Introduction

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 2003 Iraq war, he gave the following account of international law:

> In international law there is no Supreme Court . . . 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 conclusive verdicts on the legal interpretations of states. Therefore, states can reach different conclusions on what international law requires them or others to do in the same situation. The disagreement between United Nations Security Council (UNSC) members over whether there was a legal authorization for the United States (US) and the UK to use force against Iraq illustrates that states can have different opinions over what international law commands. The 2003 Iraq war is not an outlier. Debates over the meaning of well-established legal rules such as the prohibition of torture[2] or the subsidiarity principle in the European Union (EU)[3] also speak to the prevalence of norm contestation in international affairs.

[1] Greenstock 2009, 36–37. [2] Liese 2009; Keating 2014.
[3] Van Kersbergen and Verbeek 2007.

Norms are commonly defined as "standard[s] of appropriate behavior for actors with a given identity"[4] and as "collective expectations for the proper behavior of actors with a given identity."[5] This book examines contestation over the application of international law. Legal rules come with distinct discourses, practices, and audiences.[6] There is a difference between "rules" and "norms," in that the former might lack the "normative pull" which is essential to much of the processes and outcomes of contestation that this book describes. This book focuses on well-established, institutionalized, hard law, because this increases our confidence that these rules are also norms, in the sense that they generate collective expectations to appropriately apply them.[7] In addition, their contestation poses the greatest challenge to the seminal norm "life cycle" model, which assumes that compliance with such well-established norms is almost automatic.[8]

Norm contestation is a diverse field of study: It ranges from philosophical discussions over how contestation can make international affairs more inclusive to empirical studies of how different understandings of norms can manifest.[9] Hence, definitions of norm contestation abound and reflect these different research agendas: emphasizing, for example, that contestation entails value-judgments,[10] or that actors contest norms not only verbally but also through their actions.[11] Despite their different outlooks, what unites definitions is the idea that norm contestation involves some kind of disagreement over norms. This book analyzes political disagreements over the application of established norms of international law to concrete situations. Since I analyze the practical application of international legal rules and how norm addressees interpret them rather than technical, legal debates over international law, the terms "norms" and "norm contestation" are more fitting. These terms are also common in the constructivist political science literature (as opposed to legal studies) and

[4] Finnemore and Sikkink 1998, 891. [5] Katzenstein 1996, 5.
[6] Johnstone 2011; Bower 2015.
[7] Seminal rational choice accounts (Abbott et al. 2000) and constructivist accounts (Finnemore and Sikkink 1998) agree that hard, or institutionalized, law carries strong obligatory force.
[8] Finnemore and Sikkink 1998, 904.
[9] For the former, see, for example, Wiener 2008, 2014; for the latter, see, for example, Deitelhoff and Zimmermann 2019, 2020; Stimmer and Wisken 2019.
[10] Wiener 2014, 1. [11] Stimmer and Wisken 2019.

highlight the socially constructed and political nature of what counts as appropriate behavior in the international community.

Norm contestation is a regular feature of international politics, and this is not only due to the anarchical nature of international affairs: There is a possibility for contestation whenever a general legal norm is applied to a specific situation and each application can change or alter the norm.[12] As Hart famously put it: "[n]othing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture'. . ."[13] 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."[14] The inherent tensions in every normative framework often give rise to such competition: for instance, between human rights and sovereignty in international law.

This incompleteness of law is inevitable: It is impossible to foresee all future contingencies to which rules will be applied when drafting them.[15] The drafters of the International Covenant on Civil and Political Rights did not know that the internet would be developed and would provide opportunities for mass surveillance of individuals abroad, raising the question of whether rights to privacy apply extraterritorially. Policymakers also often need a fringe of vagueness about the meaning of a norm to reach agreement in the first place.[16] Hence, the incompleteness of law helps to bring about international law and makes it more adaptable to new circumstances. However, this incompleteness can also leave the meaning of rules unclear when new situations arise and trigger contestation over their meaning, which may reduce international law's ability to guide actions.

As there is no "apex arbiter of what is legal or what is not,"[17] some worry that international law provides little guidance for behavior, whereas others hope that sustained and inclusive debates make norms more legitimate and lead to consensus on how to apply norms. This book refrains from making a priori assumptions about the desirability

[12] Sandholtz 2008, 102–104.
[13] Hart 1994, 123.
[14] Krook and True 2012, 104.
[15] For a more detailed discussion of legal indeterminacy, see Chayes and Chayes 1993, 188–189; Koskenniemi 2005; Waldron 2012; Dill 2015.
[16] Ibid., 189; Van Kersbergen and Verbeek 2007, 221–222.
[17] Greenstock 2009, 37.

of norm contestation or about the potential to reach consensus on norm meaning. Instead, it sets out to analyze the process and outcomes of norm contestation empirically and presents a framework for analyzing whether a specific episode of norm contestation has increased or decreased a norm's strength. My "alternate endings" – typology shows that sometimes contestation does increase clarity on norm application, even without an apex arbitrator, and I provide insights into what makes this outcome more or less likely.

