Abhandlungen

Norm Contestation in the Law Against War: Towards an Interdisciplinary Analytical Framework

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Abstract

According to a widely shared perception, international peace and security law is in crisis. Yet it often remains unclear what the constitutive features of this crisis are, how novel it really is, and what its sources, forms, and effects

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are. In the introduction to this symposium, we unpack the current crisis narrative by focussing on norm contestation in the law against war: Which norms are contested? Who are the actors that contest these norms and how? What are the effects of these contestations on peace and security law as a whole? To answer these questions, we draw on recent scholarship on illegality in Public International Law (PIL) and on contestation in International Relations (IR); we propose an interdisciplinary analytical framework that distinguishes between applicatory, legislative, and systemic contestation. Challenges to the application of norms and the factual basis are a common theme in legal disputes that specify international norms. Legislative contestation challenges the content of norms on a more abstract level, aiming to change its boundaries. Systemic contestation fundamentally questions the cornerstones of the international order. This typology invites PIL and IR scholars to study how different forms of contestation shape international norms in the law against war.

Keywords

international norms – international law – illegality – contestation – peace and security law

I. Introduction

The prohibition of the use of force in Article 2(4) of the United Nations (UN) Charter is the core norm of the multilateral peace and security architecture established after 1945.[1] Its robustness and validity have, however, been subject to ongoing concern and debate among policy-makers and academics alike.

The norm faces challenges from multiple angles. First of all, the norm is often violated, partly in blatant ways. Most recently, the Russian aggression against Ukraine has created seismic shocks within international politics. The UN Secretary General António Guterres has described the Russian invasion as 'one of the greatest challenges ever to the international order and the global peace architecture, founded on the United Nations Charter'.[2] Even more

1 The International Court of Justice (ICJ) regards it as a 'cornerstone' of the UN Charter, ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgment of 19 December 2005, ICJ Reports 2005, 168, para. 148.

2 UNSC 9011th Meeting, 5 April 2022, S/PV.9011, 3.

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dramatically, The Economist recently concluded that 'Russia's invasion of Ukraine has shattered the norm […] that borders should not be changed by force.'[3] This conflict has thus invigorated an ever reoccurring *topos* of the debates on international law – namely the argument that numerous violations of the prohibition of the use of force since 1945 are more than a mere compliance problem, but have in fact weakened or even dissolved the norm. This was famously claimed by Thomas Franck in his 1970 article 'Who Killed Article 2(4)?' in which he argued that the interventionist politics of super powers had eroded the norm 'beyond recognition'.[4] This finding has been renewed numerous times, always in view of the latest illegal interventions.[5] It is, moreover, almost automatically raised in response to major violations of the prohibition of the use of force.[6] It is thus fair to say that the diagnosis of, or at least reflection on, the death of the prohibition of force is almost as old as the norm itself.[7] In these accounts, a norm's robustness and its validity are closely tied to compliance with the norm.[8] Taking such an approach, the

3 Economist, 'The New Geopolitical Epoch', The Economist, 26 December 2022, <https://www.economist.com/united-states/2022/12/26/the-new-geopolitical-epoch>, (last accessed: 17 January 2023).

4 Thomas M. Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States', AJIL 64 (1970), 809-837 (835).

5 Philip Kunig, *Das völkerrechtliche Nichteinmischungsprinzip*: *Zur Praxis der Organisation der afrikanischen Einheit (OAU) und des afrikanischen Staatenverkehrs* (Baden-Baden: Nomos-Verlagsgesellschaft 1981), 234; Jean Combacau, 'The Exception of Self-Defence in U. N. Practice', in: Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht: Nijhoff 1986), 9-38 (30); Richard A. Falk, *Revitalizing International Law* (Ames: Iowa State University Press 1989), 96-97; Anthony C. Arend and Robert J. Beck, *International Law and the Use of Force*: *Beyond the U. N. Charter Paradigm* (London: Routledge 1993), 188; Anthony C. Arend, *Legal Rules and International Society* (Oxford: Oxford University Press 1999), 75; Michael J. Glennon, 'Why the Security Council Failed', Foreign Aff., 82 (2003), 16-35 (16); Thomas M. Franck, 'What Happens Now? The United Nations After Iraq', AJIL 97 (2003), 607-620 (617); Michael J. Glennon, 'How International Norms Die', Geo. L. J. 93 (2004), 939-991 (960); Michael J. Glennon, 'The Limitations of Traditional Rules and Institutions Relating to the Use of Force', in: Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press 2015), 79-95 (91).

6 In view of the recent aggression against Ukraine, the conveners of the 2022 annual meeting of the American Society of International Law convened a panel on 'Is Waging Aggressive War Still Prohibited by International Law?', <https://www.asil.org/sites/default/files/annualmeeting/pdfs/AM_Program.pdf>.

7 For critical discussion, see, for example, Louis Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', AJIL 65 (1971), 544-548 (544); Thilo Marauhn, 'How Many Deaths Can Art. 2 (4) UN Charter Die?', in: Lothar Brock and Hendrik Simon (eds), *The Justification of War and International Order. From Past to Present* (Oxford: Oxford University Press 2021), 449-470 (466).

8 Nicole Deitelhoff and Lisbeth Zimmermann, 'Norms Under Challenge. Unpacking the Dynamics of Norm Robustness', Journal of Global Security Studies 4 (2019), 2-17 (6).

Russian invasion of Ukraine would be taken as evidence for yet another death of the prohibition of the use of force.

A second challenge is formulated both in political and theoretical debates. A view which is prominent in the international relations discourse, but partly also in the debates on public international law, questions the validity of the prohibition of the use of force not because the norm had fallen into desuetude, but because it lacks the normative clarity necessary for a binding legal framework. In this view, international law is not regarded as providing a normative benchmark for all states, but as the mere 'language of states' – a resource for justifying courses of actions, including violations of the law.[9] This resource is seen to be essentially open-ended so that even clear violations can be given an allegedly sound justification.[10] According to Ian Hurd, the prohibition of the use of force is therefore 'law that cannot be broken'.[11] It is up to the acting states to decide what is legal and what is illegal.[12] Taking such an approach, the justification of the Russian invasion of Ukraine would be taken as evidence for the elusiveness and instrumentality of international law, and its inability to distinguish between compliance and non-compliance.[13]

We contend that both accounts come with limitations. Focussing on individual and recent violations of the law might obscure the fact that – historically – we observe a lot more continuity than is suggested by the narrative about the law's crisis and dissolution. International law's history is one of crises, and they also define its present. The prohibition of the use of force is not automatically weakened by norm violations, but – as observed by David Wippmann – 'sometimes emerges stronger than before'.[14] The reason

9 Ian Hurd, *How to Do Things with International Law* (Princeton: Princeton University Press 2017), 81.

10 Martti Koskenniemi for example claims that '[…] it is possible to defend *any* course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards.' Martti Koskenniemi, *From Apology to Utopia*: *The Structure of International Legal Argument* (Reissue with a New Epilogue, Cambridge: Cambridge University Press 2005), 591.

11 Hurd (n. 9), 60: '[T]he reflexive dynamic between legality and state interests make the ban on war infrangible: if war is lawful when it serves the genuine security interests of the state, and states make their own judgments about the threats they face, then the ban on war has become 'law that cannot be broken'.'

12 Hurd argues that '[I]ndividual states have the capacity to change the legal status of their behaviour – from illegal to legal, from violation to compliance – by the exercise of their legal and political agency.' Hurd (n. 9), 32.

13 'There can be no general answer to the legality of many international acts.' Hurd (n. 9), 34.

