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# The Quality of Norms is What Actors Make of It

## Critical Constructivist Research on Norms

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I. Introduction.....	1
II. Critical Constructivist Research on Norms.....	4
1. Research Assumptions .....	7
2. Constitutional Quality beyond the State.....	10
3. Research Question.....	12
III. Case Studies on Contested Norms.....	13
IV. Conclusion .....	15

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### I. Introduction<sup>1</sup>

What actors make of norms matters, in particular, in situations of crisis when the contextual conditions for norm interpretation are enhanced. That is, situations of crisis add an additional factor of pressure next to the conditions of normative contingency and moving the social practice of governance

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beyond the boundaries of modern states.<sup>2</sup> The addition of time requires fast decisions thus leaving little room for deliberation about a norm's meaning. Contrary to the expectation that based on an increasing constitutional quality in beyond-the-state contexts, actors can build on and refer to a set of formally and informally shared principles for information and guidance in designing common action and policies, we hold that norm interpretation in international relations is challenged by the absence of cultural background information.<sup>3</sup> If this observation holds, it follows that the often observed constitutional quality beyond the state which includes the formalization of the role of international norms through treaties and agreements, the dense web of international negotiation forums and enhanced possibilities of iterated interaction in the global realm is not necessarily conducive to the shared interpretation of norms in an international setting. While this constitutional quality has been acknowledged and reflected by the concepts of disaggregated network governance, a global community of courts, or as sites of struggle,<sup>4</sup> paradoxically, the very process of norm proliferation and the increasing acknowledgement of the power of norms in international relations<sup>5</sup> and decisions that are taken bring the contested nature of norms to the fore—thus demanding a fresh look at norm applications. Research on norms, therefore, needs to better understand the inherently contested quality of norms that stems from and is closely interrelated with the very processes of norm application. A key theme throughout this special issue is that theoretical approaches to the study of norms need to generate a more encompassing and substantive definition of norms, allowing researchers to study and understand them in a context-specific manner. We argue that only such an approach can account for the role of contestation as an integral part

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<sup>2</sup> Antje Wiener, *The Invisible Constitution of Politics. Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008) at 64 [Wiener 2008].

<sup>3</sup> Emanuel Adler, 'Normative Power Europe: A Civilizational Community of Practice' (Paper prepared for the 2008 Annual Meeting of the American Political Science Association, Boston, 28-31 August 2008) [unpublished] [Adler]; Wiener 2008, *ibid.*; Antje Wiener, 'Enacting Meaning-in-Use. Qualitative Research on Norms and International Relations' (2009) 35 *Rev. Int'l Studies* 175 [Wiener 2009].

<sup>4</sup> See e.g. Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harv. Int'l L.J.* 191; Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004). See also Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *Am. J. Int'l L.* 241; Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006); Seyla Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' (2007) 11 *Citizenship Studies* 19; Jean L. Cohen, 'Whose Sovereignty? Empire Versus International Law' (2004) 18 *Ethics & Int'l Affairs* 1.

<sup>5</sup> Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) [Risse, Ropp & Sikkink].

of the processes by which specific policy options are derived. This poses both a conceptual and empirical challenge.

While a largely unspecified notion of legality has assumed the role of a reference frame that establishes the legitimacy for international encounters, curiously, the acceptance of international law itself has become increasingly contested. Cases of contested fundamental norms<sup>6</sup> involve, inter alia, the range of military interventions in the past decade (e.g. Kosovo, Afghanistan and Iraq), the contested norm of the prohibition of torture (e.g. the initiation of the prosecutions of Augusto Pinochet and Donald Rumsfeld, respectively), as well as—perhaps less spectacularly yet nonetheless consequentially—the principle of minority protection (e.g. in the process of European enlargement) and the norm of environmental sustainability. These and multiple other cases of norm contestation suggest that Henkin’s erstwhile observation that almost all states comply almost all the time with almost all the principles of international law<sup>7</sup> is no longer a reasonable assessment of how norms work in the twenty-first century. This special issue’s contributions seek to shed light on this development. By examining different cases of norm contestation, each article poses a common research question: how is it possible that norm contestation is increasing despite the growing need for international action to be deemed legitimate?<sup>8</sup> Even powerful actors such as the United States and the United Kingdom are keen to attach legitimacy to their actions even if it means being in breach of international law.<sup>9</sup>

While case studies and theoretical approaches which analyze the spread of international norms and their impact on policy formation are prevalent in international relations theory and international law, the contributions to this special issue attempt to take this literature further by critically reviewing the relation between norm implementation and norm acceptance. To that end, we have asked a range of authors to examine cases in which prominent

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<sup>6</sup> ‘Fundamental norms’ are distinguished from ‘organizing principles’ and ‘standardized procedures’ as the most general and hence most contested of three types of norms. For this distinctive definition of norm types, see Wiener 2008, *supra* note 2 at 65-7.