In so doing, I join a growing number of scholars who focus on the ambiguous character of norms and how their overlap generates tensions and inconsistencies.[18] Those studying norm change and contestation agree that norm meaning is dynamic and shaped by debate. However, their scholarly agendas differ. Some believe that contestation can take the form of ongoing and inclusive dialogue that renders norms more legitimate,[19] sometimes leading to normative theorizing, for example over norm ownership and access to contestation of norms.[20] Others are skeptical that actors can share an understanding of the meanings and implications of norms.[21] The malleability of norms leads some realist and critical constructivist scholars to question international law's influence.[22] If norms have no fixed meaning, materially powerful states can manipulate norms to legitimize their preferences and influence others' behavior.[23] Thus, some view discourses and debates over norms such as the antiwhaling norm[24] as "generative structures that are always charged with relations of domination."[25] Yet, since norms are not subjective but intersubjective, self-serving norm interpretations face an important social limit: the need to gain acceptance from others. Thus, another strand of the literature analyzes how disputes generate new shared understandings at the international[26] or regional level,[27] or studies modifications in norms during

[18] See, for example, Acharya 2004, 2011, 2013; Wiener 2004, 2008, 2014; Sandholtz 2008; Krook and True 2012; Zwingel 2012; Bower 2015; Bloomfield 2016; Panke and Petersohn 2016; Wolff and Zimmermann 2016; Evers 2017; Niemann and Schillinger 2017; Zimmermann 2017; Mills and Bloomfield 2018.
[19] Acharya 2004, 252–253, 2011, 116–117, 2013, 471; Wiener 2014, 3.
[20] Wiener 2014. [21] Niemann and Schillinger 2017, 48.
[22] Goldsmith and Posner 2005, 13; Koskenniemi 2005, 61.
[23] Ikenberry and Kupchan 1990, 283; Brooks and Wohlforth 2005, 518.
[24] See, for example, Epstein's (2008) book on antiwhaling discourse.
[25] Epstein 2013, 502. [26] Sandholtz 2008, 110–121; Bower 2015, 348–358.
[27] Schimmelfennig 2001, 66–76.

their diffusion.[28] Scholars have uncovered social or normative limitations that can curb materially powerful states' attempts at manipulation and generate legitimate norm interpretations.[29] However, norm contestation does not always lead to renewed consensus. Recently, scholars have moved beyond either analyzing the implications of disagreements or studying how renewed agreement over norms can be reached. There is a growing literature on different kinds of disagreements over norm meaning and how these variations affect the robustness or strength of norms.[30]

This book seeks to contribute to this last research strand and to moving beyond a focus either on the weakening or strengthening potential of contestation. It does so by refining our understanding of the conditions under which norm contestation is strengthening or weakening. Norm strength is defined as the extent of collective expectations related to applying a norm of international law in a certain way. After identifying "alternate endings" of norm contestation and their implications for norm strength, I set out to explore what fuels or curbs contestation. The book thus 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) end points can norm contestation have and what are their implications for norm strength? What influences the duration of norm contestation and the kind of norm change we see?

In the following, I start by introducing the rhetorical approach to norm contestation and change that I apply in this book. Then I present an overview of the main theoretical contributions: First, the "alternate endings" typology, which Chapter 1 explains further. The "alternate endings" typology shows that frame agreement is an internal source of stability of contestation outcomes, and the typology can be used as a basis for assessing implications of contestation for norm strength.

[28] Acharya 2004, 250–254; Krook and True 2012, 109–111; Winston 2018.
[29] In terms of social and normative constraints on self-serving interpretations of powerful states, Adler-Nissen and Pouliot (2014, 893–896) cite the need for actors to portray competence in negotiations; Sandholtz (2008, 106–110), Johnstone (2011, 21–27), and Bower (2015, 339) refer to the conventions of legal argumentation, Bloomfield (2016) refers to the power of the status quo, Goddard (2006, 40) to the network position of an actor, and Schimmelfennig (2001, 64–66) to public expectations that prior commitments should be honored.
[30] Deitelhoff and Zimmermann 2019, 2020; Ben-Josef Hirsch and Dixon 2021.

