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CONTESTED NORMS IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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Special Issue
Contested Norms in International Relations
with Guest Editors
Antje Wiener and Uwe Puetter

Contents

The Quality of Norms is What Actors Make of It
Critical Constructivist Research on Norms

ANTJE WIENER* AND UWE PUETTER**

I. Introduction[1]

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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[1] This article, as well as most of the articles in this special issue, have been discussed at a range of international workshops and conferences. For comments of the discussants involved in this process we would like to thank Michael Barnett, Bernhard Zangl, Nicole Deitelhoff, Alexander Kelle, Kirsten Ainley, Chris Brown and Jim Davis as well as the panel members and conference participants. A special thank you goes to Jim Tully for ongoing discussion and comments on critical norms research. The responsibility for this version of the article is exclusively the authors'.

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beyond the boundaries of modern states.[2] 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.[3] 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,[4] paradoxically, the very process of norm proliferation and the increasing acknowledgement of the power of norms in international relations[5] 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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[2] Antje Wiener, *The Invisible Constitution of Politics. Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008) at 64 [Wiener 2008].

[3] 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].

[4] 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.

[5] 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[6] 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[7] 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?[8] 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.[9]

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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[6] '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.

[7] Louis Henkin, *How Nations Behave*, 2nd ed., (New York: Columbia University Press, 1979).

[8] 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).

[9] 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.[10] 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.[11] As social constructivists argue, in these contexts norms are what actors make of them;[12] 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.[13] By

[10] 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).

[11] Martha Finnemore & Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 Int'l Org. 743.

[12] 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.

[13] 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.[14] 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.[15] 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.[16] 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,[17] 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.[18]

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

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

[14] 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.

[15] 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.

[16] 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].

[17] 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.

[18] 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'[19] or their 'normative baggage' (see Table 1).[20]

Table 1: Three Dimensions of Norm Implementation

	Formal Validity	Social Recognition	Cultural Validation	Assumption/ Logics
visible	UN Charta, EU Treaties, Conventions, Agreements			Community Assumption Logic of Consequence
▲		Learning, Socialization, Community-based behaviour		Identity Assumption Logic of Appropriateness
▼				
invisible			Individual Expectations, Experience, Background knowledge	Diversity Assumption Logic of Contestedness
	less ◄		► *more*	

Dimensions

Democratic Legitimacy

Source: Adapted from Wiener 2008.

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

[20] 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.[21] To tease out this dimension in more detail we draw on a relational or interactive approach[22] 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

[21] 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.

[22] 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.'[23] 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.[24] In turn, critical constructivists focus on the meaning of norms as constituted by and constitutive of specific use.[25] 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.[26] 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,[27] 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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[23] 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>.

[24] See Katzenstein, *supra* note 17; Risse, Ropp & Sikkink, *supra* note 5; Checkel 2001, *supra* note 13.

[25] 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* (Houndsmills, Basingstoke: Palgrave Macmillan, 2003) 209 [Reus-Smit 2003].

[26] 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.

[27] 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,[28] social learning remains a process that exclusively involves the participating elites within the environment of international organizations.[29] 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'[30] 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?[31]

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

[28] 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.

[29] See Checkel 2001, *supra* note 13; Johnston, *supra* note 13.

[30] 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.

[31] 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.[32] 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.[33] 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.[34] 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.[35] 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

[32] 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.

[33] On contestation see especially the contribution by Venzke in this special issue.

[34] The following draws closely on Wiener 2008, *supra* note 2 at chapter 2.

[35] 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.[36] 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.[37] 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

[36] See Francis Snyder, *New Directions in European Community Law* (London: Weidenfeld & Nicholson, 1990); Ulrich K. Preuss, 'Der Begriff der Verfassung und ihre Bezielhung 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.

[37] 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[38] and/or the Treaty on the European Union[39] 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.'[40] 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

[38] Statute of the ICJ, *supra* note 16 at Art.38(1)(c).
[39] *Treaty on the European Union*, [1992] O.J. C 191 at Art.6 & 11.
[40] 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.[41]

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.[42] 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

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

[42] 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.[43] 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.[44] 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.

[43] See especially the contributions by Schwellnus on minority rights and by Santa-Cruz on international electoral monitoring in relation to the fundamental norm of sovereignty.
[44] 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*.[45] 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

[45] '*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.[46]

[46] 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.

