), whereas Russia supports secession (claim) with an explicit reference to the right to self-determination (frame).

⁸⁹⁰ Ibid., 5-6.

⁸⁹¹ Churkin: UNSC Doc. S/PV.5969. 2008, 6-7.

⁸⁹² Ibid., 9.

⁸⁹³ Ibid., 8.

⁸⁹⁴ Wolff (United States): UNSC Doc. S/PV.5969, 14, but see also Sawers (United Kingdom), 11 and Lacroix (France), 9.

⁸⁹⁵ RIA Novosti. 2008b. August 28.

⁸⁹⁶ TASS Russian News Agency 2018. May 29.

3. Pathways to Norm Impasse: The limits of entrapment and the power of legal discourse

Because the US and Russia interpreted two similar situations within such a short timeframe very differently, some scholars question international law's influence on politics. Realists charge the US and Russia with hypocrisy and see this exchange of arguments as evidence that international law does not influence state behavior. Müllerson, for instance, argues that references to the uniqueness of a case mask considerations of power and self-interest and expose the limits of international law.⁸⁹⁷ Borgen also concludes from the *sui generis* argument that the "US seems to try to duck the issue of legality when the law does not suit its purpose," but he sees Russia's stronger reliance on legal arguments as indicator for the strategic value of law.⁸⁹⁸ Even some international lawyers see reason for pessimism: Ryngaert and Sobrie conclude that international law only played a minor role in determining the status of Kosovo, South Ossetia and Abkhazia because states were seriously divided on recognition.⁸⁹⁹

Unlike these scholars, I find little evidence that these norm impasses show disregard for international law. My analysis of statements made by senior politicians and diplomats and of interviews with decision-makers reveals that they take international law seriously and that international law has structured the debate. Rather than disregard, the US's careful framing of the Kosovo case as a *sui generis* case shows respect for international law and an awareness that setting a precedent could lead to unwanted future obligations. Similarly, Russia uses legal arguments to justify its recognition of South Ossetia and Abkhazia, even if they are of questionable quality. Nevertheless, Russia's use of (quasi-)legal language indicates that Russia considers international law a persuasive tool of argumentation.

However, the lack of consistency in the contesting parties' arguments in two similar situations imply that there are limits to what deliberation scholars call "entrapment": voicing commitment to a norm interpretation at one point in time can entrap a state to accept the same norm interpretation in the future because a change of mind would call into question the state's reliability as cooperation partner and commitment to community

⁸⁹⁷ Müllerson 2009, 3–5.

⁸⁹⁸ Borgen 2009, 25.

⁸⁹⁹ Ryngaert and Sobrie 2011, 481.

norms.⁹⁰⁰ Such a change of mind therefore involves social and material costs such as reduced social standing and cooperation that may make upholding a contested norm interpretation unsustainable. The disputes over the status of Kosovo, South Ossetia and Abkhazia provide valuable insights into the limits of entrapment: the recognition of Kosovo's statehood has neither entrapped the US and European states to recognize South Ossetia's and Abkhazia's statehood (and later Crimea's) nor Russia to uphold the sovereignty and territorial integrity of the motherlands. Instead the dispute parties have reached an impasse over the applicable frames and claims that persists to this day. Furthermore, their prior commitment to the well-established territorial integrity and sovereignty norms has prevented neither dispute party from recognizing the statehood of these contested territories. Hence, the entrapment to a prior interpretation is not automatic: norm impasses are very stable or short-lived depending on whether the benefits of protracted contestation outweigh the (normative, social or material) costs and on what the (dis)agreement to the prior norm interpretation looked like.

I find that each side could shoulder the costs of dissent from the other because in-group/out-group dynamics played out in their favour, their different argumentation strategies made entrapment difficult and delegation was not effective or timely enough to manage contestation. I will provide a brief overview of these factors in the following before engaging in a more detailed analysis of the role they played in mitigating the costs of disagreement in each case in the next section.

The different argumentation strategies that the US and Russia chose to justify their respective recognition of Kosovo and South Ossetia and Abkhazia also speak to the limits of entrapment. States pursue different legal strategies such as setting a precedent and exceptionalism.⁹⁰¹ Exceptionalism occurs when a state implements a claim that many others would consider contradicting a well-established frame like "territorial integrity". When the controversial behavior cannot be hidden to escape reputational costs, states can frame an interpretation as exceptional or historically contingent to prevent a redefinition of the existing legal consensus. The US and European states sought to achieve such overt

⁹⁰⁰ Johnstone 2011, 210–11; Krebs and Jackson 2007, 44–47; Schimmelfennig 2001, 64.

⁹⁰¹ See Byers 2003 for different strategies of legal interpretation that hegemons pursue. His definition of exceptionalism also involves seeking special rights but it differs somewhat from my definition as Byers focuses more on treaty negotiation than legal interpretation.

and explicit exceptionalism when it comes to Kosovo, similar to the US's exceptionalism regarding the prohibition of torture in Chapter 1, only that the contestable behavior could not be hidden here. Their framing of Kosovo as a *sui generis* or special case illustrates this.⁹⁰² While the *sui generis* argument gives the dispute parties the ability to advance other norms in the future, it also relies on other states accepting the special nature of the case. Otherwise, exceptionalism increases confusion rather than clarity over legal principles and there is little that prevents others from using the *sui generis* case as an example of a new trend.

In contrast, when it comes to South Ossetia and Abkhazia, Russia did not rely on exceptionalism but on controversial legal categories such as the “remedial self-determination” frame, which might have set a precedent if accepted. The US's reliance on overt, explicit exceptionalism and Russia's reliance on quasi-legal arguments shows that there is a general expectation for states to present legal justifications – no matter how solid – for their actions, and that states take this task seriously. However, it also shows that the better (legal) argument does not always win. Other factors such as the reactions of key audiences and the nature of delegation determine the duration and effect of norm contestation.

Regarding social support: as previously discussed, it matters whether the opposing sides are culturally dissonant or harmonious and have weak or strong ties with each other.⁹⁰³ when in-group and out-group members disagree on what frame applies and what claim follows, a norm impasse is harder to break. Social and material costs are lower, and there are fewer cultural ties to aid resolution. The US secured the support from European states, and thus key in-group members, for its interpretation of the events in Kosovo and Georgia. Because of greater social and material ties with in-group members, their consent lowered the costs of dissent from key out-group members. On the other hand, member states of Eurasian security organizations, and thus Russia's in-group, were reluctant to recognise South Ossetia and Abkhazia. However, their criticism was muted, and Russia counted on domestic support and critical out-group members soon toned down their

⁹⁰² See, for example, Khalilzad: UNSC Doc. S/PV.5839. 2008, 19; Sawers: UNSC Doc. S/PV.5839, 14.

⁹⁰³ Goddard 2006, 45–47.

criticism and reinitiated cooperation. These social dynamics made Russia's contested recognition of South Ossetia and Abkhazia sustainable.

I use two indicators for in-group membership in this study: first, whether states share a similar culture and history. Hence, throughout this project, I have treated the United States and European states as peers due to their shared values and history. As fellow UNSC members and powerful states, the US, UK and France are particularly close, and in turn, they share more economic and social ties with EU countries, particularly with larger and influential European states such as Germany and Italy. Similarly, Russia cares about its "near abroad" – the English translation of a "popular geopolitical label Russian politicians ... gave to the former Soviet Republics that were now independent sovereign countries in their own rights."⁹⁰⁴ The close historical, cultural and social ties make these countries in-group members.

Secondly, I use joint membership of institutions with selective membership criteria in the subject-area under contention as a proxy for in-group membership. Such institutions, for example, regional or security organizations, show that states share a special bond and common purpose. The two conflicts under analysis involve security considerations and took place in the Balkans and Caucasus, and thus in the vicinity of Russia. Hence, regional security organizations are a good indicator for the countries of Russia's in-group whose opinions matter most in the debates over the status of Kosovo, South Ossetia and Abkhazia. I treat the members of Eurasian security organizations – the Collective Security Treaty Organization (CSTO) and the Shanghai Cooperation Organization (SCO) as Russia's core in-group.⁹⁰⁵ The Commonwealth of Independent States (CIS) is also of particular importance to Russia as these former Soviet Republics do not form part of the European Union: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.⁹⁰⁶ In fact, the membership

⁹⁰⁴ Toal 2017, 3.

⁹⁰⁵ The SCO comprises Russia, China, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. The CSTO members are Russia, Kazakhstan, Armenia, Kyrgyzstan, Tajikistan and Belarus.

⁹⁰⁶ See, for example, Levada-Center. 2014. October 22. One question survey respondents were asked was "What policy should Russia Pursue with regards to CIS countries?" – answer options included: "Comply with its own economic and political interests and not interfere in the internal affairs of its neighbors", "Work to ensure that foreign states (USA, China, Turkey and others) do not exert dangerous pressure on these countries". The question and answer options indicate that CIS countries are critical states for Russia.

of all three organizations overlaps, which is a further indication of the close relations between these states.

Lastly, delegation did not help to manage norm contestation. In the Kosovo case, agreement on Resolution 1244 (1999) as frame facilitated agreement among Council members to delegate negotiations over the status of Kosovo first to Special Envoy Martti Ahtisaari and then to the Troika. The lack of sustained pressure on Kosovo and Serbia to cooperate and resolve their disagreement meant that the background conditions made it difficult for the agents to propose a solution that is acceptable to all parties. Furthermore, as described in Chapter 4, agents are more likely to manage norm contestation when they can build a reputation as credible and effective. Ahtisaari's handling of the negotiation process was not credible and effective enough to contribute to bringing about consensus. In contrast, the Troika's more open-ended and impartial approach to negotiations, while not solving the norm impasse, had the side-effect of convincing key European states that all options other than independence had been explored and thus increased European support for Kosovo's independence.

In the South Ossetia and Abkhazia case, delegation occurred after Russia's recognition of these territories and had the purpose of providing a "political and diplomatic follow-up"⁹⁰⁷ rather than of issuing a definite verdict on the norm impasse. When Tagliavini's findings were released, a year had passed since the conflict, and there was little appetite among the dispute parties to reignite old debates. Similarly, the ICJ's advisory opinion on Kosovo's declaration of independence would probably not have led to norm clarification had it contained a substantive verdict as it came at a time when most key actors had already made up their mind on Kosovo: it is rare that states withdraw recognitions of statehood, which is considered more of a political than a legal act. Hence, delegation did not contribute to managing norm contestation because it was untimely and not supported enough by social pressure or the agents themselves.

⁹⁰⁷ IIFFMCG 2009. Volume 1, 2. [hereinafter: Tagliavini Report 2009].

4. Comparing norm impasses: Analysis of the disputes over the status of Kosovo, South Ossetia and Abkhazia

I selected these two cases studies because the dispute parties adopted contradictory positions within a short time span, which has led other scholars to the conclusion that international law was inconsequential in these debates. The episodes of contestation over the status of Kosovo, South Ossetia and Abkhazia are thus particularly tough cases to show that decision-makers take international legal argumentation seriously. By showing that international law mattered in these case studies, this study underlines the influence of international law in international affairs.

Furthermore, these two case studies fit well with the focus of analysis of this study: it involves contestation of the sovereignty norm. Since sovereignty and territorial integrity are well-established norms, first generation norm scholars have difficulties explaining why we continue to see public debate instead of internalization.⁹⁰⁸ These debates speak to the malleability of norms and show that the boundaries between the rights to self-determination and sovereignty and territorial integrity are fuzzy. What is more, these debates illustrate that power differentials are not sufficient to generate consensus and norm clarification: regarding Kosovo, the US challenged the status quo, whereas Russia—the less materially powerful state—initiated the debate over South Ossetia’s and Abkhazia’s statehood. Yet, despite of the power differentials both disagreements ended in a norm impasse, and thus had the same outcome.

To analyze what contributes to the persistence of these norm impasses, I rely on content analysis of official documents such as press releases and on interviews with diplomats and other decision-makers.

Table 1 provides an overview of the case study findings.

⁹⁰⁸ Finnemore and Sikkink 1998, 895.

Table 1: Overview of Case Study Findings

	Norm Impasse over Kosovo's status	Norm impasse over the status of South Ossetia and Abkhazia
Norm conflict	The special nature of the Kosovo case and Kosovo's right to self-determination vs. Serbia's sovereignty (contested frames) → Kosovo's independence (claim) vs. Kosovo forms part of Serbia (claim)	Right to self-determination of South Ossetia and Abkhazia vs. Georgia's sovereignty (contested frames)→ South Ossetia's and Abkhazia's independence (claim) vs. South Ossetia and Abkhazia form part of Georgia (claim)
Social Support	Both US and Russia enjoy support from respective in-groups for their different frames and claims. This social support allows them to shoulder the costs of their disagreement.	Russia does not enjoy support of in-group, but in-group criticism is subtle or muted. Domestic audiences support Russia's interpretation and out-group criticism is soon toned down. These social dynamics allow Russia to uphold the frame and claim, despite few recognitions of South Ossetia's and Abkhazia's independence
Justificatory discourse	US's discursive strategy: overt and explicit exceptionalism: Kosovo is portrayed as <i>sui generis</i> case US uses appeals to output legitimacy to convince European states	Russia's discursive strategy: generally applicable norm change: reliance on quasi-legal rhetoric regarding the number of recognitions that are needed and the right to remedial self-determination
Delegation	Delegation of status negotiations to the Troika did not resolve norm contestation, but it helped convince European states to support the US's norm interpretation because they felt that now all options to reach consensus were exhausted	Delegation to the IIFMCG did not manage norm contestation as there was not sufficient social pressure on Russia to accept Tagliavini's findings regarding South Ossetia and Abkhazia
Outcome	Norm Impasse: Disagreement over whether Kosovo is a special case that requires making an exception to Serbia's sovereignty (frame) and whether Kosovo can become independent (claim)	Norm Impasse: Disagreement over whether South Ossetia and Abkhazia are entitled to remedial self-determination or if Georgia's sovereignty prevails (frame) and whether South Ossetia and Abkhazia can become independent (claim)
Reputational costs	Low (only vis-à-vis out-group)	Low (subtle or muted criticism from key audiences)

4.2 Contestation over the status of Kosovo

Three factors contributed to the norm impasse over the status of Kosovo: Each side counted on sufficient support from their respective in-groups to shoulder the costs of frame and claim disagreement. Furthermore, delegation failed to manage norm contestation because there was too little pressure on Kosovo and Serbia by the US and Russia to cooperate, and the conduct of the agents did not sufficiently legitimate the outcome, or delegation was not timely enough. Lastly, the US's reliance on exceptionalism in its argumentation strategy was designed to circumvent entrapment but at the same time could not prevent others from portraying Kosovo as a precedent.