Second, I describe my focus on audience reactions, argumentation, and speakers (including delegation to agents) when analyzing extrinsic influences on the persistence of norm interpretations, and thus of alternate endings. I then discuss how this book contributes to the existing literature on norm strength, the dual quality of norms, legal argumentation and interpretive communities, and delegation to courts and other relevant agents. The Introduction then discusses the research design and methodology of this book, before giving an overview of the remaining chapters.

2. A Rhetorical Approach to Norm Contestation and Change

I introduce a rhetorical approach to norm contestation. As there is leeway for interpretation, similar to other International Relations (IR) scholars who apply insights from rhetorical studies, I assume that actors may not strive for the most legally correct norm interpretation but rather apply norms strategically in the pursuit of beneficial outcomes.[31] Yet, collective expectations limit interpretive freedom.[32] Legal norms are intersubjective principles: Actors need to gain approval from others to change international law, and they face social and material repercussions for pursuing contested norm interpretations. Actors therefore need to create the perception among key audiences that their norm understanding is right.[33] These audiences are often states whose consent is necessary to develop international law further. The actor whose interpretation wins has the chance of cementing its preferences[34] and of holding others to account in the future.[35] Widespread acceptance of a new norm interpretation, in turn, creates social expectations to comply, which can "entrap" even powerful states into following prior interpretations when they would later prefer to deviate from them.[36] When norm addressees decide to pursue norm interpretations that others consider "inappropriate," this can negatively affect their social standing[37] and their reputation for

[31] Schimmelfennig 2001; Bower 2015. Note that here beneficial outcomes can mean the pursuit of principles, or interests, or of both.
[32] Schimmelfennig 2003, 157–158. [33] Johnstone 2011, 8; Bower 2015, 339
[34] I use the term "preferences" rather than "interests" to indicate that not only material but also value-based considerations are included in the analysis.
[35] Krisch 2005. [36] Schimmelfennig 2001, 65; Bower 2015, 339.
[37] Johnston 2001.

honoring commitments,[38] and can make it costlier to implement the contested interpretations.[39]

Thus, actors have to take into account social expectations when proposing norm interpretations if they wish to avoid or reduce social and material costs.[40] I therefore assume that contestants have "thin" instrumental rationality but that normative and social pressures bear on them and leave a mark on the processes and outcomes of norm contestation.[41] The term "rhetorical approach" captures that I use insights from rhetorical studies to identify four different discursive (dis)agreements over norms and to structure the analysis of how social dynamics can steer contestation toward these outcomes. As the arguments dispute parties bring forward reveal their norm understandings, using insights from rhetoric helps us to identify (dis)agreements over norm interpretations and to study the politics of interpreting international norms.

International law plays an important role in this book because of its influence on justificatory discourse and of the particular kind of collective expectations and social pressures it elicits. In Reus-Smit's words: "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."[42] Legal commitments differ from other commitments in that they involve specific conventions of argumentation, actors, and procedures (such as the prospect of adjudication and the possibility of setting precedents).[43] The collective expectations around well-established norms of international law thus exercise a particularly strong expectation to apply them consistently due to their socially sanctioned nature. Therefore, dispute parties often use the language of the law – or at least "quasi-legal language" – to justify their claims,[44] and this increases their accountability.[45] The use of legal rhetoric also facilitates the empirical application of the "alternate endings" typology and has

[38] Guzman 2010. [39] Byers 2003; Sandholtz 2008; Johnstone 2011.
[40] Sandholtz 2008; Johnstone 2011.
[41] See Schimmelfennig 2001; Sandholtz 2008; Johnstone 2011; Bower 2015. See also Pouliot (2008, 262–263) for a discussion of thin rationality within normative environments.
[42] Reus-Smit 2004, 38. [43] Johnstone 2011; Dill 2015, 53–54.
[44] Sandholtz 2008; Johnstone 2011. [45] Hakimi 2021.

implications for how we assess the effect of contestation on norm strength, as described in the following sections and in Chapter 1.

2.1 Alternate Endings of Norm Contestation

We can use insights from rhetorical studies to identify what elements of norms actors can interpret differently.[46] Norms provide a reference point for action. They are intersubjective beliefs about what behavior is proper in a given situation. The arguments that actors exchange on what "appropriate behavior" looks like reveal these intersubjective understandings of norms. Therefore, similar to arguments, I argue that norms consist of a *frame*, or a justification, for a *claim* that describes an action that follows from this norm frame.

The arguments 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."[47] 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."[48] They claimed that an illegal foreign population lives on the islands and that the referendum had no validity, based on the frame that "the Malvinas are Argentine sovereign soil."[49] Thus, Britain and Argentina used different norm frames – self-determination and sovereignty – to justify their respective claim to accept or reject the Falkland Islanders' vote that the Islands remain a British Overseas Territory.