14 David Wippmann, 'The Nine Lives of Article 2 (4)', Minnesota Journal of International Law 16 (2007), 387-406 (390).

for such an increase in strength is that the negation of the law is just one element of an unlawful act. Another important element is how norms are being upheld. Here we see that violators usually invoke norms and thus in principle confirm their normative value.[15] Even more importantly, we must take account of the international reactions towards violations which may, in fact, lead to strengthening the international consensus about a norm. Few social and legal norms – internationally or domestically – enjoy full compliance.[16] At the same time, many norms – including the prohibition of the use of force – are usually complied with by most actors most of the time.[17] Norm violations do not necessarily pose a threat to the norm's validity. In fact, they are an integral part of normative and legal orders, and an important source to determine the substance of international norms.[18] Norm violations can even strengthen them when their breaches are met with criticism.[19]

We argue that violations of Article 2(4) UN Charter neither suggest its death; nor do individual justifications of the use of force render the norm's meaning elusive. We concur that justifications of the use of force can *contest* the norms of peace and security law. In our perspective it is necessary to unpack the concept of contestation and to determine more precisely how the

15 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Rep. 1986, 14, para. 186. See on the ICJ's 'confirmation hypothesis': Christian Marxsen, 'Violation and Confirmation of the Law. The Intricate Effects of the Invocation of the Law in Armed Conflict', Journal on the Use of Force and International Law 5 (2018), 8-39 (21-37).

16 Wayne Sandholtz, 'Is Winter Coming? Norm Challenges and Norm Resilience', in: Andrea Liese and Heike Krieger (eds), *Tracing Value Change in the International Legal Order. Perspectives from Legal and Political Science*, forthcoming (Oxford: Oxford University Press 2023), 47-63 (51-52); Lisbeth Zimmermann, Nicole Deitelhoff, Max Lesch et al., *International Norm Disputes*: *The Link Between Contestation and Norm Robustness*, forthcoming (Oxford: Oxford University Press 2023), 13-15.

17 Louis Henkin, *How Nations Behave*: *Law and Foreign Policy* (London: Pall Mall Press 1968), 41-42.

18 Rebecca Adler-Nissen, 'Stigma Management in International Relations. Transgressive Identities, Norms, and Order in International Society', IO 68 (2014), 143-176 (144); Max Lesch, 'From Norm Violations to Norm Development. Deviance, International Institutions, and the Torture Prohibition', International Studies Quarterly 67 (2023), forthcoming; Christian Marxsen, *Völkerrechtsordnung und Völkerrechtsbruch*: *Theorie und Praxis der Illegalität im ius contra bellum* (Tübingen: Mohr Siebeck 2021), 193-194; Wayne Sandholtz, 'Dynamics of International Norm Change. Rules against Wartime Plunder', European Journal of International Relations 14 (2008), 101-131 (109).

19 Friedrich Kratochwil and John Gerard Ruggie, 'International Organization. A State of the Art on an Art of the State', IO 40 (1986), 753-775 (767); See also Ian Clark, Sebastian Kaempf, Christian Reus-Smit et al., 'Crisis in the Laws of War? Beyond Compliance and Effectiveness', European Journal of International Relations 24 (2018), 319-343 (326); Deitelhoff and Zimmermann (n. 8), 6-7.

contestation of legal norms is carried out, and which effects this has for international norms and international law in general.

In this symposium, we bring together public international law and international relations approaches to norms, legality, and contestation to develop a richer view of the law against war. In our view, PIL scholars can benefit from the recent work on contestation in IR norms research to better understand the processes of how norms emerge, diffuse, change, and erode. IR scholars can benefit from the systematic approach in PIL to identify legal norms and their substance based on the sources of international law and the concrete application of international norms in evolving case law. Building on and further developing approaches to contestation in both fields, we propose a framework that distinguishes between applicatory, legislative, and systemic contestation. Challenges to the application of norms and the factual basis are a common theme in legal disputes that specify international norms. Legislative contestation challenges the content of norms on a more abstract level, aiming to change the law's boundaries. Systemic contestation fundamentally questions the cornerstones of the international order.

In the remainder of this article, we will, first, develop our understanding of norms and legality (Section II). Based on constructivist approaches in IR, we discuss the definition of (international) norms as intersubjective points of reference for regulating and evaluating behaviour in social interactions. Based on international legal scholarship, we flesh out the criteria of legality as enshrined in the doctrines on sources of international law, which set the benchmarks for determining legal norms. Moreover, we explore the opportunities and limits of interdisciplinary research on international norms. In Section III, we draw on recent PIL and IR approaches to contestation and develop an interdisciplinary analytical framework of contestation to provide an analytical tool for understanding the characteristics and effects of specific types of contestation. We conclude by briefly summarising the contributions to this symposium (Section IV).

II. International Norms and Legality

While international law and international relations accounts share the general assumption that there is a difference between legal and social norms,[20]

20 There are of course further types of norms, including moral, religious and ethical norms, as well as related concepts such as values, rules, principles, and conventions. Nicole Deitelhoff, *Überzeugung in der Politik*: *Grundzüge einer Diskurstheorie des internationalen Regierens* (Frankfurt am Main: Suhrkamp 2006), 37-44.

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there are various approaches in both disciplines to distinguish them. In this section, we begin by analysing the definition of norms in IR. Against this background, we turn to the specific features of legal norms. Legal norms are here understood as formalised social norms, which are established based on criteria of legality as derived from rules on the sources of international law.

1. Defining International Norms

When constructivist scholars in IR returned to the concept of norms in the late 1980s and 1990s,[21] they did so by demonstrating to the discipline *that norms matter* – even in the hard case of national security.[22] This scholarship challenged key assumptions in (neo-) realist and institutionalist approaches that understood norms, including international law, mainly as a consequence of power relations and con- or diverging interests.[23]

International norms are reference points for what international society considers 'appropriate'.[24] They are *regulative* by prescribing and guiding

21 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', IO 52 (1998), 887-917 (889-891); see also Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law*: *An Interactional Account* (Cambridge: Cambridge University Press 2010), 9-15.

22 Peter J. Katzenstein, 'Introduction. Alternative Perspectives on National Security', in: Peter J. Katzenstein (ed.), *The Culture of National Security*. *Norms and Identity in World Politics* (New York: Columbia University Press 1996), 1-32.

23 See, for example, Edward H. Carr, *The Twenty Years' Crisis, 1919-1939*: *An Introduction to the Study of International Relations* (London: Macmillan 1946), 159-160; Robert Axelrod and Robert O. Keohane, 'Achieving Cooperation under Anarchy. Strategies and Institutions', Wld. Pol. 38 (1985), 226-254 (251-252).

24 We build on the common definition of 'standards of appropriate behaviour', developed by IR norms researchers. Finnemore and Sikkink (n. 21), 891; Katzenstein (n. 22), 5. Later research has criticised models of norm emergence and diffusion for focussing too much on a stable understanding of norms and their ordering effects, neglecting the potential for change and contestation. Jeffrey S. Lantis and Carmen Wunderlich, 'Reevaluating Constructivist Norm Theory. A Three-Dimensional Norms Research Program', International Studies Review 24 (2022), 1-27 (4-5). However, this definition is also the starting point for more recent conceptual work on norms and contestation. See for example, Nicole Deitelhoff and Lisbeth Zimmermann, 'Things We Lost in the Fire. How Different Types of Contestation Affect the Robustness of International Norms', International Studies Review 22 (2020), 51-76 (52); Michelle Jurkovich, 'What Isn't a norm? Redefining the Conceptual Boundaries of 'Norms' in the Human Rights Literature', International Studies Review 22 (2020), 693-711 (694); Antje Wiener, *A Theory of Contestation* (Heidelberg: Springer 2014), 19; Carla Winston, 'Norm Structure, Diffusion, and Evolution. A Conceptual Approach', European Journal of International Relations 24 (2018), 638-661 (639-640).

behaviour – describing what an actor ought or ought not to do.[25] They are also key to *evaluating* behaviour – either as conforming with or deviating from a norm.[26] Beyond these key social functions of norms, they are *intersubjective* in that they are at least to a certain degree part of interactions among the members of international society.[27] 'A social norm', as Christoph Möllers points out, 'presumes an intersubjective reference'.[28] Norms are neither *objective* in the sense that they exist outside and independent of social interactions; nor are they *subjective* in the sense that an individual actor can set a norm according to their preferences and without any form of social recognition. As Alexander Wendt notes: '[A]n intersubjective phenomenon […] confronts actors as an objective social fact that cannot individually be wished away.'[29] To have a social function (and analytical value), norms are nevertheless to a certain degree independent from social interaction to provide points of reference.[30] As we will discuss in more detail below, what actors deem appropriate should not be misunderstood as deterministic, but always open to contestation.[31]

This understanding of norms can be well-illustrated by the way prohibition norms and their violation are conceptually linked. The norm enshrined in Article 2(4) of the UN Charter prohibits any use of force except with a UN Security Council mandate under chapter VII or in self-defence. This norm regulates what states ought not to do, it aims at constraining behaviour among UN member states as the norm addressees.[32] This does, however, not mean that the norm fails as soon as it is not fully complied with – quite the contrary.[33] In its evaluative dimension, the norm provides actors with reference points to address norm violations as such, and to criticise those who breach the norm.[34] This is one of the reasons why 'norms are counterfactually

25 Finnemore and Sikkink (n. 21), 891; Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press 1989), 26.

26 Finnemore and Sikkink (n. 21), 891-892; Jurkovich (n. 24), 695.

27 Deitelhoff (n. 20), 38-39.

28 Christoph Möllers, *The Possibility of Norms: Social Practice Beyond Morals and Causes* (Oxford: Oxford University Press 2020), 301.