Social Support

First, the effort that the US put into securing support for Kosovo's independence from European states shows that in-group support is important when norm interpretations are contested. Unlike the US and Russia who soon developed their positions on Kosovo, European Union states differed in their views on Kosovo's independence.⁹⁰⁹ Hence, the US and Russia, next to Kosovo and Serbia, were the main drivers in this episode of norm contestation.

A US diplomat involved in the Kosovo status negotiations recalls that after it became clear that there was no UNSC consensus on independence, the US invested all its energy in building support among the 'big Europeans': the UK, France, Germany and Italy. Extensive diplomatic meetings ensued to convince EU member states to support Kosovo's independence.⁹¹⁰ Because states like Spain had their own minority regions, a unanimous EU decision was unlikely, but the US secured the big Europeans', and many others', support for Kosovo's independence.⁹¹¹ As a result, 17 EU member states immediately recognised Kosovo – a number that has risen to 23.⁹¹²

⁹⁰⁹ Ker-Lindsay 2011, 123.

⁹¹⁰ Interview with US diplomat, New York, 6 October 2017.

⁹¹¹ Ibid. See also New York Times 2008. February 18.

⁹¹² New York Times 2008. February 18. European Parliament 2018. December 20: 23 of 28 EU member states recognized Kosovo by December 2018.

Furthermore, due to the hesitation of countries like Spain, Cyprus and Greece that faced their own secessionist conflicts, the European Union adopted a pragmatic approach.⁹¹³ The Council of the European Union released a statement that emphasized that each EU member state will decide “in accordance with national practice and international law” whether to recognize Kosovo. At the same time, the Council showed unity on the frame that “Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions [UN Charter, Helsinki Final Act and principles of sovereignty and territorial integrity].”⁹¹⁴ Hence, the great majority of European Union member states, including the biggest countries, supported the US’s “*sui generis*”-frame and the “independence”-claim, and the EU as a whole endorsed the frame.

The great importance that the US placed on convincing European states to support Kosovo’s independence shows that gaining in-group support matters. A senior EU official’s statement indicates that the need for in-group support went both ways: “[t]he cake has been baked because the Americans have promised Kosovo independence. And if Washington recognizes Kosovo and European nations do not follow, it will be a disaster.”⁹¹⁵ According to the US negotiator, what convinced Europeans was a practical argument: Kosovars would have considered the NATO Kosovo force, KFOR, to which European countries contributed troops an occupation force and the majority of the population would have been against KFOR had the US and European countries not supported Kosovo’s independence.⁹¹⁶ Similarly, James Ker-Lindsay finds that the fear that Kosovars would perceive UNMIK as an illegitimate neo-colonial administration and use violence against UNMIK and KFOR “helped to sway the opinion of many who would otherwise have opposed independence.”⁹¹⁷ Hence, it was not a reference to principles, precedents or procedural aspects that was persuasive, but rather to the consequences of not supporting a norm interpretation. This underlines my finding that references to output legitimacy, that is to having an effective solution to a shared problem, are particularly persuasive. Furthermore, as discussed below, delegation helped to create more unity among European states to support the “*sui generis*” frame and the “independence”-claim.

⁹¹³ Weller 2009, 233.

⁹¹⁴ Council of the European Union 2008. February 18.

⁹¹⁵ Senior EU official: Bilefsky 2008. January 10.

⁹¹⁶ Interview with US diplomat, New York, 6 October 2017.

⁹¹⁷ Ker-Lindsay 2011, 109.

Similarly, the perceptions of its in-group and of domestic audiences also influenced Russia's position.⁹¹⁸ As discussed, I consider member states of the following regional or security organizations, CIS, CSTO and SCO, as Russia's in-group members. None of these countries have recognised Kosovo's statehood.⁹¹⁹ This in-group support contributes to making Russia's norm interpretation sustainable. James Ker-Lindsay argues that the Kosovo status recognition also had wider implications for Russia's relationship with its near abroad as it touched on the issue of whether Russia would recognize the independence of other regions in former Soviet republics.⁹²⁰ Because of its in-group's fears of a domino effect, insisting on Serbia's sovereignty and territorial integrity was the safer course of action for Russia.

Furthermore, a critical state for Russia in the UN Security Council, China, emphasized the frame of sovereignty and territorial integrity as "one of the cardinal principles of contemporary international law, as enshrined in the Charter of the United Nations."⁹²¹ While China did not condemn Kosovo's claim to independence outright, it did not endorse it either and has not recognized Kosovo's statehood to this day.⁹²²

What is more, Moscow was concerned about domestic public opinion.⁹²³ As a poll conducted by the independent Levada-Center indicates, 51% of Russian survey respondents were worried that Kosovo's declaration of independence would lead to an escalation of tensions and 40% preferred Russia to take its own special line of action rather than to find a coordinated solution with Western countries.⁹²⁴ Hence, the preferences of its domestic audience and of in-group countries in its near abroad facilitated Russia's opposition to the US's "*sui-generis*" frame and "independence" claim.

⁹¹⁸ Ibid., 115.

⁹¹⁹ Republic of Kosovo. Ministry of Foreign Affairs. 2019. June 1.

⁹²⁰ Ker-Lindsay 2011, 115.

⁹²¹ Wang Guangya (China): UNSC Doc. S/PV/5839, 8.

⁹²² Weller 2009, 232.

⁹²³ Ker-Lindsay 2011, 115.

⁹²⁴ Levada-Center 2009. 144.

Delegation

Second, despite efforts to find a multilateral solution through the United Nations, delegation could not manage norm contestation. As described in Chapter 4, frame agreement makes delegation of norm implementation more likely because it lowers the risk of agents making costly claims. We see such frame agreement here due to the UNSC's agreement on Resolution 1244. After the fall-out over NATO's intervention in Kosovo, the Security Council soon agreed on Resolution 1244 (1999) which establishes interim international administration of Kosovo under UNMIK but also calls for "the development of provisional institutions for democratic and autonomous self-government pending a political settlement"⁹²⁵ and "a political process designed to determine Kosovo's future status."⁹²⁶ Hence, Security Council members acknowledged that Kosovo could not go back to being centrally administered by Serbia and committed themselves to finding a solution to Kosovo's status.

Initially, the UN pursued a "standards before status"-policy and thus emphasised the need for democratic principles and the protection of minority rights, particularly of Kosovo Serbs, before any negotiations over Kosovo's status could begin. However, in 2004-2005 it became clear that this approach was not feasible anymore because riots and violence broke out between Kosovo Albanians and Serbs, in part fuelled by the high unemployment rate of 60-70% and dissatisfaction with the UN.⁹²⁷ Furthermore, extreme Kosovo Albanians increasingly directed their anger not only towards Serbs but also towards UNMIK. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) war crime indictment of Prime Minister Ramush Haradinaj in 2005 led to several bomb attacks on UNMIK property.⁹²⁸ Hence, UN General-Secretary Kofi Annan, with the endorsement of the UNSC, delegated the task of conducting a full review of standard implementation in Kosovo to Norwegian diplomat Kai Eide. While Eide found that uneven progress towards the implementation of standard had been made, he also considered that the status question can no longer be ignored.⁹²⁹ The Security Council agreed with Eide's recommendation and reiterated its commitment to Resolution 1244

⁹²⁵ UNSC S/RES/1244, para. 11 (c).

⁹²⁶ Ibid., para. 11 (e).

⁹²⁷ Ker-Lindsay 2011, 20-21.

⁹²⁸ Ibid., 22.

⁹²⁹ Ibid., 23.

(1999). This frame agreement facilitated the delegation of status negotiations to Special Envoy Martti Ahtisaari, despite differences on the “independence” claim. The President of the UNSC released the following statement on 24 October 2005:

The Council agrees with Ambassador Eide’s overall assessment that notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General’s intention to start a political process to determine Kosovo’s Future Status, as foreseen in Security Council resolution 1244 (1999). The Council reaffirms the framework of the resolution, and welcomes the Secretary General’s readiness to appoint a Special Envoy to lead the Future Status process.⁹³⁰

However, the Ahtisaari status negotiations did not convince all permanent Security Council members to endorse his plan for supervised independence. Ahtisaari reached the conclusion that “the only viable option for Kosovo is independence, to be supervised for an initial period by the international community”⁹³¹ to ensure the implementation of democratic standards, human rights and minority protection.

Two of the criteria for delegation to manage norm contestation identified in Chapter 4 were not fulfilled: there was not enough social pressure on the dispute parties and the agent was not successful in building a reputation as credible and effective. Ahtisaari – a Finnish diplomat with a long list of credentials in managing secessionist conflicts – did little to conceal his preference for Kosovo’s independence. His insistence on a quick resolution of negotiations and failure to show diplomatic tact towards Serbs negotiators also did not aid his reputation as a credible and impartial broker.⁹³² Even US and European officials in favour of independence conceded “that Ahtisaari did not handle the talks with as much diplomacy and tact as he could have.”⁹³³ Russia and several other countries were also critical of Ahtisaari’s handling of the negotiation process. According to a diplomat, “Martti went one step farther than necessary. Washington, London and Brussels planned this outcome, he rubber-stamped it. There is a groundswell of opinion against him.”⁹³⁴ Hence, Ahtisaari’s handling of the negotiation process was not credible and effective enough to contribute to bringing about consensus. However, Ahtisaari also

⁹³⁰ UNSC Doc. S/PRST/2005/51.

⁹³¹ UNSC Doc. S/2007.168. 2007, 2.

⁹³² Ker-Lindsay 2011, 110-112.

⁹³³ Ibid., 111. Ker-Lindsay relies on interviews with UK and British officials as well as with Martti Ahtisaari to support his argument that Ahtisaari’s conduct contributed to the failure of status negotiations.

⁹³⁴ Crossette 2008. December 1.

faced a difficult problem-structure: Kosovo's and Serbia's positions were entrenched and "there was no real social pressure from the key external actors—specifically the United States—for the parties to ... reach an agreement."⁹³⁵ Given that critical audiences for the US and Russia supported their respective frames and claims, there was little incentive for them to pressure Kosovo and Serbia into collaborating more fully with each other.

When Russia blocked Security Council endorsement of Ahtisaari's recommendation for "supervised independence" and Serbia, backed by Russia, demanded a new round of negotiations that takes Serbia's proposal of "supervised autonomy" into account, a Troika of negotiators was tasked with finding a solution.⁹³⁶ The United States was also in favour of further negotiations because it held out hope for a UNSC agreement on Kosovo that would end the norm contestation: Russia had been willing to participate in the process, but there were mixed signals from Russian diplomats and the US hoped that Russia would not risk undermining the authority of the Council by failing to compromise on Kosovo's independence.⁹³⁷

The Troika consisted of a US and Russian negotiator and a negotiator for the EU, Ambassador Wolfgang Ischinger of Germany, who was the most neutral agent and driving force in the process.⁹³⁸ Unlike, Ahtisaari, the Troika discussed a whole range of possible status options for Kosovo and tried to get the parties to think through the consequences of their demands.⁹³⁹ Serbia in this round of negotiations made significant concessions. It offered far-reaching autonomy to Kosovo. However, as Marc Weller observes, this proposal may have been hard to refuse for Kosovo had it been made earlier but after fifteen months of negotiations under Ahtisaari, this concession came too late.⁹⁴⁰ Furthermore, Serbia's equation of Kosovars with other minorities in these talks, when ethnic Albanians constituted 90% of Kosovo, did not give the impression that Serbia had learnt from past mistakes and diminished the credibility of its proposals.⁹⁴¹ Because of this, Kosovo had little incentive to compromise and insisted on independence. Therefore, on 10 December 2007, the Troika reported to the Security Council that its attempts at

⁹³⁵ Ker-Lindsay 2011, 107.

⁹³⁶ Weller 2009, 220-223.

⁹³⁷ Ker-Lindsay 2011.

⁹³⁸ Weller 2009, 223; Ker-Lindsay 2011, 118.

⁹³⁹ Ker-Lindsay 2011, 118.

⁹⁴⁰ Weller 2009, 223.

⁹⁴¹ *Ibid.*, 225-226.

finding a solution had been unsuccessful because “neither side was willing to yield on the basic question of sovereignty.”⁹⁴²

However, while the delegation to the Troika also failed to manage norm contestation, it helped the US to secure in-group support for Kosovo’s independence: “European officials noted that the Troika process had nevertheless served another useful purpose. It had proved to many of the members of the European Union that everything possible had been done to try to secure an agreement between the sides.”⁹⁴³ Some European countries such as Germany had been uneasy about going against established legal principles and undermining the authority of the UN. The Troika talks convinced them that all other options had been considered but were not feasible.⁹⁴⁴ This shows that when it comes to the effect of delegation on norm contestation, the conduct of the agent plays an important role.