<sup>7</sup> Louis Henkin, *How Nations Behave*, 2nd ed., (New York: Columbia University Press, 1979).

<sup>8</sup> On the distinctive approach of framing the research question as ‘why’ or ‘how possible’, see especially Alexander Wendt, ‘On Constitution and Causation in International Relations’ (1998) 24 *Rev. Int’l Studies* 101; as well as Karin M. Fierke, ‘Critical Methodology and Constructivism’ in Karin M. Fierke & Knud Erik Jorgensen, eds., *Constructing International Relations: The Next Generation (International Relations in a Constructed World)* (Armonk, N.Y.: M.E. Sharpe, 2001) 115; Karin M. Fierke, *Critical Approaches to International Security* (Cambridge: Polity Press, 2007).

<sup>9</sup> Shirley V. Scott, ‘Identifying the Source and Nature of a State’s Political Obligation Towards International Law’ (2005) 1 *J. Int’l L. & Int’l Rel.* 49 [Scott].

fundamental norms are contested. Instead of identifying these cases as indicators for the absence or decrease in the relevance of norms for international relations, these articles recommend refining research on norm application in order to account for such observations with better theory. In this introduction, the main research assumptions and approach of the critical constructivist perspective are reviewed, followed by an overview of the case studies assembled in this special issue and how they provide examples of an extended research agenda in the field of international norms with regard to different policy areas and fields of international cooperation and conflict. Finally, we offer a summary of what this special issue contributes to research on norms in current international relations.

## II. Critical Constructivist Research on Norms

Political efficiency, justice and security require generally accepted norms, rules and principles. The challenge for achieving the highest possible degree of general acceptance increases with the absence of formal government structures.<sup>10</sup> After all, in contexts beyond the state norm acceptance and, more specifically, compliance with norms depend more decisively on the shared recognition of norms than on their formal validity.<sup>11</sup> As social constructivists argue, in these contexts norms are what actors make of them;<sup>12</sup> and we would add that they are as ‘good’ (read: just, fair and legitimate) as what actors make them out to be. For example, compliance theorists in both law and political science assess the effectiveness of norms with reference to implementation as well as processes of transposition, internalization, social learning, constitutionalization and legalization.<sup>13</sup> By

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<sup>10</sup> James N. Rosenau & Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992). See also Corneliu Bjiola & Markus Kornprobst, eds., *Arguing Global Governance: Lifeworlds, Reasoning, Persuasion, Power and Change* (forthcoming).

<sup>11</sup> Martha Finnemore & Stephen J. Toope, ‘Alternatives to “Legalization”’: Richer Views of Law and Politics’ (2001) 55 *Int’l Org.* 743.

<sup>12</sup> Compare the analogy to Wendt’s argument that states are what actors make of them; Alexander Wendt, ‘Anarchy Is What States Make of It: The Social Construction of Power Politics’ (1992) 46 *Int’l Org.* 391.

<sup>13</sup> For the former, see Harold H. Koh, ‘Why do Nations Obey International Law? Review Essay’ (1997) 106 *Yale L.J.* 2599; Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995); Alastair Iain Johnston, ‘Treating International Institutions as Social Environments’ (2001) 45 *Int’l Studies Q.* 487 [Johnston]; Jeffrey T. Checkel, ‘Why Comply? Social Norms Learning and European Identity Change’ (2001) 55 *Int’l Org.* 553 [Checkel 2001]. For the latter, see Ernst-Ulrich Petersmann, ‘Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration’