29 Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press 1999), 160.

30 Möllers (n. 28), 156-157.

31 Wiener (n. 24), 27.

32 Ethan A. Nadelmann, 'Global Prohibition Regimes. The Evolution of Norms in International Society', IO 44 (1990), 479-526 (479).

33 Christoph Möllers even argues that 'Without the *possibility of norm violation*, there is no normativity.' Möllers (n. 28), 61; original emphasis.

34 Möllers (n. 28), 90. For a similar discussion of 'global prohibition regimes', see Nadelmann (n. 32), 479.

valid'.[35] To ascertain the norm, we should look at 'how the community assesses the violation and responds to it'.[36] In the case of Russia's recent aggression, the prohibition of the use of force has been put into effect by several actors: an important legally-binding reaction has been the fast-tracked decision on provisional measures by the International Court of Justice (ICJ) ordering Russia to 'immediately suspend the military operations' in Ukraine.[37] More recently, the International Criminal Court (ICC) issued arrest warrants for Vladimir Putin and Maria Alekseyevna Lvova-Belova on charges of crimes of unlawful deportation and unlawful transfer of children from Ukraine to the Russian Federation; the Independent International Commission of Inquiry on Ukraine has published two reports, documenting a series of violations of international human rights and humanitarian law.[38] Moreover, many states and regional organisations have lodged condemnations of Russian actions.[39] In an extraordinary move, the UN General Assembly made use of the 'Uniting for Peace' procedure to condemn Russia, circumventing the UN Security Council which was blocked by the looming Russian veto.[40] A world without a valid prohibition of the use of force would not have the normative means for this pushback. Yet, it is important to note that this pushback has not been universal. Major powers like China and India, representing a huge part of the world's population, remain reluctant to condemn Russian actions.[41]

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35 Kratochwil and Ruggie (n. 19), 767. As Deitelhoff and Zimmermann note, 'norms derive their validity primarily from the shared intersubjective acceptance of their obligatory claims by their addressees and, only secondarily, from their factual enforcement.' Deitelhoff and Zimmermann (n. 24), 53.

36 Kratochwil and Ruggie (n. 19), 767; Deitelhoff and Zimmermann (n. 8), 6-7.

37 ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), ICJ General List No. 182, 2022, para. 86 (1).

38 ICC Press Release (17 March 2023), Available online: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova> (last accessed 30 March 2022); Reports of the Independent International Commission of Inquiry on Ukraine, A/77/533 (18 October 2022), section IV; A/HRC/52/62 (15 March 2023), section IV.

39 For a good overview, see the compilation by the Lawfare Blog. Available online: <https://www.lawfareblog.com/world-reacts-russias-invasion-ukraine> (last accessed: 14 March 2022).

40 UNGA Res ES-11/1 of 18 March 2022, UN Doc. A/RES/ES-11/1; see Ben Christian and Antonia Witt, Totgesagte leben länger: Die Vereinten Nationen und der Krieg in der Ukraine, in: PRIF Blog. Available online: <https://blog.prif.org/2022/03/03/totgesagte-leben-laenger-die-vereinten-nationen-und-der-krieg-in-der-ukraine/> (last accessed: 14 March 2022).

41 Overall, 52 states have not supported the resolution, representing together more than 50 % of the world's population; voting results regarding Resolution ES-11/1: Yes: 141 | No: 5 | Abstentions: 35 | Non-Voting: 12 | Total voting membership: 193.

2. Determining Legal Norms

Scholarship in PIL and IR share the assumption that social and legal norms are distinctive but often diverge on how to define the line between them.[42] Very broadly, one can conceive of legal norms as formalised social norms. In IR, the influential legalisation approach looks at the variation of obligation, precision, and delegation of normative provisions to unpack 'the turn to law' in international institutions.[43] Despite their formalist approach, the authors shy away from answering the question of what constitutes a legal norm.[44] The legalisation approach has little to say about why these features should be decisive in setting a legal norm apart from a social norm.[45] Other approaches – often interdisciplinary – have turned to the procedural dimension of international law,[46] grounding it, for instance, in a 'practice of legality'.[47] Such an approach, however, tends to overstate the need for congruence between legal norms and practice, leaving little room for contestation and norm violations without calling the legal character of norms into question altogether.[48] The practice of law has, however, a more concrete focus when determining whether we face a legal or a non-legal norm. The benchmark is set by the norms on the sources of international law. These norms form what H. L. A. Hart describes as 'secondary rules', i. e. rules which set forth what is to be seen as law.[49]

Rules on the sources of international law are meant to make sure that a norm of international law is based on the consent of states. These secondary

42 Michael Bothe, 'Legal and Non-Legal Norms. A Meaningful Distinction in International Relations?', NYIL 11 (1980), 65-95 (66); Martha Finnemore and Stephen J. Toope, 'Alternatives to 'Legalization'. Richer Views of Law and Politics', IO 55 (2001), 743-758 (747-748). Martha Finnemore, 'Are Legal Norms Distinctive?', Journal of International Law & Politics 32 (2000), 699-705 (701).

43 Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik et al., 'The Concept of Legalization', IO 54 (2000), 401-419 (404).

44 While the authors acknowledge the influence of H. L. A. Hart's concept of law, they hasten to add that they 'do not seek to define 'law' or to equate our conception of legalization with a definition of a legal system'. Abbott, Keohane, Moravcsik et al. (n. 43), 403.

45 Finnemore and Toope (n. 42), 746-747.

46 Finnemore and Toope (n. 42), 750.

47 Brunnée and Toope (n. 21), 15.

48 For instance, Brunnée and Toope argue that the international torture prohibition lost its legality in the course of US counterterrorism campaigns in the early 2000 s: Brunnée and Toope (n. 21), 270. For a critique, see Nico Krisch, 'Review. Legitimacy and Legality in International Law', AJIL 106 (2012), 203-209 (205-206).

49 Herbert L. A. Hart, *The Concept of Law* (3rd edn, Oxford: Oxford University Press 2012), 94. '[T]hese secondary rules […] specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.'

rules on the sources are partly unwritten and partly codified in international treaties. The generally accepted starting point is the enumeration of the sources of international law contained in Art. 38 of the ICJ Statute. This article lists treaties, customary international law, and general principles of law as the sources of law to be applied by the ICJ. Additionally, Art. 38 (1) (d) refers to 'judicial decisions and the teachings of the most highly qualified publicists' as subsidiary means for the determination of the norms of international law. Each of the sources is then defined and operationalised in further rules. For treaties, the 1969 Vienna Convention on the Law of Treaties sets forth the rules about how treaties are, for example, concluded, interpreted, or terminated.[50] The rules for identifying customary international law remain unwritten. The same is true for general principles of law as a source of international law, which has, however, largely been neglected in theory and practice for a long time. Nevertheless, the recent work of the International Law Commission on all three sources has provided helpful guidance.[51] According to a widely held view, the list of Article 38 ICJ Statute is not exhaustive[52] so that other sources, particularly unilateral commitments are relevant as well.