After Kosovo’s declaration of independence, Serbia tried to rely on delegation to manage norm contestation. Serbia proposed to ask the ICJ to render an advisory opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”⁹⁴⁵ The General Assembly approved this referral with a clear majority of 77 to 6, and 74 abstentions. Against the background of the norm impasse over Kosovo’s statehood, it is not surprising that this referral did not gain the support of all critical states involved in the dispute. While the US objected, it could only convince five other (small) states to vote against the resolution.⁹⁴⁶ Those who backed the resolution cited respect for the UN Charter, the ICJ, and states’ right to request advisory opinions for their decision. Some of those who disagreed argued that the ICJ referral was merely a Serbian attempt to stall recognitions of Kosovo.⁹⁴⁷ In fact, Serbia admitted as much by saying that “[t]he Court’s proceedings have to be allowed to run their course without political pressure, such as any further recognition of Kosovo’s unilateral declaration of independence.”⁹⁴⁸ Indeed, the

⁹⁴² UNSC Doc. S/2007/723, 4.

⁹⁴³ Ker-Lindsay 2011, 121.

⁹⁴⁴ Ker-Lindsay 2011, 122.

⁹⁴⁵ UNGA Doc. A/RES/63/3.

⁹⁴⁶ United Nations General Assembly 2008. October 8. Press Release GA/10764.

⁹⁴⁷ Ibid.

⁹⁴⁸ Serbian President Boris Tadic: UN Doc. A/64/PV.8, 3.

rate of recognitions slightly slowed down between October 2008 and 2010 before the ICJ rendered its verdict, but not significantly.

Interestingly, the ICJ refrained from issuing a verdict on the legality of Kosovo's secession based on a technicality. It interpreted the General Assembly's question as requesting an opinion on whether the *act* of declaring independence rather than independence itself was legal. As a result, the norm impasse was not resolved and both sides could (and did) continue to argue that Kosovo's independence was legal or illegal. What is more, even if the ICJ had issued a substantive ruling against Kosovo's statehood, this is unlikely to have solved the norm impasse. It is very rare that states withdraw recognitions of statehood. Hence, delegation is unlikely to resolve norm contestation when key dispute parties disagree on the frame and do not support delegation.

Justificatory Discourse

Third, deliberation scholars who believe in the power of the better (legal) argument,⁹⁴⁹ may have expected that states show more deference to the well-established principles of sovereignty and territorial integrity. The reliance of the US and European countries on exceptionalism in their argumentation strategy, on the one hand, shows more deference to those principles than might appear at first sight, but, on the other hand, it was also designed to prevent entrapment and thus future commitments. Russia's reaction, in turn, illustrates the lasting impact of legal arguments and that setting unwanted precedents is difficult to avoid.

Sometimes states seek to avoid future obligations and want others to accept exceptional behavior in a particular situation without redefining the existing legal consensus. The US sought to achieve such exceptionalism when it comes to Kosovo. When it became clear that no consensus on the Ahtisaari Plan would be reached and the Troika negotiations failed, preparations for Kosovo declaring independence unilaterally ensued. In this context, it was important to the US to make clear that Kosovo was not a precedent but generally upholds the principles of sovereignty and territorial integrity. The US benefits

⁹⁴⁹ Risse 2000; Sandholtz 2008; Johnstone 2011; Bower 2015.

from small minority regions not breaking away from countries.⁹⁵⁰ Other states also had concerns that Kosovo's independence could be cited as precedent elsewhere.⁹⁵¹ There is a general concern that secessions lead to tensions and instability and therefore the international community "has built a legal regime that disfavors secession."⁹⁵² That is why the US placed great effort into developing the argument that Kosovo was a special case on the basis of the ethnic cleansing, UNSC Resolution 1244 that created an UN administration in the country and the UN-led state talks on Kosovo's independence.⁹⁵³

Hence, when the State Department officially recognised Kosovo's statehood, Foreign Minister Condoleezza Rice relied on the following frame:

The unusual combination of factors found in the Kosovo situation -- including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration -- are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today.⁹⁵⁴

Furthermore, the State Department went through the trouble of setting up a website that lays out the arguments why the "United States considers Kosovo to be a special case that should not be seen as a precedent for other situations."⁹⁵⁵

The US negotiator explains that it was a serious task to come up with this argument and to get the message across: "we spent a lot of time focusing on the no-precedent argument, it was a big mantra – I remember dreaming of it."⁹⁵⁶ European states also repeated this mantra: in the UNSC meeting on Kosovo's declaration of independence, the UK stated that "the unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented United Nations administration of Kosovo make this a *sui generis* case"⁹⁵⁷ and France also urged others to "recall that this is a unique situation"⁹⁵⁸. Furthermore, the Council of Europe described Kosovo as a *sui generis* case.⁹⁵⁹ Furthermore, key governments such as the United States helped in drafting Kosovo's Declaration of

⁹⁵⁰ Interview with US diplomat, New York, 6 October 2017.

⁹⁵¹ Khalilzad: UNSC Doc. S/PV.5839, 18. See also: New York Times. 2008. February 18.

⁹⁵² Borgen 2009, 27.

⁹⁵³ Interview with US diplomat, New York, 6 October 2017. See also Khalilzad: UNSC Doc. S/PV.5839.

⁹⁵⁴ Rice 2008. February 18.

⁹⁵⁵ United States Department of State. n.d. "The Case for Kosovo."

⁹⁵⁶ Interview with US diplomat, New York, 6 October 2017.

⁹⁵⁷ Sawers (UK): UNSC Doc. S/PV.5839, 14.

⁹⁵⁸ Ripert (France): Ibid., 20.

⁹⁵⁹ Council of the European Union. 2008. February 18.

Independence and checked it.⁹⁶⁰ This ensured that Kosovo agreed to the international supervision of its independence foreseen by the Ahtisaari Plan, but noticeably it also observes that “Kosovo is a special case arising from Yugoslavia’s non-consensual breakup and is not a precedent for any other situation.”⁹⁶¹

The care and effort that the US put into this argument shows how seriously it takes international law. The US was aware of the risk of supporting Kosovo’s independence claim: it could set an unwanted precedent that triggers secession movements elsewhere. Hence, the US and European states sought to avoid this by laying out the reasons for why it considered Kosovo to be a *sui generis* case. Rather than ignorance this strategy shows respect for the law, and in particular for the principles of territorial integrity and sovereignty, whose general applicability the US and European states did not wish to put into question.

The advantage of the *sui generis* frame is that it holds the potential for consistency: in similar situations in the future, the US and European states could advance the “territorial integrity” and “sovereignty” frames, and when accused of double standards, refer to the historical contingencies that in their view made Kosovo a *sui generis* case. However, since historical and legal intricacies take effort to explain to key audiences, there is little that prevents others from drawing analogies in similar situations and from using Kosovo as a pretext or precedent for their recognitions of independence. In fact, three days before Kosovo’s declaration of independence, on 14 February 2008, Russian President Vladimir Putin stated:

We think that to support a unilateral declaration of independence by Kosovo is amoral and against the law. Territorial integrity is one of the fundamental principles of international law... I do not want to offend anyone, but all the same, if we really raise this issue, there has been a de facto independent Republic of Northern Cyprus for 40 years now. Why don’t you recognise it? Are you Europeans not ashamed to apply double standards in settling one and the same issue in different parts of the world? Here in this region we have Abkhazia, South Ossetia and Trans-Dniester that exist as independent states. We are always being told that Kosovo is a special case. This is all lies. There is nothing so special about Kosovo and everyone knows this full well.⁹⁶²

⁹⁶⁰ Weller 2009, 231.

⁹⁶¹ Republic of Kosovo. Assembly 2008, 1.

⁹⁶² Putin: Kremlin 2008. February 14.

Hence, Vladimir Putin's statement, and Russia's recognition of South Ossetia and Abkhazia half a year later indicates the difficulty of preventing unwanted precedents. It also shows that the "*sui generis*" frame and "independence" claim did not convince everyone. Because of Russia's rejection of independence and the insistence on the rival frame of Serbia's territorial integrity and sovereignty, and half of the world not recognising Kosovo's claim to statehood, this norm impasse has reduced clarity over the norms governing secessionist conflicts. This uncertainty weakens international law. Despite being the most materially powerful country in the world, the US could not sway everyone's opinion; but gathering the support from European countries was sufficient to maintain this norm impasse.

4.2 Contestation over the status of South Ossetia and Abkhazia

Half a year after Kosovo's declaration of interdependence, when Russia recognised South Ossetia and Abkhazia, we see another norm impasse with a reversal of sides: This time, the United States, European countries, and most others, emphasised Georgia's territorial integrity and sovereignty and rejected independence, whereas Russia and four other countries have recognised these territories.⁹⁶³ However, Russia, unlike the United States and others, did not rely on exceptionalism but framed the case as one of "remedial self-determination". Here, similar factors contributed to the norm impasse: Russia's legalistic arguments may have given the appearance of taking the law seriously, but the reliance on controversial concepts apparently failed to convince many states. Nevertheless, Russia could uphold its frame and claim because the social costs of disagreement were low: while Russia's in-group did not agree with Russia's frame and claim, its criticism was muted; the same applies to Russia's out-group. Furthermore, delegation did not manage norm contestation because it was not timely enough and there was little social pressure on Russia to implement the agent's findings.

⁹⁶³ TASS Russian News Agency 2018. May 29.

Justificatory Discourse

First, contrary to what some scholars claim, Russia did not primarily rely on a *sui generis* argument. To examine Russia's justificatory discourse, I searched and analyzed the official publications of the President of Russia, compiled by the Kremlin and coded the legal frames that Russia used. Rather than other types of legitimation such as principle-based legitimation, precedent-based legitimation or interest-based legitimation, those legal frames were also the main justifications used. The search generated 99 publications with 237 hits.

An analysis of these press releases and interviews released by the Kremlin indicates that Russia mostly relied on the frame of "remedial self-determination" and thus on an argument that was not exceptionalist in nature but could have the effect of setting a precedent if recognised by others.⁹⁶⁴ However, these legal arguments are not as canonical as Russia presented them to be. Hence, while Russia may have deemed these frames popular with domestic audiences, they were not well suited to convincing other states.

Russia's argumentation strategy is sometimes portrayed as also relying on a *sui generis* argument,⁹⁶⁵ or as showing more deference to the law than the US in the Kosovo case.⁹⁶⁶ However, a detailed analysis of Russian statements indicates that neither is the case. Russian President Dmitry Medvedev rarely drew comparisons to Kosovo or framed South Ossetia and Abkhazia as *sui generis* cases. The *CNN* Interview that Toal quotes⁹⁶⁷ is an exception. Here Medvedev stated: "Our colleagues said more than once that Kosovo was a *causus sui generis*, a special case. But in that case, we can also say that South Ossetia and Abkhazia are also *sui generis*."⁹⁶⁸ However, when explaining to the reporter why Russia's different responses to both conflicts did not indicate "double standards", Medvedev pointed to differences between both cases, and couched his argument in terms that suggest a promotion of the right to "remedial self-determination":

⁹⁶⁴ See <http://en.kremlin.ru/search> (English Translations). Keywords: South Ossetia | Abkhazia | Georgia. Timeframe: 01.08.2006-01.08.2010. The vertical dash guarantees that at least one of the search terms figures in the document.

⁹⁶⁵ Toal 2017, 188.

⁹⁶⁶ Borgen 2009.

⁹⁶⁷ Toal 2017, 188.

⁹⁶⁸ Medvedev 2008a. August 26.

But in this particular case, in our opinion, the situation existed for 17 years, during which ethnic cleansing was conducted and cases of genocide took place, both in the early 90s and now it has happened again. So, the situation in this particular case is quite different and therefore we believe that under the UN Charter, the Declaration of 1970 and the Helsinki Act of 1975 we have every legal ground to recognize the independence of these two republics.⁹⁶⁹

Remedial self-determination is the idea that when there is severe lack of representation or repression of a territorially defined segment of the population, this group has the right to secede.⁹⁷⁰ Some see this right supported by the Friendly Relations Declaration of 1970, to which Medvedev here refers, amongst others. However, as Weller describes, state practice so far has not supported this right and it is questionable whether the framers of the Friendly Relations Declaration intended to establish it.⁹⁷¹

Even though this argument does not rest on the most solid grounds, in factual and legal terms, Russia put it front, right and centre. Time and again, Russia portrayed Georgia's actions as leaving South Ossetia and Abkhazia with no other choice but to seek independence:

We have tried repeatedly over these last 17 years to preserve Georgia's territorial integrity... This has not achieved results. In August, the Saakashvili regime launched an unprecedented new, insolent and bloody aggression. By doing so he ended hopes for a unified state in which Georgians, Ossetians and Abkhazians could live together. In this situation, to protect these people's interests and give them the chance to realise their right to self-determination, we made this decision in accordance with international law and the UN Charter.⁹⁷²

And:

Through the aggressive attack on South Ossetia on the night of 8 August 2008, which caused numerous casualties, including among peacekeepers and other Russian citizens, as well as preparations for similar actions against Abkhazia, Saakashvili himself put an end to the territorial integrity of Georgia by using crude and blatant military force against people, whom in his own words, he wanted to see as part of his State. Saakashvili left them no other choice but to provide for their own security and to seek to exercise the right to self-determination as independent States.⁹⁷³

⁹⁶⁹ Ibid.

⁹⁷⁰ Weller 2009, 272.

⁹⁷¹ Weller 2009, 272–275.

⁹⁷² Medvedev 2008b. August 26.