comparison, normative approaches would add that the impact of norms also crucially depends on the *acceptance* of norms how and where these encounters develop. In other words, we argue that who is involved in international encounters, where and how often, are the key questions which allow a more specific assessment of the role of norms in international relations in an increasingly globalized world.<sup>14</sup> It is important to note in this respect that according to recent empirical research globalization—or for that matter Europeanization—has less of a harmonizing impact on elites than previously expected.<sup>15</sup> This implies that despite ongoing processes of globalization or regional integration individual experience has significant implications for the way norms matter. With reference to exclusively legal processes, the acceptance of norms within specific cases depends primarily on the instruments of treaty law, customary law, national principles and practice as codified under international law, e.g. by the statute of the International Court of Justice.<sup>16</sup> In international politics the interpretation of norms forms part of a broader social context with less clearly defined procedures and reference frames. While a range of studies have shown that state behaviour changes in reaction to norms,<sup>17</sup> it has also been demonstrated that, especially in internationally diverse settings, the acceptance of norms depends on access to and enactment of their socially constructed meaning.<sup>18</sup>

With a view to elaborating on a framework that allows for a conversation between international lawyers and international relations scholars, we propose that the way norms are enacted through interactive international law, and interaction in international relations more generally, depends on three conditions: first, the degree of appropriateness depending on the potential for social recognition of a specific norm; second, the perception of legitimacy depending on the degree of persuasion generated through deliberation; and third, especially in the absence of the other two, the degree

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(2002) 13 E.J.I.L. 621; Kenneth W. Abbott, *et al.*, 'The Concept of Legalization' (2000) 54 Int'l Org. 401.

<sup>14</sup> Please note that we understand the term 'international relations' to include any type of international encounter, i.e. including the reference to international politics, law and other areas.

<sup>15</sup> Compare for example the findings in Wiener 2008, *supra* note 2, with the assumptions raised by Deutsch fifty years ago; Karl W. Deutsch, 'The Growth of Nations: Some Recurrent Patterns of Political and Social Integration' (1953) 5 World Politics 168.

<sup>16</sup> See *Statute of the International Court of Justice*, 59 Stat. 1031, U.N.T.S. 993 (entered into force 24 October 1945) at art.38 [Statute of the ICJ].

<sup>17</sup> Peter J. Katzenstein, *Cultural Norms and National Security: Police and Military in Post War Japan* (Ithaca, N.Y.: Cornell University Press, 1996) [Katzenstein]; Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887 [Finnemore & Sikkink]; Risse, Ropp & Sikkink, *supra* note 5.

<sup>18</sup> Wiener 2008, *supra* note 2.

of understanding that is generated through the interactive process of cultural validation. While the first two indicators of social recognition and persuasion are more readily achievable in the context of international organizations that allow for closed negotiating settings, e.g. the United Nations Security Council, the World Trade Organization's Appellate Body or the Commission of the European Union, the latter indicator of cultural validation is not dependent on such established arenas. Instead, it depends on individual experience and expectation. That is, in the absence of shared social recognition and collective deliberation to establish legitimate interpretation of a norm's formal validity, individuals will resort to their respective culturally constituted 'background knowledge'<sup>19</sup> or their 'normative baggage' (see Table 1).<sup>20</sup>

Table 1: Three Dimensions of Norm Implementation

		Formal Validity	Social Recognition	Cultural Validation	Assumption/Logics
<b>Dimensions</b>	<i>visible</i>	UN Charta, EU Treaties, Conventions, Agreements			Community Assumption Logic of Consequence
	▲		Learning, Socialization, Community-based behaviour		Identity Assumption Logic of Appropriateness
	▼			Individual Expectations, Experience, Background knowledge	Diversity Assumption Logic of Contestedness
		<i>less</i> ◀ ▶ <i>more</i>			
<b>Democratic Legitimacy</b>					

Source: Adapted from Wiener 2008.

<sup>19</sup> Etienne Wenger, *Communities of Practice: Learning, Meaning and Identity* (New York: Cambridge University Press, 1998); Adler, *supra* note 3.

<sup>20</sup> Antje Wiener, 'The Dual Quality of Norms and Governance beyond the State: Sociological and Normative Approaches to Interaction' (2007) 10 Crit. Rev. Int'l Soc. & Pol. Phil. 47; Uwe Puetter & Antje Wiener, 'Accommodating Normative Divergence in European Foreign Policy Coordination: The Example of the Iraq Crisis' (2007) 45 J. Common Market Studies 1063; Wiener 2008, *supra* note 2.