The sources of the law are a core concern for international lawyers, but they are, at the same time, notoriously controversial. Beyond the enumeration of sources in Article 38 of the ICJ Statute, disagreement begins. It is controversial if specific further sources exist, whether there are priorities among the sources, and also how the legal norms of these sources can be defined in more concrete terms.[53] Debates in international law, therefore, typically focus on whether a certain concept – e. g. on humanitarian intervention – fulfils the criteria of the sources of international law and can thus be seen as a legal norm. In this article, we thus distinguish social and political norms that provide references points for appropriate behaviour and

50 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331.

51 ILC, Draft Conclusions on Identification of Customary International Law, with Commentaries, (2018) ILCYB, Vol. II, Part Two, 122-156; ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, ILCYB 2018, Vol. II, Part Two, 16-116; ILC, First Report on General Principles of Law, 19. April 2019, UN Doc. A/CN.4/732.

52 Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press 1996), 81; Allain Pellet and Daniel Müller, 'Article 38', in: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm et al. (eds), *The Statute of the International Court of Justice. A Commentary* (3rd edn, Oxford: Oxford University Press 2019), 819-962 rn. 87-110.

53 Myres S. McDougal and W. Michael Reisman, 'The Prescribing Function in the World Constitutive Process', Yale Studies in World Public Order 6 (1980), 249 (260).

legal norms that formalise these norms based on the sources of international law.

3. Opportunities and Limits of an Interdisciplinary Approach

An interdisciplinary approach to norms faces a number of challenges, but also offers the possibility of significantly enriching the respective perspectives. Indeed, points of connection are regularly made,[54] but they are less often explicitly used – at least not in both directions.[55] Relevant tensions between the IR and the PIL perspectives arise with regard to the concept of norms and the methods used to study them, as well as with regard to different research interests when it comes to the substance, processes, and the effects of norms.[56]

First of all, based on a wider concept of norms that also includes social and political norms in its analysis, the IR discourse partly treats concepts such as humanitarian intervention and the responsibility to protect as norms – albeit not in a legal sense,[57] whereas legal scholarship predominantly holds that these concepts have not crystallised into legal norms.[58] Due to the similarity in terminology which nevertheless in fact refers to different phenomena, there is thus often cause for confusion.[59] One way to alleviate this tension would be more transparency about which kind of norms are under study and how, for instance, changing social norms affect legal norms.[60] This is also

54 Jeffrey L. Dunoff and Mark A. Pollack, 'International Law and International Relations. Introducing an Interdisciplinary Dialouge', in: Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (Cambridge: Cambridge University Press 2013), 3-32 (4); Emilie M. Hafner Burton, David G. Victor and Yonatan Lupu, 'Political Science Research on International Law. The State of the Field', AJIL 106 (2012), 47-97 (49-50).

55 Dunoff and Pollack note that 'the intellectual terms of trade have been highly asymmetrical, with most IL/IR writings involving the application of international relations theories and methods to the study of international legal phenomena.' Dunoff and Pollack (n. 55), 10.

56 See also Dunoff and Pollack (n. 55), 11-21.

57 See, for example, Nicholas J. Wheeler, 'Humanitarian Intervention after Kosovo. Emergent Norm, Moral Duty or the Coming Anarchy?', Int'l Aff. 77 (2001), 113-128 (127); Alex J. Bellamy, 'The Responsibility to Protect Turns Ten', Ethics & International Affairs 29 (2015), 161-185 (171). For an IR critique, see Christopher Daase, 'Legalizing Legitimacy. A Critique of the Responsibility to Protect as an Emerging Norm', Telos 170 (2015), 67-87.

58 Carsten Stahn, 'Responsibility to Protect. Political Rhetoric or Emerging Legal Norm?', AJIL 101 (2007), 99-120 (101).

59 See, for example, Jan Klabbers, 'The Bridge Crack'd. A Critical Look at Interdisciplinary Relations', Int'l Rel. 23 (2009), 119-125 (120).

60 Ingvild Bode's contribution to this symposium proposes to distinguish between normative and legal international orders and discusses their potential interfaces. See also Brunnée and Toope (n. 21), 86.

reflected in different methods to study norms. In IR, the range of norm constituting actors is much broader than in PIL, and so are the potential sources for testing the existence, development, or erosion of norms. They can, for example, include the role of non-state actors[61] or a discourse analysis of newspapers.[62] From a traditional international law standpoint it is predominantly state actors and, to a lesser degree, international organisations that are relevant. Second, IR approaches often share a research interest in the processes of international norm dynamics, explaining why and how norms emerge, diffuse, change, and erode. The legal perspective, by contrast, is rather interested in determining the substance of norms – that is the content and scope of concrete legal obligations, which is determined in view of states' actual practice. PIL scholarship is thus tasked with the more burdensome exercise of determining the 'international law on a given day'.[63] Put differently, PIL is usually interested in *what* the substance of international legal norms is, whereas IR is interested in *why* or *how* the law becomes what it is. Third, research interests with regard to the effects of norms are usually different. IR scholars grapple with studying to what degree states comply with norms and why – e. g. with the prohibition of anti-personnel landmines.[64] IR norms research often focusses on whether or not norms are reflected in practice, which sometimes leads to a conflation of normality (what *is*) with normativity (what *ought* to be).[65] A legal perspective rather

61 Nina Reiners, for instance, recently demonstrated 'how water became a human right' through the work of a transnational coalition of expert members of UN treaty bodies and other non-state actors that led to the adoption of General Comment No. 15 to the International Covenant on Economic, Social and Cultural Rights. Nina Reiners, *Transnational Lawmaking Coalitions for Human Rights* (Cambridge: Cambridge University Press 2022), 66-93. See also Max Lesch and Nina Reiners, 'Informal Human Rights Lawmaking: How Treaty Bodies Use "General Comments" to Develop International Law', Global Constitutionalism online first (2023), 1-24.

62 See, for example, Elvira Rosert and Sonja Schirmbeck, 'Zur Erosion internationaler Normen. Folterverbot und nukleares Tabu in der Diskussion', Zeitschrift für Internationale Beziehungen 14 (2007), 253-287 (253); Elvira Rosert, 'Norm Emergence as Agenda Diffusion. Failure and Success in the Regulation of Cluster Munitions', European Journal of International Relations 25 (2019), 1103-1131 (1112).

63 James Crawford and Thomas Viles, 'International Law on a Given Day', in: Konrad Ginther, Gerhard Hafner, Winfried Lang et al. (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (Berlin: Duncker & Humblot 1994), 45-68 (45).

64 See the codification in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18. September 1999, 2056 UNTS 211.

65 One of the reasons for this bias is linked to the models for norm emergence and diffusion developed in IR that take norm-compliance as the end point of these processes, thereby putting a stronger emphasis on normality than on normativity. See the discussion by Lesch (n. 18).

asks whether a particular state is bound by that norm.[66] Thus, it takes a more concrete perspective with regard to specific *legal* effects and puts more emphasis on the specific legal obligations deriving from international norms.[67]

These difficulties notwithstanding, both disciplines significantly overlap and can learn from each other. In this article, we suggest that IR debates can benefit from a closer engagement with PIL approaches to the application and interpretation of international law.[68] The careful assessment of case law, for instance, allows for a better understanding of how norms matter and develop over the *longue durée*, than the presentism in IR norm research on contestation. For international law scholarship the IR debates are particularly relevant when it comes to conceptualising normative change. Such change is difficult to grasp in terms of the sources of international law, since these categories are often not fine-grained enough to capture what Ingo Venzke has described as 'semantic struggles' over the development of the law.[69] Rather, the traditional theory of change has – as René Urueña points out – been 'one of a constant present',[70] in which normative change is understood as a series of turning points in which the law shifts from one content to the other. The focus on norm contestation provides promising pathways for mutually beneficial exchange between both fields.

III. Norm Contestation

In this section, we begin by discussing the role of contestation in international norm dynamics within IR norms research. Building on this scholar-

66 Lisa Martin, for instance, more fundamentally criticises the use of the legal concept of compliance as a variable in IR studies because it cannot reveal the causal effects of international norms. Lisa L. Martin, 'Against Compliance', in: Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (Cambridge: Cambridge University Press 2013), 591-610 (605).