⁹⁷³ Churkin: UNSC Doc. S/PV.5969, 8.

Furthermore, Medvedev argued that “[w]e have recognised these two new subjects of international law. From the point of view of international law, these two subjects now exist.”⁹⁷⁴ Here too, Russia couches its argument in legal terms, despite little support for this legal interpretation. It is disputed whether recognition is a constitutive element of statehood or a declaratory one with the reality probably lying somewhere in the middle: a state needs to be able to enter into relations with other states but also display the three main elements of statehood – defined territory, population and government – to be able to function as a state.⁹⁷⁵ Certainly, under neither of these theories is the recognition of a state by one other state what brings a state into existence.

While Borgen recognises that the arguments that Russia employs tend to be of quasi-legal nature, he nevertheless concludes that unlike the US’s *sui generis* argument on Kosovo, Russia “maintains a rhetoric that shows its concern for the norms of international law.”⁹⁷⁶ However, since Russia used controversial legal concepts at best, this use of quasi-legal rhetoric is better understood as giving the appearance of taking international law seriously than as actual deference to international law. However, this rhetoric shows that Russia considers references to international law as an argumentation strategy that has the potential to convince key audiences – otherwise decision-makers would not engage in that kind of discourse.

Furthermore, Russia’s use of the language of the law shows that there is an expectation for states to justify their actions in legal terms. This expectation can generate acceptance of the law or law-abidance, but it does not automatically do so. The reactions of other states are crucial. Most other states were not convinced as the low number of recognitions of South Ossetia and Abkhazia show and rejected the Russian frame of “remedial self-determination”. The US and EU emphasize Georgia’s “independence, sovereignty and territorial integrity recognised by international law, the Final Act of the Helsinki Conference on Security and Cooperation in Europe and United Nations Security Council resolutions.”⁹⁷⁷

⁹⁷⁴ Medvedev 2008e. November 13.

⁹⁷⁵ Bederman 2006, 57.

⁹⁷⁶ Borgen 2009, 25.

⁹⁷⁷ Council of the European Union. 2008. September 15 and 16. The US similarly emphasises Georgia’s sovereignty. See testimony by US Assistant Secretary of State for European and Eurasian Affairs Fried 2008. September 9.

Despite Russia's use of weak legal arguments and its insistence on territorial integrity and sovereignty six months earlier in Kosovo, we do not see entrapment. The reactions of key audiences, particularly domestic support and muted out-group criticism made Russia's argumentation strategy sustainable. This suggests that Russia's argumentation strategy may not have been intended to convince other states or to set a precedent, given its own secessionist conflicts. Instead, the quasi-legal rhetoric may have been directed towards domestic audiences.

It is also worth noting that several diplomats that I interviewed for this study stated that it is a Russian tradition to engage in what they referred to as "legalistic" approach: they remarked that Russian diplomats "are just very much aware of the rules and of the procedures and they know how to work it in their favour as well"⁹⁷⁸, or more cynically that "this is just a cynical tradition that Russia has held for many decades... they act like international bandits but they try to have it masked in legalistic language. But it is very hard to buy – their actions speak louder than words."⁹⁷⁹

Social Support

Only six other countries, Nicaragua, Venezuela, Nauru, Syria, Tuvalu and Vanutau have since joined Russia in recognising South Ossetia and Abkhazia, two of which (Tuvalu and Vanutau) subsequently withdrew their recognition.⁹⁸⁰ Nevertheless, the norm impasse continues because the reactions of critical audiences did not inflict social and material costs on Russia that would have made its frame and claim unsustainable.

In fact, US and European decision-makers initially urged Russia to reverse its decision to recognise South Ossetia and Abkhazia,⁹⁸¹ but Russia did not heed their calls. While Russia's in-group was reluctant to endorse Russia's norm interpretation, the lack of in-

⁹⁷⁸ Phone Interview with a diplomat from the group of like-minded states on targeted sanctions, 2 May 2018.

⁹⁷⁹ Phone Interview with Giorgi Badridze, Ambassador Extraordinary and Plenipotentiary of Georgia to the United Kingdom and Ireland (2007-2009), 11 February 2019.

⁹⁸⁰ TASS Russian News Agency 2018. May 29.

⁹⁸¹ See, for example, RIA Novosti 2008a. August 27; Russia & CIS Diplomatic Panorama 2008. September 25.

group support did not create enough pressure to withdraw recognition as criticism was subtle or muted. The statement of the SCO, which comprises Russia, China, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan, fell short of Russian expectations,⁹⁸² but at the same time, it did not directly criticise Russia's "remedial self-determination" frame and "recognition" claim. The SCO member states emphasised "the unity of a state and its territorial integrity" as frames, thereby signalling disagreement with Russia's frame, but also stated that "they support Russia's active role in promoting peace and cooperation this region."⁹⁸³ Similarly, the CSTO, another organization, composed of Russia's in-group members, lauded the "active role of the Russian Federation in working toward peace and cooperation in the Caucasus"⁹⁸⁴ and voiced concern over "Georgia's attempt to resolve the conflict in South Ossetia by force"⁹⁸⁵. Yet, CSTO also did not endorse Russia's framing or recognition of South Ossetia and Abkhazia.

Perhaps since recognitions were not forthcoming to the extent that Russia had hoped, President Medvedev and Foreign Minister Lavrov started to emphasise that "each country makes its own individual decision on recognition"⁹⁸⁶ or that "[r]ecognition is an individual move".⁹⁸⁷ Furthermore, Medvedev used the idea that one recognition is sufficient to establish statehood to downplay the significance of the decision of other states: "It is clear that in this situation some countries will agree to the emergence of new states, while others will consider their emergence untimely. But according to international law, a new state becomes a subject of law, as the lawyers say, from the moment it gains recognition from at least one other country."⁹⁸⁸

The efforts that Russia, but also its opponents, went through to gain support from other countries, particularly those in Russia's near abroad, indicates the importance of in-group support. Belarus, a member state of CIS and CSTO, serves as example. Shortly after Russia's recognition, Belarusian President Lukashenko sent a message to Medvedev that endorsed the "remedial self-determination" frame: "Under the circumstances Russia had no other moral choice but to support appeals of South Ossetian and Abkhazian peoples

⁹⁸² Borgen 2009, 18. BBC Monitoring Former Soviet Union 2008. September 10.

⁹⁸³ Shanghai Cooperation Organization 2008. August 27.

⁹⁸⁴ Radio Free Europe 2008. September 5.

⁹⁸⁵ Medvedev 2008d. September 5.

⁹⁸⁶ Medvedev 2008c. August 31.

⁹⁸⁷ Lavrov: BBC Monitoring Former Soviet Union 2008. September 6.

⁹⁸⁸ Medvedev 2008c. August 31.

on the recognition of their right to self-determination in line with fundamental international documents.”⁹⁸⁹ The Belarusian ambassador to Moscow added that Belarus would recognise South Ossetia and Abkhazia in the next couple of days.⁹⁹⁰ However, Belarus’s recognition still has not been forthcoming.

Lukashenko faced pressure both from the West and from Russia. He openly accused Russia of blackmail in 2009, saying that Russia made recognition a pre-condition for the receipt of the last \$500 million instalment of a \$2 billion loan.⁹⁹¹ However, according to Lukashenko: “While Europe and America have differences on this issue, they acted in concert and have proven to be much stronger than the contemporary Russia. You have employed economic and financial levers and personal relations with the leaders of the former Soviet republics so as not to allow South Ossetia’s and Abkhazia’s consolidated recognition at the present stage.”⁹⁹² In another interview, he talked of threats from the West to cut him off the global financial system if Belarus recognised South Ossetia and Abkhazia.⁹⁹³ Giorgi Badridze, Georgian ambassador to the United Kingdom from 2007-2009, who was involved in Georgia’s “non-recognition” diplomacy, explains that recognition from any country in the former Soviet space would have been very damaging:

Any country in former Soviet space, recognising Russian annexation as independent territories, would have been more damaging compared to the recent recognitions by the rogue regime of Assad or some communist regimes in Latin America. Once one country from the former Soviet Union recognised, or CIS or whatever you call them, then that could have caused a domino effect. Russia would clearly have started acting in order for others to recognize, there would be some kind of economic, political pressures, etc....⁹⁹⁴

Georgia and its European partners were worried that other countries from the former Soviet Union would have followed suit after one country recognised these territories. Hence, all sides pressured Belarus very hard to support their respective stances.⁹⁹⁵ This

⁹⁸⁹ RIA Novosti. 2008b. August 28.

⁹⁹⁰ Ibid.

⁹⁹¹ Associated Press 2009. June 5.

⁹⁹² Russia & CIS Military Weekly 2008. September 29.

⁹⁹³ BBC Monitoring Kiev 2015. April 23.

⁹⁹⁴ Phone Interview with Giorgi Badridze, Ambassador Extraordinary and Plenipotentiary of Georgia to the United Kingdom and Ireland (2007-2009), 11 February 2019. Note that when Badridze refers to Russian annexation, he means the Russian support for South Ossetia’s and Abkhazia’s independence since 2008.

⁹⁹⁵ Ibid.

illustrates the importance that the dispute parties attributed to gaining support from critical in- or out-group states for their norm interpretations.

While Russia did not receive explicit support for its frame and claim from its in-group, the reactions of other critical audiences contributed to lowering the social and material costs of the norm impasse. According to a survey conducted by the independent Levada-Institute, 40% of Russian survey respondents considered the recognition of South Ossetia and Abkhazia to have benefited Russia in September 2008, 28% for it to have neither benefited nor harmed Russia and only 15% replied that it harmed Russia.⁹⁹⁶ Still in August 2015, more respondents considered Russia to have benefitted from the recognitions than for it to have harmed Russia (23% vs. 10%), however the majority now considered the recognitions not to have had a significant effect (47%).⁹⁹⁷ Nevertheless, the very positive response of domestic audiences to the recognitions shortly after the event in 2008 shows that Russia received domestic support for its actions and words.

Perhaps even more importantly, while critical out-group members such as the United States and European countries clearly rejected Russia's frame and claim, they did not follow through on claims that they would suspend cooperation because of Russia's recognition. Efforts by the West to continue cooperation with Russia in spite of this disagreement reduced the social and material costs of the norm impasse. Hence, Russia can uphold the "remedial self-determination" frame and the "statehood" claim.

While the European Union announced on September 1, 2008, that it would suspend talks on a partnership agreement with Russia in response to Russia's actions in Georgia and recognition of South Ossetia and Abkhazia, it soon changed course. In mid-November, EU leaders announced that they would resume talks with Russia on the agreement on December 2, 2008.⁹⁹⁸

Similarly, US Commerce Secretary Carlos Gutierrez warned Russia before its recognition of South Ossetia and Abkhazia that "Washington's support for Russia's WTO bid could be at stake over the Georgia conflict."⁹⁹⁹ Putin signalled that he questioned the benefits

⁹⁹⁶ Levada-Center 2015. September 21.

⁹⁹⁷ Ibid.

⁹⁹⁸ Goodspeed 2008. November 19.

⁹⁹⁹ Coleman 2008. August 25.

of World Trade Organization (WTO) membership anyway.¹⁰⁰⁰ Roughly half a year later on March 7, 2009, US Foreign Minister Hilary Clinton symbolically pressed the “reset” button on US-Russia relations with her Russian counterpart.¹⁰⁰¹ While Georgia continued to block Russian WTO membership, a Swiss brokered deal on improved access to South Ossetia and Abkhazia paved the way for Russia’s WTO membership in late 2011.¹⁰⁰² Hence, there was little social pressure on Russia to rescind recognition of South Ossetia and Abkhazia. These social dynamics helped Russia to uphold its norm frame and claim.

Delegation

Third, similarly delegation did not manage norm contestation because there was little social pressure on Russia to respond to the agent’s findings and delegation did not happen in a timely enough manner.

The Council of the European Union set up an independent fact-finding mission as a “political and diplomatic follow-up to the conflict.”¹⁰⁰³ Swiss Ambassador, Heidi Tagliavini, led the IIFFMCG, and thus the report that presented the findings of the independent experts is often referred to as “Tagliavini Report”. The EU Council provided the IIFFMCG with the following mandate:

[T]he aim of the fact-finding mission shall be to investigate the origins and the course of the conflict in Georgia, including with regard to international law [including the Helsinki Final Act], humanitarian law and human rights law, and the accusations made in that context [including allegations of war crimes]. The geographical scope and time span of the investigation will be sufficiently broad to determine all the possible causes of the conflict.¹⁰⁰⁴

Hence, the IIFFMCG’s mandate was primarily to examine the responsibility for and the conduct of the August War between Russia and Georgia rather than to analyze the status question of South Ossetia and Abkhazia. In fact, Russia and Georgia were not asked to provide statements on the status question. However, Heidi Tagliavini interpreted her

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ BBC News 2009. March 7.

¹⁰⁰² BBC News 2011. December 16.

¹⁰⁰³ Tagliavini Report 2009. Volume 1, 2.

¹⁰⁰⁴ Council of the European Union. 2008. December 2, reprinted in the Tagliavini Report 2009. Volume 1, 3.

mandate broadly and discussed the status of South Ossetia and Abkhazia as “related legal issues.”¹⁰⁰⁵ Thus, the IIFFMCG’s findings regarding the status of South Ossetia and Abkhazia were only of secondary relevance for the work of the experts, which was focused on analysing the August War. This may explain why the findings regarding South Ossetia’s and Abkhazia’s independence did not figure prominently in the subsequent debate over the Tagliavini Report.