### 1. Research Assumptions

While formal validity and social recognition are well researched dimensions of norm interpretation, we know very little about the third dimension of cultural validation and how it works.<sup>21</sup> To tease out this dimension in more detail we draw on a relational or interactive approach<sup>22</sup> within the framework of critical constructivism in international relations. This approach focuses on two research assumptions. First, norms entail an inherently contested quality and therefore acquire meaning in relation to the specific contexts in which they are enacted. Second, norm contestation is a necessary component in raising the level of acceptance of norms. By briefly reviewing the literature on norms, the following section identifies shared analytical pointers which guide all contributions. To that end we summarize the major research in international relations theory from which these articles draw, as well as the literature on constitutionalism, which remains relatively new to international relations scholars. We propose to incorporate constitutionalism into studies of norms in international relations, arguing that constitutionalism's distinctive analysis of social practices as both organizational and cultural is helpful for an understanding of just how and where 'contestation' emerges and interrelates with the role of norms.

As the international relations literature has demonstrated empirically, norms may achieve a degree of appropriateness reflected by changing state behaviour on a global scale. However, in the absence of social recognition, norms are likely to be misinterpreted or simply disregarded. In any case, contestation is expected. This also holds true for legal norms, which require social institutions to enhance understanding and identify meaning, i.e. normative practice. The documented language about norms indicates no more than the formal validity of a norm, while its social recognition stands to be constructed by social interaction. In other words, understanding does not follow from reference to 'objective reality ... rather it is inherently

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<sup>21</sup> For the distinction between formal validity, social recognition and cultural validation, see Wiener 2008, *supra* note 2 at chapter 4; Wiener 2009, *supra* note 3. For research that focuses mainly on the first two dimensions, see conventional constructivist work on norms, particularly Katzenstein, *supra* note 17; Finnemore & Sikkink, *supra* note 17; James G. March & Johan P. Olsen, 'The Institutional Dynamics of International Political Orders' 52 *Int'l Org.* 943; Risse, Ropp & Sikkink, *supra* note 5.

<sup>22</sup> For IR theory, see Fred Dallmayr, 'Conversation Across Boundaries: Political Theory and Global Diversity' (2001) 30 *Millennium* 331. For international law see Jutta Brunnée & Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2001) 39 *Colum. J. Transnat'l L.* 19 [Brunnée & Toope 2001]; Jutta Brunnée & Stephen Toope, *Legitimacy and Persuasion: The Hard Work of International Law* (Cambridge: Cambridge University Press, forthcoming) [Brunnée & Toope forthcoming].

constructed and sustained by social processes.<sup>23</sup> The literature offers two types of theoretical frameworks for studying norms. Conventional (or modern) constructivists focus on the structuring power of norms and their influence on state behaviour in world politics.<sup>24</sup> In turn, critical constructivists focus on the meaning of norms as constituted by and constitutive of specific use.<sup>25</sup> The former's focus on *reaction* to norms is helpful to indicate the influence of one specific fundamental norm on policy decisions, for example, human rights or the demand for sustainable development. The latter's interest in *relation* to norms enhances the understanding of how intersubjectivity plays out in (interactive) international relations based on normative structures that entail meaning which is actually in use.<sup>26</sup> It is therefore explicitly receptive of the interrelation between agency and structures and seeks to comprehend the changes that evolve from this process.

While the potential for misunderstandings and conflict can be kept at bay by adding a deliberative dimension to facilitate arguing and, ultimately, persuasion that one meaning should legitimately trump another,<sup>27</sup> this approach bears a central limitation. Namely, arguing takes place within a context of negotiation that is bounded and exclusive, say within one particular committee dealing with a specific policy issue over a limited period of time. It is hence conducive to establishing social recognition of a fundamental norm within that specific and limited context only. Whereas

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<sup>23</sup> Monica Colombo, 'Reflexivity and Narratives in Action Research: A Discursive Approach', online: (2003) 4:2 Forum: Qualitative Social Research/Sozialforschung at 1, <<http://www.qualitative-research.net/fqs-texte/2-03/2-03colombo-e.htm>>.

<sup>24</sup> See Katzenstein, *supra* note 17; Risse, Ropp & Sikink, *supra* note 5; Checkel 2001, *supra* note 13.

<sup>25</sup> See Friedrich V. Kratochwil, *Rules, Norms, and Decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs* (Cambridge: Cambridge University Press, 1989); Jutta Weldes & Diana Saco, 'Making State Action Possible: The United States and the Discursive Construction of the "Cuban Problem" 1960-1994' (1996) 25 Millennium 361 [Weldes & Saco]; Christian Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions' (1997) 51 Int'l Org. 555; Christian Reus-Smit, 'Constructivism' in Scott Burchill & Andrew Linklater, eds., *Theories of International Relations* (Houndmills, Basingstoke: Palgrave Macmillan, 2003) 209 [Reus-Smit 2003].