67 The IR discourse treats the prohibition of anti-personnel landmines as a norm and, for example, the US as a norm challenger – see Finnemore and Sikkink (n. 21), 892. Under a legal perspective, however, the US are not bound by that treaty, as they are not party to the Ottawa convention, nor does a prohibition exist under customary international law – see ICRC, Customary IHL Database, Regel 81, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule81>.

68 Nora Stappert, 'Practice Theory and Change in International Law. Theorizing the Development of Legal Meaning Through the Interpretive Practices of International Criminal Courts', International Theory 12 (2020), 33-58 (37); Lesch (n. 18); Sandholtz (n. 18), 106-107.

69 Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press 2012), 37-38.

70 René Urueña, 'Temporariness and Change in Global Governance', NYIL 45 (2014), 19-40 (25).

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ship, we understand contestation as discursive and behavioural challenges to the application, meaning, and validity of international norms, as well as to the broader normative system.[71] Linking the IR contestation debate to related concepts in PIL debates allows us to develop an analytical framework that includes both: the recent conceptual work in IR on different forms and effects of contestation and the sophistication of PIL approaches to study the legal processes of ascertaining and applying norms. In that way, we believe, interdisciplinary research on norm contestation can benefit from a deeper exchange between PIL and IR.

1. Contestation and International Norm Dynamics – IR Perspectives

In the last two decades, contestation has become a central research topic in International Relations.[72] In this scholarship it is well established that contestation is a driving force for the emergence, diffusion, change, and erosion of international norms. In other words, contestation is not only a source for norm decay, but also for the development and even for strengthening international norms.

First, contestation is an important aspect of norm emergence. As Martha Finnemore and Kathryn Sikkink point out: '[N]ew norms never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other norms and perceptions of interest.'[73] Actors advocating for new or alternative norms do so by way of challenging extant norms that they seek to alter or displace.[74] Second, and closely related, contestation shapes the diffusion of norms across the globe. A key mecha-

71 IR scholarship views contestation broadly as 'the diverse social practices by which actors […] dispute the validity, the meaning, or the application of norms': Jonas Wolff and Lisbeth Zimmermann, 'Between Banyans and Battle Scenes. Liberal Norms, Contestation, and the Limits of Critique', Rev. Int'l Stud. 42 (2016), 513-534 (518).

72 See, for example, the discussions in Deitelhoff and Zimmermann (n. 24), 54-56; Anette Stimmer and Lea Wisken, 'The Dynamics of Dissent. When Actions Are Louder than Words', Int'l Aff. 95 (2019), 515-533 (518-520); Wolff and Zimmermann (n. 71), 516-518; Wiener (n. 24), 17-34.

73 Finnemore and Sikkink (n. 21), 897.

74 IR discusses these dynamics by focussing on the role of 'norm entrepreneurs', Finnemore and Sikkink (n. 21), 896-897; Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press 1998), 14. Whereas norm research has mainly focussed on liberal actors, norm violating states can also act as norm entrepreneurs. Carmen Wunderlich, *Rogue States as Norm Entrepreneurs: Black Sheep or Sheep in Wolves' Clothing?* (Cham: Springer 2020), 3-4.

nism for diffusion is seen in norm socialisation processes 'intended to induce norm breakers to become norm followers'.[75] This process goes rarely uncontested as actors deny international norms altogether, or only partly accept them before they finally comply with them.[76] As socialisation studies have been criticised for their top-down character,[77] scholarship on the appropriation,[78] localisation,[79] translation,[80] or vernacularisation[81] of international norms puts more emphasis on how domestic and regional actors contest international norms in an attempt to change or even resist them.[82] This research focusses on norm change in the domestic and regional setting however, paying less attention to its effects on norms at the international level.[83]

A third strand in IR norms research explicitly foregrounds actions by states and their justificatory arguments as sources for change that evolve in ongoing cycles – even after norms have emerged and diffused.[84] Antje Wiener argues that norms have to be understood through their 'meaning-in-use', which is always open to contestation.[85] Drawing on theories of legal argumentation, Wayne Sandholtz argues that due to the inherent indeterminacy

75 Finnemore and Sikkink (n. 21), 902.

76 Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices. Introduction', in: Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press 1999), 1-38 (22-31).

77 Lisbeth Zimmermann, Nicole Deitelhoff and Max Lesch, 'Unlocking the Agency of the Governed. Contestation and Norm Dynamics', Third World Thematics: A TWQ Journal 2 (2017), 691-708 (693).

78 Mathias Großklaus, 'Appropriation and the Dualism of Human Rights. Understanding the Contradictory Impact of Gender Norms in Nigeria', TWQ 36 (2015), 1253-1267.

79 Amitav Acharya, 'How Ideas Spread. Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', IO 58 (2004), 239-275; Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World', International Studies Quarterly 55 (2011), 95-123.

80 Lisbeth Zimmermann, 'More for Less. The Interactive Translation of Global Norms in Postconflict Guatemala', International Studies Quarterly 61 (2017), 774-785.

81 Peggy Levitt and Merry Sally, 'Vernacularization on the Ground. Local Uses of Global Women's Rights in Peru, China, India and the United States', Global Networks 9 (2009), 441-461.

82 See the analysis of the relationship between the African Union and the United Nations with regard to the legality of military intervention by John-Mark Iyi in this symposium.

83 This research has, however, paid less attention to how domestic or regional contestation affects norms at the international level: Zimmermann, Deitelhoff and Lesch (n. 77), 696-697; Lisbeth Zimmermann, *Global Norms with a Local Face*: *Rule-of-Law Promotion and Norm Translation* (Cambridge: Cambridge University Press 2017), 204.

84 Mona L. Krook and Jacqui True, 'Rethinking the Life Cycles of International Norms. The United Nations and the Global Promotion of Gender Equality', European Journal of International Relations 18 (2012), 103-127 (109); Sandholtz (n. 18), 103-104.

85 Wiener (n. 24), 4.

of international norms, and the uncertainty about norm applications especially in novel cases,[86] international norms always remain open to change.[87] This approach makes it possible to trace the triggers of contestation and their effects on the meaning of norms across time.[88]

Finally, contestation has been discussed with regard to the question of norm erosion. In light of several challenges to international norms by the George W. Bush administration, norm researchers argued that contestation was an indicator or a cause of norm erosion.[89] Empirically, however, there are few norms that have in fact eroded.[90] Recently, Nicole Deitelhoff and Lisbeth Zimmermann introduced a more differentiated approach to the links between contestation and norm erosion. They argue that contestation at the level of norm applications does not weaken (and can even strengthen) international norms, whereas challenges at the level pertaining to the validity of international norms are likely to weaken them.[91] Relatedly, there are ongoing debates on the question of what defines a 'strong' or 'robust' norm. Recent approaches agree that a focus on compliance falls short of giving credit to the manifold ways through which norms take effect.[92] To avoid a bias on compliance, they instead either focus on concordance with the norm in discourse and its institutionalisation,[93] or combine an analysis of compliance with negative reactions to norm violations.[94]

IR norms research thus provides several avenues for studying contestation in different phases of international norm dynamics. The distinction between applicatory and validity contestation is particularly helpful to study the effects of contestation on norm robustness.[95] It does, however, bracket the issue of norm change as a consequence of contestation by taking – for analytical purposes – a fixed normative core as a starting point for the

86 Sandholtz (n. 18), 106-107.

87 Sandholtz (n. 18), 110.

88 See Giulia Persoz in this symposium and her analysis of the changing meaning of 'peaceful purposes' in norms related to space.

89 McKeown argues that 'the norm will always lose some salience just in virtue of it being publicly challenged'. Ryder McKeown, 'Norm Regress. US Revisionism and the Slow Death of the Torture Norm', Int'l Rel. 23 (2009), 5-25 (11)

90 Wayne Sandholtz, 'Norm Contestation, Robustness, and Replacement', Journal of Global Security Studies 4 (2019), 139-146 (145).

91 Deitelhoff and Zimmermann (n. 24), 58.

92 Deitelhoff and Zimmermann (n. 8), 6; Michal Ben-Josef Hirsch and Jennifer M. Dixon, 'Conceptualizing and Assessing Norm Strength in International Relations', European Journal of International Relations 27 (2021), 521-547 (523-524).