The Tagliavini Report briefly discusses the status question and clearly rejects Russia’s frame of “remedial self-determination” and “independence” claim for South Ossetia and Abkhazia:

To sum up, outside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in form of a secession is not accepted in state practice. A limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most authors opine that such a remedial “right” or allowance does not form part of international law as it stands. The case of Kosovo has not changed the rules.¹⁰⁰⁶

And

Even if an extraordinary allowance to secede were accepted under extreme circumstances, such an exception was not applicable to South Ossetia¹⁰⁰⁷

And

Abkhazia was not allowed to secede from Georgia under international law, because the right to self-determination does not entail a right to secession.¹⁰⁰⁸

What weighed heavily for Tagliavini in reaching this conclusion was not only her finding that there is no right to remedial secession in international law, but also that the international community (including Russia) consistently found South Ossetia and Abkhazia to form part of Georgia.¹⁰⁰⁹

Tagliavini’s clear rejection of Russia’s arguments did not lead Russia to withdraw them and to give up its contestation. As discussed in chapter 4, when it comes to the impact of

¹⁰⁰⁵ Tagliavini Report 2009. Volume 2, Table of Contents.

¹⁰⁰⁶ Tagliavini Report 2009. Volume 2, 141.

¹⁰⁰⁷ Ibid., 145.

¹⁰⁰⁸ Ibid., 147.

¹⁰⁰⁹ Ibid, 145 and 147.

delegation on norm contestation, what matters is the perception that the agent is a legitimate, credible and effective authority, and social pressure on the dispute parties to accept the agent's findings. Since the task of the IIFFMCG was primarily to analyze the causes and conduct of the conflict between Russia and Georgia, Tagliavini's findings regarding South Ossetia's and Abkhazia's independence may not have been perceived as sufficiently relevant or legitimate. In this context, it is also worth emphasising that the fact-finding mission's mandate was political in nature and not designed to render binding legal verdicts to solve this norm impasse. From this we might conclude that Tagliavini's findings might not have been authoritative enough to generate much social support and pressure on Russia.

Indeed, there was not much pressure on Russia to abandon its norm frame and claim when the Tagliavini report was released in September 2009, and therefore at a time when the dispute parties were keen to put their differences behind them and to reset their relationship.¹⁰¹⁰ Thus, while the Council of Europe's installation of the fact-finding mission exercised pressure on Russia and Georgia to cooperate with it despite their frame disagreement, the social pressure did not extend to implementing the findings. A year after Russia's recognition of South Ossetia and Abkhazia the dispute did not rank highly on the political agenda anymore, so it did not lead to much social pressure by the EU or US.¹⁰¹¹ In Giorgi Badridze's words:

These investigations were being held in an atmosphere where the West had no appetite for confronting Russia... The West was not ready for sanctions. Not many people cared [about the findings]. My impression is that the Tagliavini Report was designed in a way to help those who wanted to put this problem behind them and resume business as usual with Russia. The West did not want to confront Russia and they had to find a kind of diplomatic way to avoid attribution of blame to Russia. And this is what they tried to do through the Tagliavini Report.¹⁰¹²

In sum, the delegation to the IIFFMCG did not help to manage norm contestation because the mandate was not focused on the status question and there was not enough

¹⁰¹⁰ BBC News 2009. March 7.

¹⁰¹¹ Deutsche Presse-Agentur. 2009. September 30.

¹⁰¹² Phone Interview with Giorgi Badridze, Ambassador Extraordinary and Plenipotentiary of Georgia to the United Kingdom and Ireland (2007-2009), 11 February 2019.

pressure on Russia from key audiences to accept Tagliavini's findings and to give up its frame and claim regarding South Ossetia's and Abkhazia's status.

5. Conclusion

To conclude, the norm contestation over the status of Kosovo, and over the status of South Ossetia and Abkhazia came with an interesting reversal: While the US and European states supported Kosovo's independence, they rejected South Ossetia's and Abkhazia's independence claims and emphasised Georgia's sovereignty. Russia, on the other hand, rejected Kosovo's independence claim and emphasised Serbia's sovereignty but supported South Ossetia's and Abkhazia's independence.

Thus, both secessionist conflicts ended in a norm impasse (frame and claim disagreement): the disagreements over the status of Kosovo, South Ossetia and Abkhazia, and over the legal basis for their status continue to this day. These disagreements have tangible implications: not only do they increase uncertainty over the situations in which sovereignty or self-determination apply and thus weaken international law, but the lack of recognition from critical states means that Kosovo, South Ossetia and Abkhazia have trouble joining international organisations, fully participating in international affairs and operating as states.

I have shown that these norm impasses, however, do not indicate disregard but rather respect for international law. While these episodes of norm contestation disclose the limits of entrapment with prior interpretations, all dispute parties explained their different positions in both secessionist conflicts. The main contestants, the US and Russia, brought forward arguments that show that they take international law seriously: the US's careful framing of Kosovo as a *sui generis* case reveals concern of setting an undesirable precedent, namely that the recognition of Kosovo expands the right to self-determination and leads to more secessions. Thus, this framing indicates that the US is aware of the risk of entrapment. Russia, on the other hand, did not engage in such overt and explicit exceptionalism but rather invoked contested legal categories such as the "right to remedial self-determination". Even though Russia's interpretations did not rest on the most solid legal grounds, the use of legalistic discourse to justify the recognition of South Ossetia

and Abkhazia reveals that Russia considers international law an important tool of persuasion.

We did not see entrapment in these episodes of norm contestation because the US and Russia did not face sufficient social pressures to end their disagreements. The US was able to secure the support of most European states for Kosovo's independence and its *sui generis* frame. The delegation of the status negotiations to the Troika helped to secure this social support. It convinced European states that all options other than independence had been explored but were not feasible. Russia, unlike the US, did not receive public support from its in-group, for its recognition of South Ossetia and Abkhazia. In-group countries in the former Soviet space rather subtly criticised Russia. However, domestic audiences supported this recognition and the US and EU were soon keen to improve relations and thus toned down their criticism. This allowed Russia to compensate for the lack of clear in-group support and to uphold its contestation and recognition of South Ossetia and Abkhazia even though only four other countries also recognized these territories as states. Because each side enjoyed sufficient social support for their interpretations, the norm contestation has reached a norm impasse and remains unresolved.

Conclusion

When states have to decide how to react to security risks such as a terrorist attack or mass atrocities or the treatment of prisoners, international law does not always give clear-cut guidance. In this study, I have shown that states often interpret international law differently: imprecise language and tensions that are inherent in every normative framework give rise to debates over what norm applies and over what actions it requires. Such norm contestation is a common occurrence in international affairs.

Scholars so far have either focused on agreements or disagreements over norm meaning. Those who study agreements tend to treat norm meaning as clear-cut and static and thereby overestimate the ability of law to give guidance for behavior. Those who study disagreements, in turn, either see different interpretations of law as an opportunity to learn about diversity or conclude that the malleability of international law makes it an instrument for the powerful to impose their will on others. In this study, I have shown how moving away from these absolutes provides a better picture of how norms both structure debates and are constructed by them. My theoretical framework allows us to categorize agreements and disagreements and can guide empirical research on the implications and process of norm contestation.

Specifically, I show that actors can agree or disagree on the applicable norm frame (justification) and also on the claim (action) that follows from it when applying norms. Hence, norm contestation can have four “alternate endings”: *norm clarification* (frame and claim agreement), *norm recognition* (frame agreement and claim disagreement), *norm neglect* (frame disagreement and claim agreement) and *norm impasse* (frame and claim disagreement).

These four outcomes differ in their effects on the clarity and strength of the contested norms, as well as on subsequent debate over them. Norm clarification, as the name implies, clarifies what norm frame applies in a given situation and what claim to action follows from it. This makes the norm a better reference point in similar situations in the future. The proponent of the accepted norm interpretation also avoids social or material costs that come with disagreement. I illustrated these effects with the acceptance by other

states of the Bush administration's frame that the right to self-defense applies to state-sponsored terrorism after 9/11, which facilitated intervention in Afghanistan (claim). Prior US administrations had failed to secure widespread approval for military action in response to terror attacks and consequently faced tangible costs such as longer flight routes. When norm clarification broadens a norm vis-à-vis other norms, the norm becomes stronger. The opposite is true when its scope becomes narrower. Norms are also clarified when a compromise between different interpretations is found or when a norm interpretation is clearly rejected. My study of the Bush administration's interpretations of the prohibition of torture, which were ultimately rescinded, illustrates norm clarification through rejection.

Scholars have maintained that social pressures lead to norm clarification. But what constitutes an appropriate interpretation of legal norms depends on how other states react to it. There is an expectation for states to justify why their preferred norm interpretation is legitimate, which is why we see states bringing forward legal justifications for their actions. If states do not give up contested interpretations, this lack of social acceptance weakens credibility, social standing and cooperation opportunities. The state whose interpretation wins can make its preferences stick and hold others to account in the future. But successful legal arguments can also lead to unwanted obligations: the acceptance of a new norm interpretation creates social expectations to comply that can even “entrap” powerful states when they attempt to deviate from the interpretation in similar situations in the future. Hence, states put significant resources into crafting their legal arguments. In the words of the political co-ordinator for the UK mission to the UN, Stephen Hickey:

Every resolution, we have two legal advisors that sit around the corner from us and every resolution that we write, we consult with them and with our legal advisors in London. With every resolution that we write, we are always very concerned about legal precedent. So, we definitely think through all of that [possible long-term commitments]. Actually, the Americans in particular, are very, very focused on legal precedent. And it's always central to the drafting of a Security Council Resolution.¹⁰¹³

An important finding of this study is that while entrapment does not always work—the alternate endings of norm contestation suggest as much—states take the risk of entrapment seriously and carefully craft their legal arguments to minimize it. Take the

¹⁰¹³ Interview with Stephen Hickey, political co-ordinator at the United Kingdom Mission to the United Nations, New York, 3 October 2017.

US's argument that Kosovo constitutes a *sui generis* case that requires an exception to the rights to territorial integrity and sovereignty (frame), and Kosovo's independence (claim), but does not set a precedent for any other case. This overt and explicit exceptionalism acknowledges that the legal justification brought forward in one case may be taken up by others to justify unwanted behavior in another case.

Furthermore, I find that the kinds of legal arguments states bring forward indicate that states pursue different strategies when interpreting norms. Sometimes they seek to set a generally applicable new norm interpretation, as the US's attempts to extend the right to self-defense to state-sponsored terrorism shows. In other situations, states try to carve out an exception for themselves while trying to keep the generally applicable norm frame intact. Such exceptionalism can take different forms: it can be covert or overt, and overt exceptionalism can be explicit or implicit.

Where possible, we would expect states to engage in covert exceptionalism, and like the Bush administration try to cover up the implementation of claims such as waterboarding that others would consider violating the norm frame (here: the prohibition of torture). Such covert exceptionalism, if unnoticed, allows a state to prevent changes to the norm and avoid reputational costs for its non-conforming behavior.

When it is not possible to hide contested behavior, states may engage in overt exceptionalism. Overt exceptionalism is implicit when states remain silent on the legal norms that drive their behavior. China, for example, did not explain which norm frame guided its agreement to the Philippines' claim to give Filipino fishermen access to Scarborough Shoal. We see such implicit exceptionalism in situations of norm neglect when finding a pragmatic solution to a shared problem is the priority. However, even in the situations of norm neglect analyzed in this study—the claim agreement on the no-fly zone over Libya and on access for Filipino fishermen to Scarborough Shoal—we see dispute parties subsequently adapting the frames that they advance. These frame adaptations acknowledge a social expectation to rely on legal arguments or that other, less contested, norms might fare better in the justificatory discourse.

Overt exceptionalism can also be explicit. The US's argument that Kosovo is a *sui generis* case that requires an exception to the rights to territorial integrity and sovereignty is a

prime example of a state openly portraying a case as an exception to generally applicable rules.

However, other states may not agree with the norm frame and claim a state proposes. For norm clarification, and thus the avoidance of social and material costs, widespread state consent—including consent from influential (critical) states—is necessary. I treat as critical those states that have institutional power or access to decision-making over norm implementation. In security affairs, the focus of this study, the P5 UNSC members are critical states. Dissent from critical states, however, does not necessarily end norm contestation. I show that states can uphold contested norm frames or claims when their in-group supports these interpretations. Membership in selective institutions such as regional organizations and a shared culture and history are indicators of in-group membership. Since states share more social and material ties with in-group members, their support allows them to shoulder the costs of out-group dissent.

Take, for example, the contestation over the status of Kosovo. The US and Russia counted on the support of their respective in-groups for their frames and claims. The US framed Kosovo as a *sui generis* case that requires Kosovo's independence, while Russia emphasized Serbia's sovereignty and claimed that Kosovo belongs to Serbia. Contestation between in- and out-group members is less costly than contestation among in-group members as there are fewer normative, social and material ties between the countries. Thus, the norm impasse remains unresolved.

Notably, the US actively lobbied European states to support its position, and ultimately received the support of most of them, including influential countries such as the UK, France and Germany. A consistent finding of this study is that states try to gain support from their in-group members and to prevent the opponent's in-group members from supporting the opponent's norm interpretation. Russia and the West, for example, both used economic incentives and threats to try to convince Belarus to recognize South Ossetia's and Abkhazia's independence (Russia) or to reject it (West). Belarus, a member of Eurasian (security) organizations CIS and CSTO, is an in-group member of Russia. Its consent could have pressured other CIS and CSTO members to recognize South Ossetia's and Abkhazia's statehood, too.

When a state wishes to uphold a norm frame and/or claim even though its in-group is critical of the norm interpretation, several factors can compensate for the lack of (unified) in-group support: the reactions of out-group members and of domestic audiences, and the intensity of the dissent.