<sup>26</sup> See Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 Eur. J. Int'l Rel. 189; Wiener 2008, *supra* note 2.

<sup>27</sup> See Thomas Risse, "'Let's Argue!'" Communicative Action in World Politics' (2000) 54 Int'l Org. 1; Harald Mueller, 'Arguing, Bargaining, and All That. Reflections on the Relationship of Communicative Action and Rationalist Theory in Analysing International Negotiation' (2004) 10 Eur. J. Int'l Rel. 395; Nicole Deitelhoff & Harald Mueller, 'Theoretical Paradise – Empirically Lost? Arguing with Habermas' (2005) 31 Rev. Int'l Studies 167; Michael Barnett, 'Building a Republican Peace: Stabilizing States after War' (2006) 30 Int'l Security 87.



ideas are all pervasive and do not stop at borders,<sup>28</sup> social learning remains a process that exclusively involves the participating elites within the environment of international organizations.<sup>29</sup> This is all the more important as these international elites are either dependant on or involved in processes of domestic policy formation which may occur in parallel or independent of the international context and follow their own dynamics. This limitation may be underestimated. Research on norm application therefore cannot limit itself to the—albeit desirable and necessary—definition of scope conditions for argumentative action, but rather needs to better understand the potential for contestation of a specific norm itself as well as the context in which it is applied. We therefore propose a theoretical framework that is able to disaggregate norms and which allows for studying how individuals enact ‘meaning-in-use’<sup>30</sup> with regard to specific norms. For example, does an international treaty such as the UN Charter, in which non-intervention is agreed upon, allow for deviation from the norm under specific circumstances, for example, by insisting on reference to other norms?<sup>31</sup>

This special issue assumes persistent if changing patterns of diversity in the way elites relate to fundamental norms in the international realm, despite enhanced international interaction and the emergence of constitutional quality beyond modern states. The assumption of norm contestation implies that designated norm-followers are often reluctant to proceed as expected. Once norm interpretation and implementation occur in various different contexts, the meaning attached to a norm is likely to differ according to the respective experience with norm-use. Not surprisingly, processes of norm implementation have been associated with practices such as shaming, adjacent framing or conditionality policy to force designated norm-followers. It has therefore been argued that norm ‘erosion’ rather than the ‘power’ of

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<sup>28</sup> See Peter Hall, *The Political Power of Economic Ideas* (Princeton: Princeton University Press, 1989); Jane Jenson, ‘The European Union’s Citizenship Regime: Creating Norms and Building Practices’ (2007) 5 *Comp. Eur. Pol.* 53.

<sup>29</sup> See Checkel 2001, *supra* note 13; Johnston, *supra* note 13.

<sup>30</sup> See Weldes & Saco, *supra* note 25; Jennifer Milliken, ‘The Study of Discourse in International Relations: A Critique of Research Methods’ (1999) 5 *Eur. J. Int’l Rel.* 225.

<sup>31</sup> See Liese in this special issue; see also Martin Dixon, ‘The nature of international law and the international system’ in Martin Dixon, ed., *Textbook on International Law* (Oxford: Oxford University Press, 2007) 1; Eric Wyler, ‘From “State Crime” to Responsibility for “Serious Breaches of Obligations under Peremptory Norms of General International Law”?’ (2002) 13 *Eur. J. Int’l L.* 1147; Christian J. Tam, ‘Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?’ (2002) 13 *E.J.I.L.* 1161; Scott, *supra* note 9.

norms will eventually prevail.<sup>32</sup> However, if norms evolve interactively, as most constructivists would agree, then any process of contestation will reflect a specific (re-)enacting of the normative structure of meaning-in-use.<sup>33</sup> It will therefore be constitutive towards norm change. If this is the case, the challenge for research on the role of norms in international relations is to study how meaning is enacted and to identify distinct patterns and conditions of this process. The contributions of this special issue target these two goals. Accordingly, it is therefore important to recover the crucial interrelation between experience with and enactment of meaning-in-use. The contributions assembled in this volume share this perspective. They seek to recover the crucial interrelation between experience with and enactment of meaning-in-use by reconstructing empirically normative structures of meaning-in-use as well as contested normative meanings. While not following the same case design the choice of case studies nonetheless offers a comparative angle on critical constructivist research design based on the shared interest in studying contested meanings for norms. The special issue hence makes the case for a contextualized approach to study norms in the international realm.