This book mostly focuses on first-order behavioral claims, such as accepting or rejecting the vote on the Falkland Islands remaining a British Overseas Territory, because they clarify norm content more than do abstract second-order claims, such as whether the acceptance of the

[46] Schimmelfennig 2001, 73; Krebs and Jackson 2007, 43.
[47] British Prime Minister Cameron: Watts 2013.
[48] Senator Anibal Fernandez: Watts 2013. [49] Ibid.

Falkland Islanders' vote is legal or illegal.[50] Furthermore, seeing behavioral claims and norm frames as the constituent parts of norms resembles the common understanding of customary law as the combination of state practice with expressions of belief of a legal obligation (*opinio juris*).

Actors can disagree on the frame, claim, or both. I focus on public reactions to norm interpretations because public protest is necessary to avoid obligations under international law.[51] Actors who seek to reinterpret a norm require widespread public approval (or, under certain conditions, at least abstention or silence)[52] to create a precedent. In Chayes and Chayes' words, "discourse among the parties, often in the hearing of a wider public audience, is an important way of clarifying the meaning of the rules."[53]

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 widely agree on the norm frame and claim. Widespread agreement elucidates what norm applies and what to do in similar situations in the future. Chapter 6 shows that the right to self-defense was clarified when the US's interpretation that the right to self-defense applies against states that actively support or willingly harbor terrorist groups that have attacked the responding state (norm frame), and that it authorized intervention in Afghanistan (behavioral claim) after 9/11, was widely accepted. Social consensus on a norm interpretation affirms or refines the standard of appropriateness. This prevents reputational costs if an interpretation is widely accepted and extracts reputational costs if it is widely rejected. Widespread public agreement on a norm interpretation (whether through acceptance, synthesis, or rejection of frame–claim combinations) renders norm clarification a relatively stable outcome: It signals that there are collective expectations to use this interpretation, structuring future debates in similar situations and making "entrapment" more likely.

We see *norm recognition* when there is widespread agreement on the norm frame that applies, but not on the behavioral claim that

[50] As discussed in Chapter 1, vague "is legal" statements somewhat blend the claim (legal behavior) and frame (international law).
[51] Legally, states can only avoid international customary law obligations by voicing their disapproval from the start (persistent objection). See Thirlway (2014), 103.
[52] See Chapter 1 for a further discussion of the role of abstentions in the UNSC, and of other states remaining silent.
[53] Chayes and Chayes 1993, 190.

follows from it. When actors agree that a particular norm frame applies, this recognition focuses the debate; it involves categorization and *signals* commitment to a norm frame in a certain kind of situation.[54] Because collective agreement that a norm frame applies in a certain kind of situation leads to collective expectations to consistently apply this norm frame, frame agreement signals collective normative commitment regardless of whether all actors sincerely belief in the appropriateness of the norm frame in this kind of situation.[55] International legal norms are shared standards of appropriate behavior that help to classify a problem as falling within the regulatory ambit of a specific norm, narrowing down the range of acceptable behavior. Thus, frame agreement is an internal source of stability: It can lead to a relatively stable agreement to disagree, provided that the behavioral claims are not perceived to blatantly contradict the prior history of the frame. As shown in Chapter 5, the UNSC eventually agreed with the European Court of Justice (ECJ) that due process rights (norm frame) apply in the context of the UNSC's 1267 targeted sanctions regime for terror suspects but the UNSC and ECJ differ over the behavioral claim: whether an Ombudsperson or an independent court is necessary to protect due process rights. Since in the eyes of key audiences neither of these claims blatantly contradicts the due process frame, norm recognition has been stable and reputational costs limited.[56]

When we see *norm neglect*, the opposite is true: Dispute parties agree on the behavioral claim but disagree on the norm frame. When developing the typology of "alternate endings" of norm contestation, I built on Krebs' and Jackson's typology of results of policy debates.[57] One important difference is that 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."[58] I contend that when it comes to the interpretation of international law, frame agreement provides more stability than claim agreement because it signals collective normative commitment and narrows the range of claims that states consider appropriate. As it is not clear what norm frame guided the claim agreement and resulting joint actions in situations of norm neglect, there is uncertainty about

[54] Entman 1993, 54; Johnstone 2011, 6; Zimmermann 2017, 776; Lenz 2018, 44.
[55] This is a core assumption of the rhetorical approach that I adopt in this book, summarized on pages 6–7.
[56] Chapter 2 provides further guidance on what audiences are key.
[57] Krebs and Jackson 2007, 43. [58] Ibid., 44.