When the dissent from in- or out-groups is muted or subtle, for example, it is easier to shoulder it without fearing adverse consequences for social standing and cooperation. For instance, Russia could uphold its contested “remedial self-determination” frame and claims regarding South Ossetia’s and Abkhazia’s independence despite lack of clear in-group support because the US and EU member states soon sought to reset their relationship with Russia and in-group members’ criticism was subtle or muted. Support from domestic audiences further mitigated any reputational damage Russia incurred internationally for its recognition of South Ossetia and Abkhazia.

The verdict is out on the conditions under which domestic opinion compels leaders to abandon or modify their preferred norm frame or claim. Domestic audiences in the Philippines want Filipino President Duterte to stand up for the Philippines’ rights in the South China Sea that the PCA ruling confirmed. This domestic expectation has pressured the Duterte administration, which is primarily concerned with maintaining good relations with China, into reminding China to uphold its agreement on access to Scarborough Shoal. On the other hand, Tony Blair decided to forgo the British public’s disapproval of intervention in Iraq and to follow through with his pledge of support to US president George W. Bush concerning the Iraq war. It is a topic for further research to identify when leaders abandon their preferred course of action due to domestic pressures. I wager that it matters how much support heads of state enjoy within their own parties for a contested norm interpretation and how much they value their relationship to other proponents of the norm interpretation.

When trying to convince others to support a norm interpretation, states construct the legitimacy of their interpretation discursively by providing justifications for why others should recognize their norm interpretation. What matters is legitimacy in a sociological sense of perceptions of what is right rather than actual rightness. Scholars have found that consistency with prior interpretations and shared principles (precedent-based or principle-

based legitimation) and a fair debating environment (process-based legitimation) help to gain support for norm interpretations. However, these scholars have mainly studied disagreements within in-groups such as the European Union. I find that references to output legitimacy are particularly common and successful when states have to persuade both in-group and out-group members. Such interest-based legitimation has the advantage that it does not require a shared identity. It only requires others to recognize the need to address a joint problem and that the suggested norm frame and claim provide a beneficial or effective solution to this problem. Therefore, appeals to output legitimacy are more likely to convince out-group members, whose consent is necessary for norm clarification, than precedent-based or principle-based legitimation. The US relied heavily on such interest-based legitimation when it tried to convince other states to broaden the right to self-defense and once the US's "enhanced interrogation techniques" became public.

However, when states engage in covert exceptionalism and try to conceal what others would consider "inappropriate" behavior, we are likely to see them refer to their trustworthiness or credibility regarding the norm to reject accusations of wrongdoing. Such identity-based legitimation, I find, resonates and keeps criticism at bay when the state's domestic culture or identity supports the conclusion of norm-conforming behavior. The US's identity as liberal, human rights respecting state allowed it to engage in covert exceptionalism for a few years before evidence to the contrary accumulated.

States can also decide to delegate the task of managing or resolving norm contestation to an independent third party. We see such delegation in most cases discussed in this study, however, it did not always play a crucial role. Delegation is most likely to contribute to managing norm contestation when we see norm recognition as the frame agreement lowers sovereignty costs by narrowing the range of claims that agents could find applicable. This facilitates consensual delegation by the dispute parties. I find that social pressure and perceptions of output legitimacy also determine whether delegation contributes to the management of norm contestation. What is important here is how clear the agent's contribution is. When agents are tasked with implementing norms, certainty over the effectiveness of their work helps to keep delegation alive. While the numbers clearly indicate that terror suspects have shifted their litigation from courts to the Ombudsperson, the impact of the work of UN weapons inspectors in Iraq was difficult to assess for UNSC members (principals) as WMD can be easily concealed. The

Ombudsperson mechanism persists, whereas UN weapons inspectors were withdrawn. When agents are tasked with interpreting norms, the clarity of their verdicts matter, too. The PCA tribunal's ruling on the South China Sea clearly found on behalf of the Philippines. When the ruling leaves no doubt as to who the winner is, those whose interpretation the verdict affirms can add legitimacy to their interpretation and use the ruling to pressure others to insist on the implementation of the findings.

Moreover, social pressure can create a more favorable environment for agents or the agent's interpretations to manage norm contestation. Litigation from terror suspects, and consequently from European Courts, has pressured the UNSC into establishing, strengthening and maintaining the Ombudsperson mechanism. On the contrary, lack of unanimous pressure from its in-group and domestic audiences made it less costly for the US to stop relying on weapons inspections to contain the Iraqi threat and to intervene in Iraq.

It is also worth noting that I consider powerful states to be in a privileged position to shape the law because of their greater influence. That is why I treat those states that have institutional power as critical states in norm contestation. However, I do not consider international law to be epiphenomenal to material power. To show that the justificatory discourse that states engage in and social pressures matter, I controlled for the influence of material power on the outcome of norm contestation. I did so by discussing two cases in each outcome category: one where the US, the most powerful state, was the driving force in norm contestation, and one where contestation by a less powerful actor such as a weaker state or international court had the same result. I also focus the analysis on security matters, and thus on norms such as "sovereignty" and "territorial integrity", where realist scholars consider international law to matter least. By showing that in these tough cases norm contestation has the four outcomes that I identified and that social dynamics lead to them, we can be reasonably confident that the findings of this study apply in other areas, too.

I close this study by highlighting two important topics for future research beyond solely using this framework for empirical studies in further areas of international law.

First, scholars who study reputational mechanisms in IR presuppose that states whose behavior contradicts legal norms will be shamed or sanctioned by other states, NGOs or other influential actors, and thus incur costs for their non-conforming behavior.¹⁰¹⁴

Interestingly, in two cases in this study, where the interpretation of one dispute party was clearly found to be a better match, the winning party did not act triumphantly or use this conclusion to publicly criticize the opponent. Instead, they let the facts speak for themselves and refrained from mobilizing shame. We see this dynamic when after the Iraq intervention it became clear that there were no WMD in Iraq, which cast doubt on the legitimacy and legality of the intervention. Opponents of the military intervention including France and Germany refrained from publicly highlighting this. Similarly, when the arbitration tribunal clearly found in favor of the Philippines in the South China Sea arbitration case, the Philippines refrained from harshly and openly criticizing China for its non-conforming behavior, and instead pursued diplomacy outside of the public eye. It might therefore be a relatively common occurrence in international affairs that states exercise restraint in publicly criticizing other states whose norm interpretation was exposed as not conforming with international law. This phenomenon warrants further research as it can help us to better understand reputational mechanisms.

There are several possible explanations for states exercising restraint in mobilizing shame.

When it becomes clear that one interpretation does not comply with international law, the social costs of this non-conforming behavior are automatic and do not require public shaming. Hence, the state(s) whose interpretation triumphed may not need to further strain their relationship with the opposing side for the opponent to incur reputational costs. In this age of "fake news" a related question is what makes the evidence of non-compliance so clear that it need not be pointed out publicly. Experimental studies into what kind of evidence resonates with public audiences might provide further insights.

It is equally important to recall that I focused on norm contestation by states in this study. Perhaps non-governmental actors such as NGOs, the media and individual protestors are

¹⁰¹⁴ See, e.g., Risse and Sikkink 1999; Schimmelfennig 2001; Guzman 2002.

those who primarily mobilize shame rather than other states. Non-governmental actors often have a mandate to scrutinize state behavior and thus, they might be less concerned about the implications of their criticism for the relationship with the criticized state. Nevertheless, the question remains why sometimes states criticize others for their norm implementation—as we saw in the debate over the Bush administration’s “enhanced interrogation techniques”—and other times refrain from doing so.

Second, I find that norm neglect is a volatile outcome: the lack of normative commitment due to the frame disagreement allows states to justify the agreed-upon action as exceptional compromise and later revert back to a norm impasse. However, the joint action may also trigger socialization processes that lead to agreement on both frames and claims—that is, norm clarification. In this study, I have focused on instances of norm neglect that do not culminate in norm clarification but are temporary and volatile concessions in norm impasses. The dispute between China and the WHO on how to manage the SARS outbreak shows that norm neglect can pave the way for norm clarification. China’s concession to accept the health measures and travel warnings that the WHO suggested (claims), eventually led China to accept a strengthening of global health norms and of the WHO’s authority (frames).¹⁰¹⁵ Further research on this or other cases could identify under what circumstances claim agreement prompts frame agreement. It is conceivable that implementing the claim can trigger a learning process that leads to the conclusion that accepting the norm frame is desirable. Considerations of output legitimacy also may play a role here: China might have realized that the travel warnings and health measures have the beneficial consequence of improving public health and thus decided that a long-term commitment to global health norms, and thus to the hitherto contested norm frame, is desirable.

To conclude, norm contestation comes in many shapes and forms. My “alternate endings” typology builds a bridge between understandings of contestation as a never-ending debate and as an avenue toward agreement. I hope that it will further theoretically-informed empirical research into norm contestation and help to improve our understanding of compliance mechanisms and of contestation.

¹⁰¹⁵ Huang 2010; Kreuder-Sonnen 2016, 213–241.

Methodological Appendix

Chapter 3

As in-group members of the United States, I code Australia, New Zealand, Japan, Israel, Canada, and all West and East European countries that are EU members today. All these countries have a polity IV score as full democracy or as democracy, and this classification takes historical ties into account.

Out-group members of the United States are all countries that do not fall within the in-group as defined above.

Case study 1: Rejection of Reinterpretation: The Bush administration and the prohibition of torture and of CID treatment

Sources & Methods:

1. Newspaper articles:

Vincent Keating kindly shared the dataset with me that he used for his 2014 article “Contesting the International Illegitimacy of Torture: The Bush Administration’s Failure to Legitimate Its Preferences within International Society.” *The British Journal of Politics & International Relations* 16 (1): 1–27.

The dataset includes newspaper articles and transcripts of interviews with senior administration officials from major TV stations (ABC, CNN, NBC, etc.) from the Nexis database ‘All English Language News’. The search terms used were ((“United States” OR America OR Bush) w/p torture).

This search generates thousands of articles and Keating filtered out those that reported on torture or mistreatment in the United States. Note that there is little difference in the search results when one searches for torture or abuse/mistreatment. He shared this pre-filtered dataset with me.

I then filtered out those articles that contained statements from senior US officials and from senior diplomats, foreign ministers or heads of states of other countries. I read through 800 pages of newspapers and transcripts to do so. To make sure, I captured all statements, I also searched for keywords such as “Bush”, “White House”, “Rumsfeld”, “Rice”, “Britain”, “Australia”, “France”, “Canada”, etc.

In an excel table, I coded 279 observations: 85 statements of other states, 43 statements of NGOs or IOs, 135 statements from Bush administration officials and 16 statements from domestic opponents. I coded the international observations based on whether the statement was made by the in-group, out-group or observes (NGOs or IOs), whether the US’ frame or claim was supported or rejected and based on the justification that was chosen (see codes below). I only coded the US data based on the justification.

I triangulated these statements with official documents.

2. Official Documents: I mainly used official documents in this case study to triangulate newspaper statements and reporting

- Legal Memos (available at: “The National Security Archive” of the George Washington University:

- John Yoo. “Memorandum for William J. Haynes II, General Counsel, Department of Defense.” January 9, 2002.
- Alberto Gonzalez. “Decision Re Application of Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban.” January 25, 2002.
- The White House. “Humane Treatment of al Qaeda and Taliban Detainees.” February 7, 2002. Unclassified.
- Jay S. Bybee. “Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.Sc. §§ 2340 – 2340A”. August 1, 2002.
- From: William J. Haynes. For: Secretary of Defense. “Counter-Resistance Techniques.” November 27, 2002. Includes Notes from Donald Rumsfeld. Unclassified.

- White House press releases: The American Presidency Project at

<https://www.presidency.ucsb.edu/>

- I triangulated the White House statements the media reported with the official press releases.
- I searched for the keywords “torture” or “abuse” from 2001 to 2008, which generates the statements by Bush and White House officials on the matter.

- U.N. Committee Against Torture:

- “The United States’ Oral Response to the Questions Asked by the Committee Against Torture.” May 8, 2006. <https://www.state.gov/j/drl/rls/68562.htm>
- “Conclusions and recommendations of the Committee against Torture. United States of America.” CAT/C/USA/CO/2. 25 July 2006. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/USA/CO/2&
- “United States Written Response to Questions Asked by the Committee Against Torture.” April 28, 2006. <https://www.state.gov/documents/organization/68662.pdf>
- “Second Periodic Report of the United States of America to the Committee Against Torture.” 29 June 2005. CAT/C/48/Add.3. <https://www.refworld.org/docid/43f2fe442.html>

Coding Scheme:

In the following, I provide definitions for the codes that I used and examples of how I applied the codes. Note that I provide more examples for legitimization strategies that were used more often.

The contestation mainly centred around the US's 'no-torture' claim. From time to time, differences on the interpretation or applicability of the norm frame were made explicit. However, for most of the debate, particularly when US practices had been revealed (from 2004 onwards), the claim was contested without explicit explanations of what is understood under the frame (prohibition of torture and CID). However, because the practices were known, support for the claim, also meant implicit support for the frame. The same applies to rejection of the claim. When the norm frame is made more explicit, I code this as 'legal framing'. When non-legal 'frames', i.e. identity-based or interest-based legitimation, are used, I code them as such.