## 2. *Constitutional Quality beyond the State*

Albeit relatively little explored, the literature on constitutionalism is particularly important for research on norms because it proposes to distinguish between organizational and cultural social practices.<sup>34</sup> The distinction is between social practices as far as they are understood as formal or organizational practices on the one hand and informal or cultural practices on the other hand. Both play a key role for the analysis of constitutional quality. Thus, organizational practices are central to the development and understanding of modern constitutionalism while cultural practices are predominant in ancient constitutionalism.<sup>35</sup> Governance beyond the state involves an understanding of norms as working outside of the familiar modern context. In practice, the interpretation of norms occurs at a distance from their respective root-contexts, where they originated through interaction. That is, norm interpretation requires the additional and relatively new step of establishing a relationship between the formal validity

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<sup>32</sup> See Elvira Rosert & Sonja Schirmbeck, *Das Ende der Selbstverstaendlichkeit. Zur Erosion internationaler Normen: Folterverbot und Nukleares Tabu* (M.A. Dissertation, Johan-Wolfgang von Goethe University, 2007) [unpublished] and Risse, Ropp & Sikkink, *supra* note 5, respectively.

<sup>33</sup> On contestation see especially the contribution by Venzke in this special issue.

<sup>34</sup> The following draws closely on Wiener 2008, *supra* note 2 at chapter 2.

<sup>35</sup> James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) [Tully].

of a norm according to treaty language on the one hand and the social recognition of a norm according to its appropriateness within a given community on the other. To establish this link when social practices have moved outside modern contexts, each traveling individual will face the task of setting up the link by herself. To do so, she will mobilize her individual normative baggage (cf. Table 1) as the cultural validation available to her on location.

We argue that this distinctive conceptualization of social practices offers a helpful reference frame for studying norms in international relations; it allows for a distinct analysis of visible or formal elements of the fabric of international order on the one hand, and the invisible or informal elements, on the other. In light of the specific quality of the international realm students of norms need to take into account the absence of government, while dealing with the presence of governance structures that are often structured by the relevance that actors ascribe to norms through their interactions. Distinguishing two types of social practices involves an understanding of the constitution of politics as both formally organized through conventions or constitutions and informally structured through social interaction. For example, when speaking of a constitution we mean a set of norms, principles and provisions and the mandate to organize the political.<sup>36</sup> In distinction from other agreements, such as conventions or treaties, constitutions are expected to offer a 'civilized' and 'embedded' approach to settling conflicts while respecting the constituents' wishes and ways of life. Constitutions relate to a set of cultural and social conditions within specific contexts, and they represent an agreement (written or unwritten) among representatives of the governed within a community to ensure that the governors proceed according to the wishes of the community's membership.<sup>37</sup> While this type of agreement has had a long-standing role in domestic politics in Europe, starting with the Greek city-states, a similar constitutional quality has emerged only much more recently in international politics. Thus, the creation of international organizations that

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<sup>36</sup> See Francis Snyder, *New Directions in European Community Law* (London: Weidenfeld & Nicholson, 1990); Ulrich K. Preuss, 'Der Begriff der Verfassung und ihre Bezielung zur Politik' in Ulrich K. Preuss, ed., *Zum Begriff der Verfassung. Die Ordnung des Politischen* (Frankfurt/Main: Fischer, 1994) 7; Michel Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity' in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994) 3.

<sup>37</sup> See Tully, *supra* note 35; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Mod. L. Rev.* 317; Miguel Poiares Maduro, 'Europe and the Constitution: what if this is as good as it gets?' in J.H.H. Weiler & Marlene Wind, eds., *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003) 74.

attempt to move ahead with arrangements of an increasingly binding constitutional quality such as the UN, the European Union (and its predecessors), Mercosur, the Association of South East Asian Nations (ASEAN), and the African Union (AU), dates back only to the previous century.