93 Hirsch and Dixon (n. 92), 524-526.

94 Deitelhoff and Zimmermann (n. 8), 8-9.

95 For a comparative analysis of the link between contestation and norm robustness in six cases of international norms, see Zimmermann, Deitelhoff, Lesch et al. (n. 16).

analysis.[96] This gives only little room to the diagnosis that the abstract general content of legal obligations changes and that partly radically new claims are presented as interpretations of existing legal norms, so for example: the concept of preemptive self-defence against remote threats that is formulated as a form of self-defence under Art. 51 of the UN Charter. Moreover, due to the focus on individual norms, this approach is less interested in challenges to the underlying normative orders, or legal systems as such.

2. Norm Contestation from an International Law Perspective

Stating that norms are contested is a truism from the perspective of international law. Contestation is no term of art in the doctrines on the sources of international law, but contestation is chiefly important for international law on various levels. Law is of adversarial nature and we find evidence of such practices of contestation in every legal dispute. Even where norms are widely agreed, they remain abstract and need to be applied to specific cases which gives plenty of room for diverging opinions: Norms need to be interpreted and conclusions need to be drawn for the case at hand. Contestation therefore first of all takes the form of interpretative struggles over the meaning of existing norms. International legal doctrine accordingly provides rules on interpretation which are partly contained in international treaties, particularly the Vienna Convention on the Law of Treaties but are also of customary nature.

In addition to that, also legal development often depends on contestation. Norms and their specific interpretations usually emerge out of an adversarial process of claims and counterclaims.[97] In such a way, new norms can emerge and, for example, crystallise into norms of customary international law. But also existing treaty interpretations can change over time through evolutive interpretation.[98] Eventually, also the decline of legal norms depends on processes of contestation. The doctrine of desuetudo describes the phenomenon that a once established legal norm can lose its

96 Deitelhoff and Zimmermann (n. 24), 53; Deitelhoff and Zimmermann (n. 8), 8-9.

97 This is aptly put by Michael Reisman: 'International law is still largely a decentralized process, in which much lawmaking (particularly for the most innovative matters) is initiated by unilateral claim, whether explicit or behavioral. Claims to change inherited security arrangements, or any other part of the law, ignite a process of counterclaims, responses, replies, and rejoinders until stable expectations of right behavior emerge.' – W. Michael Reisman, 'Assessing Claims to Revise the Laws of War', AJIL 97 (2003), 82-90 (82).

98 Christian Djeffal, *Static and Evolutive Treaty Interpretation* (Cambridge: Cambridge University Press 2016), 27; see generally: Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press 2014).

legal character by not being applied in practice anymore.[99] The terminal moment of a treaty is described as obsolescence, meaning that a legal norm is dissolved.

The concept of contestation is, accordingly entrenched in numerous legal doctrines, but it is not made explicit. We contend that developing an explicit understanding of contestation is helpful for debates on international law as it allows to better identify whether and how legal norms are being challenged, where specifically contestation takes place and what, accordingly, the potential effects of contestation are likely to be.

3. Applicatory, Legislative, and Systemic Contestation

The foregoing analysis shows that IR and PIL research acknowledge the inherent dynamism of normative systems and the role that contestation plays in the emergence, diffusion, and development of international legal norms. At the same time, legal norms may not be dissolved into a purely dynamic form, but must retain an essential static element in order to provide an identifiable framework from which concrete legal obligations can be derived. In order to identify the dynamic and static elements, it is crucial to understand the object of contestation, and the level at which contestation takes place. We contend that we can distinguish three types of contestation of legal norms which occur on different levels, i. e. they are characterised by different degrees of generality in which controversies are carried out.[100] The typology suggested here builds on the concepts developed within the IR discourse and develops it further in order to respond to the specificities of legal norms. It builds on the IR distinction of applicatory and validity contestation by distinguishing between contestation about the application in concrete cases and contestation about the more abstract interpretation of the norm and adds an additional layer of even more fundamental systemic contestation, in which the international order as a whole is challenged.

First of all, *applicatory contestation* constitutes the main form of conflicts concerning legal norms.[101] Applicatory contestation connotes disputes about the application of norms in concrete situations: What is the situation about, what are its facts, which norm applies to this situation and what does

99 Jan Wouters and Sten Verhoeven, 'Desuetudo', in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (Oxford: Oxford University Press 2008), para. 1.

100 See on these levels of contestation: Marxsen (n. 18), 339-347.

101 This concept has been introduced in IR by Nicole Deitelhoff and Lisbeth Zimmermann: Deitelhoff and Zimmermann (n. 24), 56-57. For a PIL account of applicatory contestation, see Marxsen (n. 18), 198-218.

it require?[102] In many ways, applicatory contestation is a normal procedure in norm disputes and an integral part of legal argumentation.[103] It is the result of the indeterminacy of norms which are formulated on an abstract and general level, but must be applied to specific situations. As a consequence, there is a necessary uncertainty about the application of norms. Actors contest the facts of a case as well as the application of abstract legal norms to concrete cases, for example, whether one state has shot down an airplane (factual question), or whether an attack is sufficiently intensive so as to be classified an armed attack (legal question). In such applicatory disputes all actors essentially act in good faith vis-à-vis the legal obligation and therefore they do not challenge the validity of the norm. Applicatory contestation thus does not constitute a pathology. Rather, it can even lead to a concretisation of norms,[104] and, moreover, as actors refer to international law, it usually means a confirmation and strengthening of international law.[105]

A relevant phenomenon related to the application of the law are cases in which states aim to *not apply* the law in emergency situations.[106] An actor here generally acknowledges and confirms an existing norm, but claims exculpation from a violation of the law in view of necessity considerations. This has been the logic behind many states' participation in the 1999 Kosovo war, which was not predominantly justified as a lawful humanitarian intervention, but as 'a special case'.[107] This type of contestation thus aims to leave the general norm in place, but intends to disapply it in the specific case.

The second type of contestation is what we call *legislative contestation*. Legal concepts are often not merely controversial as regards their concrete application in the specific case, but rather are controversial on an abstract general level. Therefore, when actors dispute the legality of conduct, they in fact extend to controversies over the abstract general scope of the legal concepts at stake. They act with what may be described as a legislative intention of shaping or developing the legal concepts they invoke. For

102 Deitelhoff and Zimmermann (n. 24), 57.

103 See above, sections III. 1. and III. 2.

104 Deitelhoff and Zimmermann (n. 24), 58.

105 ICJ, *Military and Paramilitary Activities* (n. 15), 14, para. 186. It is significant to highlight though that there are limits to a confirmation of legal norms through its invocation. Where an actor, pro forma, invokes the law but does so in cynical disrespect of the law, no confimation of existing norms takes place. See on this point: Marxsen (n. 15), 27-36.

106 Marxsen (n. 18), 219-242.

107 German Foreign Minister Klaus Kinkel stated that NATO's decision may not become a precedent and warned of the effects on the prohibition of the use of force. Deutscher Bundestag: Plenarprotokoll 13/248, 16 October 1998, 23129.

many legal questions of international peace and security law, the rights and obligations remain controversial on an abstract level. Does the jus contra bellum apply to cyber-attacks or are adaptations necessary?[108] Is self-defence against non-state actors operating from the territory of a third state generally lawful, and if so under what circumstances?[109] In these cases we are dealing with grey zones of international law in which the abstract formulation of legal obligations have already been, and remain, contested.[110]

In addition, states occasionally challenge existing norms of international law with the intention of changing them. They act as norm entrepreneurs and deliberately violate an established norm of international law. Some states have, for example, presented far reaching interpretations of the right to self-defence.[111] Other states put forward the claim that humanitarian interventions are lawful,[112] and have thus justified violations of the jus contra bellum based on a claim of what the law *should* provide for according to their view. In essence, they question the established legal framework through their justifications and act with a legislative intention.[113] Legislative contestation, overall, is characterised by a higher degree of generality on the level of dispute: it is the abstract scope of obligations under the jus contra bellum which are at stake, not only the more concrete questions regarding the application of generally uncontroversial norms.