Legal Framing:

- Statements that explicitly refer to applicability of a given legal norm or document and that explains what is understood by them. The frame is made explicit, whereas other legitimation strategies only mention abstract commitment (principle-based legitimation) or specific prior commitments (precedent-based legitimation) but do not explain them. The interpretation of the legal frame rather than the commitment is the centre of the justification
- Examples:
 - "U.S. Releases Human Rights Report Delayed After Abuse Scandal." The Washington Post. May 18, 2004." White House spokesman Scott McClellan told reporters the memo did not pertain to Iraq and thus had no role in the prison abuse scandal. It "related specifically to al Qaeda and the Taliban. It did not reference Iraq at all. We have made it clear that we are bound by the Geneva Conventions in Iraq," he said. McClellan said the provisions Gonzales had called quaint were giving the captured enemy "such things as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific instruments." He added that the administration decided to treat al Qaeda and Taliban detainees "humanely and consistent with the Geneva Conventions." The White House has not released the memo, though lawmakers have requested a copy." *This statement reflects what the US considers 'consistent with the Geneva Conventions' and gives some examples of what kind of treatment that would involve, that is what rights the Geneva Conventions guarantee.*
 - "Bush claimed right to ignore Geneva Convention Donald Rumsfeld." Birmingham Post. June 24, 2004. 'I accept the legal conclusion of the attorney general and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time,' the President said in the memo, entitled Humane Treatment of al Qaida and Taliban Detainees. *This is the interpretation of the President of the legal memo he received. Thus, I coded it as 'legal framing'.*
 - January 20, 2002. "Guantanamo prisoner photos stir controversy in Britain." Associated Press Worldstream. "Human rights groups and some British politicians have criticized the treatment of the prisoners. Blair has sought to balance defending U.S. authorities with insisting the prisoners' human rights must be guaranteed. He has called the prisoners "very dangerous people," but insisted they must be treated in accordance with the Geneva Conventions." *It was debated at the time if the Geneva*

Conventions are applicable to prisoners in Guantanamo, so this statement reflects an interpretation. Thus, I coded it as 'legal framing'

Identity-based legitimization:

- statements that emphasize the image, trustworthiness, credibility or identity of a speaker
- Examples:
 - Source: "Spain's Zapatero against condemning US for Iraq abuse." ABC web site. May 28, 2004. "At a joint press conference with the Mexican president, Vicente Fox, Zapatero had to reply to several questions about this matter, based on newspaper reports which say that several countries, among them Cuba, are planning not to limit article 25b of the declaration of the summit - which begins tomorrow in Guadalajara (Mexico) - to a general condemnation of torture, but to name the United States expressly. The prime minister repeated his condemnation of these practices and said he was convinced that they were repudiated by the majority of the United States' citizens. "As I have confidence in US democracy," he said, "I am sure that the perpetrators will be held responsible for their deeds.""*The reference to the US's democratic identity is what serves as backing for the claim that the US does not need to be condemned for torture.*
 - Source: "US urged to respect prisoners' rights." United Press International. January 20, 2002. "U.S. Defense Secretary Donald Rumsfeld dismissed the critics as "not well-informed," saying that the United States has "a just criminal system ... and people do get treated right.""*The US diffuses any accusations of prisoners' abuse by referring to its domestic make-up, that is its democratic identity.*
 - Source: March 7, 2003. "Bush Assures UN No Torture of Terror Suspects." The White House Bulletin. Spokesman Jose Luis Diaz said today President Bush has assured the UN Human Rights Commission "in the strongest terms that the United States has not and will not use torture in interrogating prisoners" detained in the war on terror." *I coded statements like this as identity-based legitimization because "the United States" [or often the word "we"], and thus implicitly the image as democratic, human rights protecting state, is used here as backing for the claim that no torture is used.*

Interest-based legitimization:

- Justifications based on necessity, utility or effectiveness
- Examples:
 - "Captives have no complaints, says No 10" January 22, 2002. The Daily Telegraph. "DOWNING Street made a robust defence of America's treatment of the terrorist suspects in Cuba yesterday, saying there were "no complaints" from the three British captives... Referring to the pictures released at the weekend showing some of captives manacled, blindfolded and kneeling, Mr Bradshaw said the photographs were taken when the men arrived, "where security needs are paramount"." *The UK supported the US's claim of not abusing prisoner's in Guantanamo by referring to security concerns and the need for protection.*

- January 22, 2002: "Rumsfeld Defends Handling of Afghans." Associate Press.
The West risks losing support if it mistreats the prisoners or subjects them to the death penalty, said Chris Patten, the EU's external relations commissioner. "That would be a way of losing international support and losing the moral high ground," Patten said. He urged "decency and generosity of spirit to the vanquished, even if they are pretty dangerous." *The justification is an interest in a morally correct image.*
- "Bush rejects accusations of US torture." The Irish Times. November 8, 2005. Bush: "We are finding terrorists and bringing them to justice. We are gathering information about where the terrorists may be hiding. We are trying to disrupt their plots and plans. Anything we do to that effort, to that end, in this effort, any activity we conduct, is within the law. We do not torture" ... "There's an enemy that lurks and plots and plans, and wants to hurt America again. And so, you bet, we'll aggressively pursue them."
"But we will do so under the law." While Bush denies illegal conduct/torture, he also emphasizes the need for protection from terrorism. I coded that as interest-based legitimation for Bush's understanding of 'legal interrogation methods' because references to the terrorist threat are used to justify the need to 'aggressively pursue them'.

Principle-based legitimation:

- Justifications that cite a substantive opinion or commitment to a normative standard, often to international law in general.
- Examples:
 - "Monitors of Torture Treaty Rebuke US; Close Guantanamo, UN Panel Urges." The Boston Globe. May 20, 2006. Earlier this month, British Attorney General Peter Goldsmith said the prison "should close" because it is an "unacceptable" symbol of injustice." *This statement shows a principled opinion on what is acceptable or not.*
 - "U.S. denies torture allegations; A U.N. panel in Geneva said the U.S. was playing word games over actions in Iraq and elsewhere." May 6, 2006. Philadelphia inquirer. "I want to reiterate the United States government's absolute commitment to upholding our national and international obligations to eradicate torture and to prevent cruel, inhumane or degrading treatment or punishment anywhere," State Department legal adviser John B. Bellinger 3d said. *The principled commitment to the norms is cited as justification for the claim that the US does not torture.*

Precedent-based legitimation:

- Justification based on concrete cases or legal interpretations that were brought forward in the past. Because stating 'commitment to international law' is not very concrete, I code it as principle-based legitimation. To qualify as 'precedent', reference to a concrete prior argument or case must be made. In the context of the contestation surrounding the prohibition of torture and CID, this legitimation strategy was used sparsely, and mainly by non-state actors such as NGOs.

- Examples:
 - "U.S. Rebuked on Afghans in Detention." The New York Times. March 8, 2004. Human Rights Watch Report on Prison Conditions in Afghanistan: "It contended that the United States was employing interrogation techniques, like shackling prisoners, stripping them naked or depriving them of sleep, that the State Department had condemned as torture in countries like Libya, North Korea and Iran." *The report refers to a concrete prior argument by the United States to reject the US's interpretation. This resembles Schimmelfennig's argument that prior commitment entraps actors most, but it was not used often or by states.*
 - "Iran criticizes US at Human Rights Council." BBC Monitoring Middle East. March 16, 2008. Mo'ayeri stated that the Bush administrations recent veto of an anti-torture bill is a clear sign of the United States disregard for international norms. He also expressed regret over the inhumane actions of the United States at the Guantanamo Bay detention camp and Abu Ghuraib prison." *The statement refers to a concrete prior argument (veto to the McCain amendment) to reject the US's interpretation.*

Evidence-based legitimization:

- Justification based on (lack of) evidence or factual information. This kind of justification was used sparingly, and only by opponents.
- Examples:
 - "Ottawa will not query U.S. over 'spy planes'." National Post. December 8, 2005. "We have no reason to raise this issue with the U.S. because there is no credible information that U.S. activities are taking place in Canada that are contrary to Canadian and international law," said Zuwenia Robidas, a spokeswoman for the Department of Public Safety." *Canada cites a lack of evidence to the contrary to justify the support of the US's claim.*

Questioning of opponent's (O's) credibility:

- Legitimation based on criticism or mistrust of the credibility and motives of the opponent. Unlike in precedent-based legitimization, the credibility is questioned not because of what was said before (arguments) but because of a mismatch of practices with the opponent's identity.
- Examples:
 - "Chinese agency reports indignation at US human rights report." BBC Monitoring Asia Pacific. May 20, 2004. Foreign Ministry spokesman Liu Jianchao warned Tuesday 18 May that the United States should look more into its own problems and think more of how to improve its own human rights situation, rather than meddling in the internal affairs of other countries under the pretext of human rights. "Posed as a 'world human rights guard', the United States has made itself a scoundrel as its forces ruthlessly ravaged prisoners' dignity and trampled their basic human rights in Iraq, which has tarnished civilization and is despised by the whole international community. The release of the record, therefore,

only serves to satirize its human rights 'promotion' around the world," Lin said. *This statement exposes perceived double standards of the United States and thus also rejects the US's claim of treatment of prisoner's that is in line with human rights.*

- "Officials laud Czech premier's comments on US human rights report." BBC Monitoring Europe. March 17, 2008. "All I can say about the US State Department report is that a country that allows torturing of prisoners can hardly give me lessons about human rights violations in my country. To me, torturing is not divided into good and bad," he said. President George Bush last week vetoed a bill that was going to prohibit the CIA to torture prisoners in the framework of fighting against terrorism. *This statement exposes perceived double standards of the United States and thus also rejects the US's claim not to engage in torture.*

Case study 2: Acceptance of Reinterpretation: Debates over self-defense and terrorism

For this case study, more official documents were able such as Security Council and General Assembly debates or compilations of press releases. Since they are a more reliable primary source, I relied more on those official documents than on statements in newspaper articles.

1986 Debate over self-defense against terrorist attacks

Sources:

1. Newspaper articles.

I conducted a content analysis of statements that were obtained by running a query for all articles on the Nexis database, category 'All English Language News', that mention "Libya", and either "self-defense", "sovereignty" or "terror*" from 4 – 21 April 1986. The term 'self-defense' also displayed results for the word 'self-defence'. I chose this timeframe because it ranges from the bombing to one week after the US missile strikes and thus captures most of the debate. This search generated 508 newspaper articles, but also included reprinted speeches and press statements by Ronald Reagan, the White House Press Secretary, Larry Speakes, and legal opinions.

2. Official Documents:

I supplemented these articles with records of the 18 November 1986 UN General Assembly meeting, where a resolution condemning the US military strikes was passed, and with records of the April 15-16, 1986 Security Council meetings on the US's response:

- "General Assembly. Provisional Verbatim Record of the Seventy-Eighth Meeting." 22 November 1986. A/41/PV.78.
- Report of Security Council meetings on the matter: "Letter dated 12 April 1986 from the Chargé d'Affaires A.I. of the Permanent Mission of Malta

to the United Nations Addressed to the President of the Security Council.” (accessed 20 July 2017) http://www.un.org/en/sc/repertoire/85-88/Chapter%208/85-88_08-26-Letter%20dated%2012%20April%201986%20from%20the%20Charg%C3%A9%20d'affaires%20a.i.%20of%20the%20Permanent%20Mission%20of%20Malta.pdf

- Report of Security Council meetings on the matter: “Letter dated 15 April 1986 from the Chargé d’Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya, of Burkina Faso, of the Syrian Arab Republic and of the Permanent Representative of Oman to the United Nations addressed to the President of the Security Council.” (accessed 20 July 2017) http://www.un.org/en/sc/repertoire/85-88/Chapter%208/85-88_08-27-Letters%20dated%2015%20April%201986%20from%20Charg%C3%A9%20d'affaires%20a.i.%20of%20the%20Permanent%20Mission%20of%20Libyan%20Arab%20Jamahiriya,%20Burkina%20Faso,%20Syrian%20Arab%20Republic%20and%20Rep%20of%20Oman.pdf

1998 Debate over self-defense against terrorist attacks

1. Newspaper articles:

I conducted a content analysis of statements that were obtained by running a query for all articles on the Nexis database, category ‘Major World Publications’ (English), that mention “Afghanistan”, “Sudan” and “embassy” from 7 August – 7 October 1998. This search generated 823 articles. Those articles that did not contain statements by government officials were filtered out. The debate was strongest in the week after the US strikes – August 20-27.

2. Official Documents

I supplemented these articles with public papers of Bill Clinton and letters sent to the UNSC on behalf of the US and the League of Arab States (LAS), on which I relied most:

Contestation in and around the United Nations Security Council:

- US letter to the UNSC: “Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council.” S/1998/780. http://repository.un.org/bitstream/handle/11176/46977/S_1998_780-EN.pdf?sequence=3&isAllowed=y (accessed 1 July 2017)
- LAS letter to the UNSC: “Letter dated 21 August 1998 from the Chargé d’Affaires A.I. of the Permanent Mission of Kuwait to the United Nations addressed to the President of the Security Council.” S/1998/789. http://repository.un.org/bitstream/handle/11176/46976/S_1998_789-EN.pdf?sequence=3&isAllowed=y (accessed 1 July 2017)
- Sudan’s letter to the UNSC: “Letter dated 21 September 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council.” S/1998/880.

http://repository.un.org/bitstream/handle/11176/47141/S_1998_880-EN.pdf?sequence=3&isAllowed=y (accessed 1 July 2017)

- UNSC Resolution, condemning terrorism: “Resolution 1189 (1998).” S/RES/1180. 13 August 1998.
[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1189%20\(1998\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1189%20(1998)) (accessed 1 July 2017)

Bill Clinton’s public papers: “Papers of Bill Clinton.” The American Presidency Project. http://www.presidency.ucsb.edu/bill_clinton.php (accessed 1 July 2017):

Bill Clinton:

- “Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan.” August 21, 1998.
<http://www.presidency.ucsb.edu/ws/index.php?pid=54810><http://www.presidency.ucsb.edu/ws/index.php?pid=54768>
- “The President’s Radio Address.” August 22, 1998.
<http://www.presidency.ucsb.edu/ws/index.php?pid=54811>
- “Address to the Nation on Military Action Against Afghanistan and Sudan.” August 20, 1998.
<http://www.presidency.ucsb.edu/ws/index.php?pid=54799>

Background briefings and press briefings by senior administration officials:

- “Background Briefing by Senior Administration Officials.” August 22, 1998. <http://www.presidency.ucsb.edu/ws/index.php?pid=48233>
- “Press Briefing by Mike McCurry.” August 22, 1998.
<http://www.presidency.ucsb.edu/ws/index.php?pid=48263>
- “Press Briefing by National Security Advisor Sandy Berger and Mike McCurry.” August 21, 1998.
<http://www.presidency.ucsb.edu/ws/index.php?pid=48360>
- “Press Briefing by Secretary of State Madeleine Albright and National Security Advisor Sandy Berger.” August 20, 1998.
<http://www.presidency.ucsb.edu/ws/index.php?pid=48285>

2001 Debate over self-defense against terrorist attacks

1. Newspaper articles:

I ran a query for all articles on the Nexis database, category ‘Major World Publications (English)’, that mention “terrorism” and “Afghanistan” or “self-defense” from September 9 – October 13, 2001. Those articles that did not contain statements by government officials were filtered out. Since this search generated thousands of results, I only downloaded the first one thousand articles with the best fit.