While communities that are part of quasi-constitutional arrangements—such as the EU by way of its various treaties, or the UN by means of its Charter—are much less defined by the boundaries of a Hegelian state than by international agreements negotiated among government representatives, the language of ‘civilization,’ ‘constitutionalization,’ or ‘the rule of law’ did create an over-arching framework of reference for practicing international law as well as global politics. The addressees of this framework are the ‘civilized nations’ that had signed the UN Charter<sup>38</sup> and/or the Treaty on the European Union<sup>39</sup> respectively. In sum, and despite their formal differences, both types of institutions—regional and international—share the issue of contested constitutional quality. The norms, principles and rules that guide politics within these contexts provide the substance of this quality. It is their input, i.e. the way they ‘work,’ which establishes the ‘invisible constitution of politics.’<sup>40</sup> Given the necessity of social recognition for the interpretation of any kind of legal document, this invisible constitution of politics is crucial for the interpretation of norms. It is therefore suggested to include the notion of cultural practices to that end.

### 3. Research Question

In sum, the distinction between organizational and cultural social practices informs this special issue’s focus on norms research. We ask how it is possible that some of the fundamental norms that lie at the core of the international community, e.g. human rights, abstention from torture, or the rule of law, generate diverse interpretation when enacted in different contexts. This observation suggests that cultural practices have a more significant impact on international politics than expected by existing approaches on the role of norms in the international community, such as, for example, the liberal community assumption, which would hold that

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<sup>38</sup> Statute of the ICJ, *supra* note 16 at Art.38(1)(c).

<sup>39</sup> *Treaty on the European Union*, [1992] O.J. C 191 at Art.6 & 11.

<sup>40</sup> See Friedrich Kratochwil, ‘The force of prescription’ (1984) 38 *Int’l Org.* 685 and Wiener 2008, *supra* note 2, respectively.

members of a community with a given identity share a set of norms, values and beliefs.<sup>41</sup>

### III. Case Studies on Contested Norms

Contested interpretations of norms are not necessarily due to a lack of agreement about a norm's meaning, but to a lack of understanding of that meaning.<sup>42</sup> It follows that the more diverse a social environment is, the greater the need for explanation becomes. This observation suggests an enhanced and under-researched impact of individual social practice in the process of developing norm acceptance. In distinction from shared social recognition, which depends on stable social environments and iterated social encounters, this individual social practice is referred to as cultural validation (cf. Table 1). The case studies explore contestation with reference to specific norms in selected contexts. Increased contestation is expected whenever domestic social contexts are transgressed, for example in different member states or in different transnational arenas. This research follows the assumption that potential political contestation is based on cultural reference frames.

While the contributors have met on several occasions to discuss the case studies, the respective approaches to the study of norms have been separately generated by research in a number of disciplines in the social sciences, including political science, international relations, and law. All contributions in this volume take a fresh look at norms in international relations. What they have in common is a particular focus on the interplay of domestic and international contexts. They focus mainly on three instances of norm contestation. First, it is argued that contestation of international norms emerges from the fact that norm application and implementation is reviewed and discussed in the domestic context often following particular patterns. These patterns are inherent to individual domestic settings and are not necessarily reflected upon when actors engage in intergovernmental treaty negotiations or policy coordination within a regional or global setting. Whereas international norms may very well enjoy a considerable degree of social recognition in domestic contexts, the meanings attached to a particular norm and its context-related application might deviate from practice in other

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<sup>41</sup> See Katzenstein, *supra* note 17; Frank Schimmelfennig, *The EU, NATO and the Integration of Europe* (Cambridge: Cambridge University Press, 2003).

<sup>42</sup> Charles Taylor, 'To Follow a Rule ...' in Craig Calhoun, Edward LiPuma & Moishe Postone, eds., *Bourdieu: Critical Perspectives* (Cambridge: Polity Press, 1993) 45 at 47 & 50.

domestic contexts.<sup>43</sup> Second, it is possible to observe multiple cases of diverging interpretations of a single norm across different cultural contexts. These contexts may coincide with the boundaries of a particular nation-state context but may also apply to specific cultural communities or sub-communities which are transnational in nature. Similarly, this observation can be made in cases of interaction between state actors; representatives of international organizations and the transnationally organized non-governmental advocacy community.<sup>44</sup> Third, norm contestation may emerge as the conflict between two or multiple (equally) recognized international norms. Here, preference for the superiority of a particular norm in situations of conflicting norm applications may equally reveal diverging practices of norm application and interpretation which had been established prior to the emergence of such a conflict.