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108 The general application has been argued for by the group of experts who have established the Tallinn Manual – see Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge: Cambridge University Press 2017). State practice, however, remains ambiguous, see: Dan Efrony and Yuval Shany, 'A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice', AJIL 112 (2018), 583-657 (653-654).

109 See the contrasting accounts on this question in Mary Ellen O'Connell, Christian J. Tams and Dire Tladi, *Self-Defence against Non-state Actors* (Max Planck Trialogues on the Law of Peace and War edited by Christian Marxsen and Anne Peters, Cambridge: Cambridge University Press 2019).

110 Marxsen (n. 18), 243-263.

111 This has, for example, been done by Israel when proposing the concept of pre-emptive self-defence as a justification for military action. Israel, inter alia, invoked this doctrine when justifying the destruction of the Iraqi nuclear reactor Osirak (Tamuz-I) in 1981, see: UN Doc. S/PV.2280, paras 58 f., 97 (Israel).

112 See the position of the UK government on the legality of the 1999 Kosovo intervention: Geoffrey Marston (ed.), 'United Kingdom Materials on International Law', BYIL 70 (1999), 595-598; Geoffrey Marston (ed.), 'United Kingdom Materials on International Law', BYIL 71 (2000), 643-646; see also Geoffrey Marston (ed.), 'United Kingdom Materials on International Law', BYIL 72 (2001), 695-696.

113 These cases of violations of the law have therefore been described as 'legislative illegality', see Marxsen (n. 18), 264-282.

We describe the third type of contestation as *systemic contestation*. This type refers to challenges to foundational norms of the international legal order. What this form shares with legislative contestation is an actor turning against existing international legal norms. Systemic contestation is, however, more radical in that the actor advocates for an international legal order that deviates significantly in its fundamental values or its basic orientation from that of the existing order. Systemic contestation therefore operates on an even more general level than contestation of the second type. In the past, we saw examples of this during the Cold War, when the Soviet Union proclaimed a right to intervene in other socialist countries under the Brezhnev doctrine. Similar doctrines, such as the Johnson and Reagan doctrines, were put forth by the US.[114] Today it seems likely that Russia's interventionist strategy since 2014 points in a similar direction, and that Russia is advocating for a framework in which other states within Russia's proclaimed sphere of influence are deprived of their right to equal sovereignty as guaranteed by the UN Charter. Russia seems to advocate for a type of *Großraumordnung* in the sense of Carl Schmitt.[115] Even in Western states, we can observe fundamental pushback by radical nationals and populist movements against international governance or law as such.[116]

Generally speaking, the potential effects of contestation increase throughout the levels. The first level, applicatory contestation, is largely limited to individual cases. It only reaches beyond them to the extent that it may affect further interpretations of legal norms, since it forms part of the 'interpretive struggles' about the law.[117] Legislative contestation relates to the abstract general norm content and thus is more far-reaching. It may include the attempt to dissolve existing norms of international law. Legislative contestation is not generally a pathology, as states engage with the international legal order and aim to shape its content. Lastly, systemic contestation affects core principles or foundational elements of the legal system, and thus the existence of the current order is at stake.

114 See on these doctrines Thomas M. Franck and Edward Weisband, 'The Johnson and Brezhnev Doctrines. The Law You Make May Be Your Own', Stanford L. Rev. 22 (1970), 979-1014.

115 Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte* (Berlin: Deutscher Rechtsverlag 1941).

116 Liesbet Hooghe, Tobias Lenz and Gary Marks, 'Contested World Order. The Delegitimation of International Governance', The Review of International Organizations 58 (2018), 647 (736); Heike Krieger, 'Populist Governments and International Law', EJIL 30 (2019), 971-996 (976-977); Eric A. Posner, 'Liberal Internationalism and the Populist Backlash', Ariz. St. L. J. 49 (2017), 795-819 (795-796).

117 Venzke (n. 69), 37.

These levels of contestation are not neatly separated from each other. Rather, there are significant connections between them and it is important to highlight that contestation at a less general level may develop into a more general type of contestation.[118] A legal problem may at first appear to be merely a question of applying the law to the concrete case. The question of whether self-defence is possible against attacks by non-state actors operating from a third state was long known to international law. It has been treated as a mere problem of application, which did not attract too much attention in scholarship or practice.[119] However, it has developed into one of the most discussed problems of international peace and security law over the last two decades because the contestation level shifted from an applicatory to a legislative contestation that seeks to loosen the boundaries of the right to self-defence.

States may also have the intention of contesting isolated legal norms of international law, for example, they might aim to extend the right to self-defence. One could argue that the temporal extension of the right to self-defence, as suggested by proponents of the right to preemptive self-defence, would aim only to change one isolated norm. On closer scrutiny, however, it seems likely that in fact such change would be radical as it would essentially replace the criterion of an armed attack with a much more subjective element, such as the 'danger of an armed attack'. Here the strict framework established under the UN Charter would be challenged radically. Therefore, legislative contestation would in fact lead to a systemic challenge of the existing legal system.

Based on this typology, it is possible to classify individual acts and practices of contestation, and to assess their overall effects on international norms and the international legal order more generally (Table 1). Challenges to international norms address different levels, which will have different effects. Applicatory contestation is in many ways a normal process in international legal disputes and likely to specify and even strengthen norms. Legislative contestation, in contrast, aims at changing international norms. The most fundamental challenge, systemic contestation, will likely weaken not only specific international norms but also the overall order they are grounded in.

118 See also Deitelhoff and Zimmermann (n. 24), 58.

119 Christian J. Tams, 'Embracing the Uncertainty of Old. Armed Attacks by Non-State Actors prior to 9/11', HJIL 77 (2017), 61-64.

Table 1. A typology of contestation

Type	Definition	Examples
Applicatory contestation	Contestation of a norm's application to the concrete case; this includes contestation of facts as well as the concretisation of rules to the case.	Interpretation of the concept of 'peaceful use' in space law.[120] Assessing the legality of self-defence actions.
Legislative contestation	Contestation of a norm's abstract meaning that can lead to more general norm change.	Aim to abrogate the prohibition of the threat of force.[121] Claim to humanitarian intervention as an existing legal principle.
Systemic contestation	Contestation of foundational norms of the international legal order that can lead to radical transformations.	Claiming a right to intervene in a state's sphere of influence. Establishing a general right to preemptive self-defence.

This framework contributes to IR and PIL debates by inviting systematic empirical analysis for the modes and consequences of norm contestation. Focussing on these different types of norm contestation will also contribute to a better understanding of the changes currently unfolding in the international realm. In the case of the war in Ukraine, we can observe a lot of applicatory contestation with regard to the question of whether the delivery of (which) weapons would make the delivering state a party to the conflict under international humanitarian law (IHL). There are also some Russian arguments with regard to the invasion that can be viewed as applicatory contestation, for example when it comes to the responsibility for concrete violations of IHL, in particular attacks against civilians and civilian infrastructure. Russia has not – at least not openly – turned against the norms of IHL in general, but has, on many occasions, contested the facts, e. g. by denying responsibility for attacks or by claiming that civilian infrastructure had been used for military purposes. Several Russian arguments, however, can be situated at the level of legislative contestation, e. g. in relation to the right of self-determination of the population of Eastern Ukraine. By recognising these entities in Eastern Ukraine, Russia has violated established international law by relying on an overly broad concept of (external) self-determi-

120 See the article of Guilia Persoz in this symposium.
121 See the article of Agata Kleczkowska in this symposium.

nation. The core point of the entire conflict is, however, that Russia has in fact entered into a systemic opposition by contesting foundational norms of the current international system. Its reference to the law, for example to the right of self-defence as a justification for the invasion, cannot be read as a good faith invocation of the law. These references to the law are untenable legal standpoints, do not have any merits and can thus only be called cynical. If generalised as a principle, the underlying core would be the aim to establish a regional sphere of influence that would undermine the tenets of the UN Charter system.