2. Official Documents:

These official documents were obtained from the Avalon Project of Yale Law School, which is a compilation of pertinent press statements and briefings as well as legal documents that were issued in response to 9/11. I searched for the statements of ‘critical actors’ to find the relevant documents, e.g.: “President”,

“Bush”, “Britain/British”, “Blair”, “NATO”, “EU”, “Russia”, “China/Chinese”, “France/French”, “United Nations,” etc.

The Avalon Project: Yale Law School:

“September 11, Attack on America”.

http://avalon.law.yale.edu/subject_menus/sept_11.asp (Accessed 10 February 2017):

---Joint Media Availability at the Pentagon with Foreign Minister Joschka Fischer of Germany; September 19, 2001.

---Secretary Colin L. Powell Remarks with Russian Foreign Minister Igor Ivanov. 19 September 2001.

---Statement by NATO Secretary General, Lord Robertson. 2 October 2001.

---Statement by President Prodi on the attacks against the United States. 12 September 2001.

---Statement by the North Atlantic Council. 12 September 2001.

---Radio Address of the President to the Nation. 29 September, 2001.

---Statement of Ambassador Roger F. Noriega, U.S. Permanent Representative to the Organization of American States before the House Committee on International Relations, Subcommittee on Western Hemisphere. 10 October 2001.

---“Prime Minister Tony Blair’s Statement to the House of Commons.” October 4, 2001.

--- “Letter of John Negroponte to the President of the Security Council. 7 October 2001. UN Doc. S/2001/946.

Coding Scheme:

In the following, I provide definitions for the codes that I used and examples of how I applied the codes. Note that I provide more examples for legitimization strategies that were used more often.

Where possible, I read the official documents in full. When there were too many (e.g. after 9/11), I searched the official documents and the news coverage for statements by ‘critical states’, that is mostly for statements from the P5 with search terms such as: “Bush”, “Clinton”, “Reagan”, “United States”, “White House”, “Britain”, “France”, “Soviet Union”, “Russia”, “China”, names of heads of states and norms such as “self-defense” and “sovereignty”.

I coded the international observations based on whether the statement was made by the in-group, out-group or observes (e.g. United Nations General Secretaries), whether the US’ frame or claim was supported or rejected and based on the justification that was chosen (see codes below). The US data, I coded based on the justification and on what frames/claims were brought forward – unlike in the first case study on the prohibition of torture and CID, the frames and claims were much more explicit. This indicates that from the start the goal was generally applicable norm change.

Frame and Claim:

- I distinguished between the frame (legal justification) and claim (to action). Both the frame and claim were made more explicit in the debate over self-defense against state-sponsored terrorism. I do not see norm frames and claims as ‘backing’, but rather as the interpretation of a norm or its applicability that then gets debated.
- Example:
 - “Transcript of Address by Reagan on Libya.” The New York Times. April 15, 1986. “When our citizens are abused or attacked anywhere in the world, on the direct orders of a hostile regime, we will respond, so long as I’m in this Oval Office (claim). Self-defense is not only our right, it is our duty (frame). It is the purpose behind the mission undertaken tonight - a mission fully consistent with Article 51 of the United Nations Charter.” Parenthesis added. *Reagan makes the frame and claim explicit.*

Legal Framing:

- Statements that explicitly refer to applicability of a given legal norm or document and that explains what is understood by them. The frame is made explicit, whereas other legitimation strategies only mention abstract commitment (principle-based legitimation) or specific prior commitments (precedent-based legitimation) but do not explain them. The interpretation of the legal frame rather than the commitment is the centre of the justification
- Example:
 - “Letter dated 15 April 1986 from the Chargé d’Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya, of Burkina Faso, of the Syrian Arab Republic and of the Permanent Representative of Oman to the United Nations addressed to the President of the Security Council.” Representative of Ghana: “He stated that a specific precondition for the exercise of the right of self- defence was “if an armed attack occurred against a member of the United Nations”. In this context, he doubted that an armed attack within the meaning of Article 51 had occurred that justified resort to the use of force in self- defence. The incidents described were not in the nature of armed invasions perpetrated against the territorial integrity or sovereign independence of the United States. Indeed, they had not occurred on United States territory.” (p. 342). *Ghana clearly engages in legal interpretation here to justify its position. Such legal framing was rare in the debate over self-defense against state-sponsored terrorism.*

Identity-based legitimation:

- Statements that emphasize the image, trustworthiness, credibility or identity of a speaker
- Example:
 - Joint Media Availability at the Pentagon with Foreign Minister Joschka Fischer of Germany; September 19, 2001. “I think first of all I have to explain how deeply we were shocked when we saw these terrible suicide attacks on innocent people here on the Pentagon and in New York City. It was an attack on the American people, on the American government. And this shock was everywhere, in Europe and in the German people. It's

a very emotional reaction because this is also a criminal and mass murderous attack on the open society, on the way we live. And I think we should now stay together in full solidarity and fight against this murderous terrorism. We had today very good talks about what has to be done for the future. We have a lot of common understandings and analyses. But first of all, once again, let me tell you, Mr. Secretary, and to the American people that we are in full solidarity. We share the pain, and we also share the burden now in fighting against this terrible danger.” *Fischer refers to the shared identity and values, when legitimating Germany’s support for the US.*

Interest-based legitimization:

- Justifications based on necessity, utility or effectiveness
- Examples:
 - “Transcript of Address by Reagan on Libya.” The New York Times. April 15, 1986. “We believe that this pre-emptive action against his terrorist installations will not only diminish Colonel Qaddafi's capacity to export terror -it will provide him with incentives and reasons to alter his criminal behavior. I have no illusion that tonight's action will bring down the curtain on Qaddafi's reign of terror, but this mission, violent though it was, can bring closer a safer and more secure world for decent men and women. We will persevere.” *Reagan backs up the missile strikes by pointing out possible beneficial consequences.*
 - Petty, Terrence. “British Government Backs Raid; Other U.S. Allies Question Its Wisdom.” The Associated Press. April 15, 1986. “Statements today by France, Norway, Denmark and the Netherlands said military action was wrong approach. The French Foreign Ministry said France “deplores the intolerable escalation of terrorism which has led to an action of reprisals which in itself renews the chain of violence.” *France thus rejects the US’s frame and claim by arguing that it perceives the use of violence to combat terrorism to be ineffective.*
 - “Statement by the North Atlantic Council.” September 12, 2001. “The commitment to collective self-defence embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism. When the Heads of State and Government of NATO met in Washington in 1999, they paid tribute to the success of the Alliance in ensuring the freedom of its members during the Cold War and in making possible a Europe that was whole and free. But they also recognised the existence of a wide variety of risks to security, some of them quite unlike those that had called NATO into existence. More specifically, they condemned terrorism as a serious threat to peace and stability and reaffirmed their determination to combat it in accordance with their commitments to one another, their international commitments and national legislation.” *This statement shows that NATO’s threat perception changed and that self-defense against state-sponsored terrorism is now seen as necessary for protection. The success of the alliance and the need for protection from*

terrorism are cited as reason to invoke Art. 5 of the Washington Treaty (collective self-defense), rather than for instance the shared identity.

Principle-based legitimization:

- Justifications that cite a substantive opinion or commitment to a (different) normative standard, or international law in general.
- Examples:
 - “General Assembly. Provisional Verbatim Record of the Seventy-Eighth Meeting.” 22 November 1986. A/41/PV.78.
Mr. Bartkevich (Union of Soviet Socialist Republics): “Firmly condemning the United States aggressive action against Libya, the Soviet Government once again came out in support of unswerving compliance with the principles found in the Charter and in United Nations decisions, principles which do not allow for the use of force in international relations, the need for resolving any difficult questions through political means and respect of the right of each people to choose the ways and forms of its own development... “Individual criminals and individual terrorist cannot be unified with States and peoples. Individual incidents cannot be used in order to punish peoples and States, as was the case with Libya.” *The USSR backs up its choice of frame (sovereignty, prohibition of the use of force, etc.) and claim (US’s missile strikes are illegal) by citing its commitment to these principles.*
 - “General Assembly. Provisional Verbatim Record of the Seventy-Eighth Meeting.” 22 November 1986. A/41/PV.78. Mr. Liang Yufan (China): “The attack carried out by the United States Navy and Air Force against the territory of the Libyan Arab Jamahiriya last April was an act which contravened the norms guiding international relations and violated Libyan sovereignty and territorial integrity. China is opposed to such acts. The Chinese Government always opposes and condemns terrorism in whatever form. We are against using terrorist means to carry out a political struggle. At the same time, we are also against violating the territory of a sovereign State on the ground of combating terrorism. As everyone knows, the peaceful settlement of international disputes is a universally recognized principle in contemporary international law and also one of the important principles enshrined in the Charter. Strict observance of this principle in relations between States and to refrain from the use or threat of force against each other are obligations common to all countries. We are of the view that both the United States and Libya should abide by this principle and settle their differences in a fair and reasonable fashion through peaceful talks.” *China backs up its choice of frame (sovereignty and territorial integrity) and claim (US’s missile strikes are illegal) by citing its commitment to these principles.*

Process-based legitimization:

- Justifications based on the (lack) of fairness of the deliberations
- Example:

- Lafraniere, Sharon. "Yeltsin 'Outraged' by Attacks, Angry at Not Being Informed." The Washington Post. August 22, 1998. "My attitude is indeed negative, as it would be to any act of terrorism, military interference, failure to solve a problem through talks," said Yeltsin, speaking at an airport outside the Arctic Circle city of Murmansk. "I am outraged, and I denounce this. "About if I knew that that strike would be carried out . . . I can tell you honestly I did not know," he said. "It looks like the whole world did not know about it. That makes it even more indecent." *This shows that Yeltsin, in part, backed his rejection of the US's frame and claim up by pointing to the lack of deliberations.*

Evidence-based legitimation:

- Justification based on (lack of) evidence or factual information.
- Examples:
 - "Transcript of Address by Reagan on Libya." The New York Times. April 15, 1986. "On April 4, the People's Bureau alerted Tripoli that the attack would be carried out the following morning. The next day they reported back to Tripoli on the great success of their mission. Our evidence is direct, it is precise, it is irrefutable. We have solid evidence about other attacks Qaddafi has planned against the United States' installations and diplomats and even American tourists." *In the beginning of his speech, Reagan goes to great length to ensure listeners of the quality of the evidence that links Libya to the bombings. He thus sees good evidence (grounds) as an important backing for the missile strikes and the applicability of self-defense.*

Questioning of O's credibility:

- Legitimation based on criticism or mistrust of the credibility and motives of the opponent. Unlike in precedent-based legitimation, the credibility is questioned not because of what was said before (arguments) but because of a mismatch of practices with the opponent's identity.
- Examples:
 - Hall, Allan. "Credibility Goes Up in Smoke; US public back Clinton over the bombings but question timing; President Bill Clinton walking tightrope over cruise missile strikes." Daily Record. August 22, 1998. The Sudanese embassy in Kenya launched a vicious attack on Clinton. In a statement they described him as "a sexual pervert and maniac". They added: "The timing was chosen to divert attention away from his crumbling credibility and reputation." *Sudan questioned Clinton's motives and accused him of launching the missile strikes to divert attention from the Lewinsky scandal, when citing its opposition.*
 - "General Assembly. Provisional Verbatim Record of the Seventy-Eighth Meeting." 22 November 1986. A/41/PV.78.
Mr. Bartkevich (Union of Soviet Socialist Republics):
"The attempts of the United States to justify the attack on Libya through references to Article 51 of the United Nations Charter are unfounded and totally unconvincing as was demonstrated yesterday in the statement of the representative of Qatar and that of other representatives. The real

reason for these unbridled actions of the United States Administration clearly lies in the fact that the independent anti-imperialist policy of certain developing countries in international affairs is not to its liking. And neither is the firm resistance to attempts made by the United States to impose its will. It is not to the liking of the United States that those countries firmly oppose the claims of the American Administration to deal with the developing countries as though they were its own property. It cynically wishes to show all the developing countries that if harsh bellowing from Washington is not sufficient bring about changes in their independent policy, then the United States has in readiness naval forces and aircraft in order to impose order, using neo-colonial formulas prepared in Washington.” *The Soviet Union is questioning the real motives of the US for the missile strikes here and thus its credible invocation of self-defense.*

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