*Arturo Santa-Cruz* reviews the process of establishing the practice of election monitoring in Mexico. This process crucially involves interaction among national and international actors. This discussion evolved around the fundamental norms of sovereignty and non-intervention on the one hand, and the organizing principle of international election monitoring—which is considered an important tool for ensuring democratic standards and fair elections—on the other hand. However, the way in which domestic actors, in particular, interpreted these norms and developed a new policy of election monitoring including the involvement of international observers shows the crucial role of contestation in the context of policy development. Most importantly, this article demonstrates how norms which were considered to be stable and unambiguous over a longer period of time are re-interpreted during such processes.

Combining insights from international relations and legal theory, *Ingo Venzke* shows how the legal discourse over the treatment of what the US calls ‘enemy combatants’ in its war on terror reflects the contestation of underlying fundamental norms and terms in international law such as ‘combatant’ and ‘civilian’. Those terms have been perceived as widely shared among international actors in the past but become increasingly challenged in the new context of the war on terror while revealing that diverging policy options are derived from an existing system of international law.

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<sup>43</sup> See especially the contributions by Schweltnus on minority rights and by Santa-Cruz on international electoral monitoring in relation to the fundamental norm of sovereignty.

<sup>44</sup> See the contribution by Park in this special issue.

*Andrea Liese* discusses the contested meaning of the fundamental norm of the prohibition of torture and ill-treatment, a human rights protection that is considered a peremptory international legal norm, known as *jus cogens*.<sup>45</sup> By reconstructing the meaning of this norm in the context of domestic debates on counter terrorism measures this article reveals that the norm is anything but stable. These findings are also contrasted with the fact that the prohibition of torture and ill-treatment is enshrined in international legal texts. Again, the context of norm application is considered to inform diverging interpretations of a seemingly stable concept.

By looking at the case of the World Commission on Dams (WCD), *Susan Park* analyses the role of norm contestation in global environmental governance. The article follows the evolution of the World Bank policy of sustainable development into a fundamental norm. It argues that the World Bank and member states, but notably also environmentalists and the private sector, were involved in reconstituting and establishing its meaning-in-use.

*Guido Schwellnus* provides an analysis of the contestation of the fundamental norm of minority protection within the domestic context of Polish politics. The contribution investigates how the Polish debate on minority protection in the context of the negotiation of a new minority law refers to international documents and European Union standards. Despite the fact that minority protection has been more and more codified within the international and European context after the end of the Cold War, and thus has gained increased importance for the reform domestic legislation, the very process of norm application reveals the remaining potential for contestation.

#### IV. Conclusion

This special issue's contributions shed fresh light on the role of norms in international relations. They critically observe that, while identity does matter for norm-following, membership in a community does not necessarily imply a given identity. Instead, the quality of norms is conceptualized as inherently contested. It is therefore assumed that how norms are enacted depends first and foremost on the specific contextual conditions which include the normative structure of meaning-in-use at a specific place and

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<sup>45</sup> *Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis.' Mark W. Janis, *An Introduction To International Law* (New York, N.Y.: Aspen Publishers, 2003) at 62-3.

time. With these observations in mind, the special issue stresses the contested quality of norms. It emphasizes the ultimate importance of taking into account and understanding the role of norms within different cultural contexts, and appreciating their cultural validation. Cultural validation therefore needs to be added to the familiar dimensions of social recognition and formal validation in research on norms. Students of international relations and international law have so far concentrated their attention almost exclusively on the latter two dimensions. The innovative aspect of the notion of cultural validation consists in shedding light on the more specific questions about divergence and convergence of individually perceived normative meanings which do play a role in international encounters. While modern constructivists have focused on the stable structural quality of norms and state behaviour within a community of a given identity, this special issue is part of larger research program which focuses on the flexible quality of norms and, therefore, contributes to critical constructivist research in international relations.<sup>46</sup>

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<sup>46</sup> See Richard Price & Christian Reus-Smit, 'Dangerous Liaisons? Critical International Theory and Constructivism' (1998) 4 *Eur. J. Int'l Rel.* 259; Reus-Smit 2003, *supra* note 25; Jutta Weldes, 'Bureaucratic Politics: A Critical Constructivist Assessment' (1998) 42 *Mershon Int'l Studies Rev.* 2216; Brunnée & Toope 2001, *supra* note 22; Brunnée & Toope forthcoming, *supra* note 22.