4. Varying Modes and Actors of Contestation

These three types of contestation and norm challenges can be carried out in different modes: in discourse, by action, or in silence. Discursive challenge usually comes in the form of a justification: a state claims that its actions have been lawful and thus presents a verbal legality claim to which other actors can respond. Indeed, discursive challenges to international norms have been the focus of many studies in IR norms research.[122] However, as the contributions to this symposium show, norm contestation can also manifest itself in more indirect and subtle ways.[123] On the one hand, actions can also contest international norms when they 'imply the existence of conflicting understandings of the meaning and/or (relative) importance of a norm'.[124] This is not to say that any norm violation contests an international norm – many of them simply raise questions of (non-) compliance. Yet norm violating states can implicitly or explicitly aim at contesting – and thereby changing or replacing – existing norms through their actions.[125] On the other hand, actors can silently contest international norms. When states do not justify their action with regard to international norms at all, this silence can be interpreted as a challenge to the specific norm, or even forms of radical contestation in

122 Deitelhoff and Zimmermann (n. 24), 54; Stimmer and Wisken (n. 72), 520; Wiener (n. 24), 1; Zimmermann, Deitelhoff, Lesch et al. (n. 16), 1.

123 Similarly, Antje Wiener distinguishes 'explicit' and 'implicit' forms of contestation: Wiener (n. 24), 49-50; see also Zimmermann, Deitelhoff, Lesch et al. (n. 16), 258-259.

124 Stimmer and Wisken (n. 71), 521. For related practice-theoretical arguments, see Frank Gadinger, 'The Normativity of International Practices', in: Alena Drieschova, Christian Bueger and Ted Hopf (eds), *Conceptualizing International Practices. Directions for the Practice Turn in International Relations* (Cambridge: Cambridge University Press 2022), 100-121 (119); Simon Frankel Pratt, 'From Norms to Normative Configurations. A Pragmatist and Relational Approach to Theorising Normativity in IR', International Theory 12 (2020), 59-82 (66).

125 Miles M. Evers, 'On Transgression', International Studies Quarterly 61 (2017), 786-794 (790).

which states signal that they are opting out of the international legal system, shifting their justificatory strategy away from the law.[126] Relatedly, silence by states who witness norm violating acts can also amount to contestation.[127] It can be seen as either silent consent to the contestation by another actor or as calling into doubt whether these states still want to uphold the norm in question. In terms of the sources of international law, such silence can amount to acquiescence and thus be interpreted as silent consent to, for example, a newly emerging norm or to a specific interpretation of international law.[128] The silence around violations of the prohibition of the *threat* to use force – as states rarely justify or criticise threats of the use of force – is a good example of how the neglect of this part of Article 2(4) in the UN Charter pushes the norm towards *desuetude*.[129] From a slightly different angle, contestation can be silent in the sense of dormant normative tensions between international norms or institutions,[130] or by disguising more fundamental challenges as applicatory norm contestation.[131]

126 Marxsen (n. 18), 327-334.

127 Silence means 'a lack of a publicly discernible response either to conduct reflective of a legal position or to the explicit communication of a legal position'. Dustin A. Lewis, Naz K. Modirzadeh and Gabriela Blum, *Quantum of Silence*: *Inaction and Jus Ad Bellum,* Harvard Law School Program on International Law and Armed Conflict (HLS PILAC), 2019, 7.

128 Sophia Kopela, 'The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals', Austr. Yb. Int'l L. 29 (2010), 87-134 (87); see also the study on silence by Lewis, Modirzadeh and Blum (n. 124) and the recent analysis by the ICJ, *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya), judgment of 12 October 2021, paras 36-89.

129 See Agata Kleczkowska in this symposium.

130 On dormant norm collisions, see Sassan Gholiagha, Anna Holzscheiter, and Andrea Liese, 'Activating Norm Collisions. Interface Conflicts in International Drug Control', Global Constitutionalism 9 (2020), 290-317 (295). In this symposium, John-Mark Iyi discusses the potential contestation of the UN peace and security law through the framework of the African Union.

131 An example here is the US justification for its 2003 Iraq war, which was justified under reference to (implausible) interpretations of UNSC Resolutions 678 and 1441, and not with the more radical claim of the doctrine of preemptive self-defence, which the US had just pronounced in the abstract in its 2002 National Security Strategy (see National Security Strategy of the United States of America, 2002, 6). With regard to the US contestation of the torture prohibition, Schmidt and Sikkink argue that upon 'closer examination, however, it is clear that US actions masked a deeper attempt to contest the norm itself, a policy we call *covert validity contestation*. Despite public claims that it did not torture, the Bush administration challenged the United States' accepted legal obligations and implemented a clandestine policy of torture at US detention facilities overseas'. Averell Schmidt and Kathryn Sikkink, 'Breaking the Ban? The Heterogeneous Impact of US Contestation of the Torture Norm', Journal of Global Security Studies 4 (2019), 105-122 (106). See also the discussion of 'hidden contestation' by Julia Drubel and Janne Mende, 'The Hidden Contestation of Norms. Decent Work in the International Labour Organization and the United Nations', Global Constitutionalism 2023, 1-23 (5-7).

Moreover, there are several actors relevant to the contestation of international norms. For PIL, states remain the dominant actors, and also recent IR research has mainly focussed on the state as contesting actor. This is a natural focus given that states are the primary addressees of international law and instrumental in facilitating its implementation on the ground, as well as its ongoing international negotiation. *International and regional organisations* can, however, also contest international norms in the course of their implementation and application.[132] This is highlighted by John-Mark Iyi, who investigates the relationship between the African Union and the UN in his contribution to this symposium. Non-governmental organisations (NGOs) and their networks can also contest norms – this has been shown with regard to norm emergence,[133] but more recently also with regard to the transnational pushback against human rights norms.[134]

IV. Contributions to the Symposium

Existing research has extensively discussed humanitarian interventions, the responsibility to protect, territorial integrity, and the role of the right to self-defence. It has recently focussed on the unwilling-or-unable-standard as justification for self-defence against non-state actors. The contributions to this symposium go beyond existing scholarship in that they explore less evident instances of norm contestation, particularly exploring cases in which contestation is somewhat hidden, carried out silently, or pursued indirectly.

Ingvild Bode explores how technological practices related to the use of force contribute to changing norms. Targeted killings and the issue of human control over use of force gradually evolve into a 'new normality', which first affects what she identifies as the 'international normative order'. This broader realm of normative practices forms a reservoir from which international legal norms are contested.

Gulia Persoz investigates norm contestation with regard to outer space law. She traces cycles of norm contestation in which the concept of the peaceful use of space has been contested. Contestation here did not occur in the form of a direct attack on the norm, but rather predominantly through an

132 See above, section III. 1. and John-Mark Iyi in this symposium.

133 Finnemore and Sikkink (n. 21), 896-897; Christian Marxsen, 'The Promise of Global Democracy. The International Impact of Civil Society', N.Y.U.J. Int' l L. & Pol. 47 (2015), 719-781 (752-758).

134 See, for example, Jelena Cupać and Irem Ebetürk, 'The Personal is Global Political. The Antifeminist Backlash in the United Nations', The British Journal of Politics and International Relations 22 (2020), 702-714 (704-705).

incremental and often indirect way of shifting the meaning of legal terms according to the security preferences of the major powers.

John-Mark Iyi explores contestation between core institutions of international peace and security: the UN Security Council and the African Union (AU) as a regional organisation. Here we witness what may be described as dormant contestation. The African Union reserves the right to authorise humanitarian interventions in its member states under conditions fixed in the AU Charter and – potentially – in stark opposition to the UN Charter and the authority of the UN Security Council. However, practice is still lacking, and thus the institutional conflicts remain latent.

Aurel Sari investigates the role of legal narratives. He shows how storytelling can be used to contest international norms. Such contestation often does not directly address specific norms, but rather aims to employ legal narratives so as to influence the public discourse, with the aim of also indirectly influencing the law and its application.

Agata Kleczkowska focuses on one specific norm, namely the prohibition of the threat of force. She shows that this norm has been 'silently contested' as states have not directly questioned the norm, but have – in omitting international reactions to violations of the norm – undermined it.

These contributions show that contestation is a recurrent theme in the development and life of international norms. The individual dynamics of contestation merit scrutiny to understand and project the development of international (legal) norms. Scholarship should continue to focus on these dynamics to better understand under which conditions norm contestation strengthens, changes, or weakens international norms.

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