Exceptional Necessity
How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment when Countering Terrorism

ANDREA LIESE*

I. Introduction

On Human Rights Day, 7 December 2005, Louise Arbour, UN High Commissioner for Human Rights, shared her concern that national strategies

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to counter terrorism were severely threatening a core human rights norm, the prohibition of torture and ill-treatment:

> The absolute ban on torture, a cornerstone of the international human rights edifice, is under attack. The principle once believed to be unassailable—the inherent right to physical integrity and dignity of the person—is becoming a casualty of the so-called 'war on terror'.[1]

The contested meaning of the prohibition of torture and ill-treatment is a serious concern for any human rights defender, and it challenges many accounts of human rights diffusion, legalization, and compliance in the literature on international relations and international law. Accordingly, this article is an attempt to capture patterns of contestation and reinterpretation with regard to the prohibition of torture and ill-treatment in national and transnational debates, and to discuss their implications for current research on human rights norms and their diffusion.

Contestation of human rights norms is not new. Advocates have been familiar with the contestation of international human rights for decades. Notably, proponents of Asian values have argued that the liberal conception of human rights is unduly restricted to the rights of the individual and, hence, is incompatible with culturally specific values and practices.[2] Yet, shortly after the gradual acceptance of universalism in the 1990s and the support of a 'core of rights' even by hardliners from South East Asia,[3] human rights activists are confronting what may be seen as the 'most sustained attack' since the establishment of the global human rights regime half a century ago:[4] the reinterpretation of fundamental human rights by western

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[1] Louise Arbour, 'On Terrorists and Torturers' (Statement by the UN High Commissioner for Human Rights, for Human Rights Day, New York, 7 December 2005), online: <http://www.unama-afg.org/news/_statement/Others/2005/_others/05dec07-Louise%20Arbour%20Statement.doc>.

[2] Cf. Jack Donnelly, *Universal Human Rights in Theory and Practice,* 2nd ed. (New York: Cornell University Press, 2003) at 112.

[3] Take for example the statement of a representative from Singapore: 'Diversity cannot justify gross violations of human rights. … No one claims torture as part of their cultural heritage.' Quoted in James T.H. Tang, ed., *Human Rights and International Relations in the Asia-Pacific Region* (London: Pinter, 1995) at 244.

[4] 'The current framework of international law and multilateral action is undergoing the most sustained attack since its establishment half a century ago. International human rights and humanitarian law is being directly challenged as ineffective in responding to the security issues of the present and future. In the name of the "war on terror" governments are eroding human rights principles, standards and values.' Amnesty International, *Amnesty International Report*

liberal democracies. Most human rights advocates fear that these discursive interventions will eventually change the content and the meaning of an already established fundamental norm in world politics, namely the torture taboo.

Such a change to fundamental norms has major importance for students of international human rights politics. First, allegations of non-compliance with the absolute ban on torture as well as the contestation of this fundamental human rights norm challenge established convictions with regard to the domestic effects of international human rights. The most prominent theories of human rights diffusion and socialization[5] hardly explain why in recent years liberal democracies are contesting and violating the obligations enshrined in the legal ban on torture. Not only does the ban on torture rank among the highest principles in both a normative and a legal hierarchy of human rights,[6] it is also one of the most institutionalized human rights norms and is believed to resonate with the interests and the domestic structure of liberal democracies. Therefore, from the standpoint of human rights research and theory building, the currency of disputes on the gradual legalization of ill-treatment[7] or torture in these liberal states is rather unexpected.

Second, it is not clear what the consequences of the attack will be. Will the international norm be 'watered-down'? Will the ban on torture lose its influence on the political practice of norm followers? Will exceptions to the absolute prohibition become the rule?

Third, what does contestation reveal with regard to the formal validity of a norm? Are norms contestable all the way down, or does some fixed meaning remain? And how is the attack possible?

2004 (New York: Amnesty International Publications, 2004) at 5, online: Amnesty International <http://www.amnesty.org.ru/report2004/hragenda-1-eng>.

[5] For an overview see Hans Peter Schmitz and Kathryn Sikkink, 'International Human Rights' in Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., *Handbook of International Relations* (London: SAGE, 2002) 517 [Schmitz & Sikkink].

[6] William A. Schabas, *The Death Penalty as Cruel Treatment and Torture, Capital Punishment Challenged in the World's Courts* (Boston: Northeastern University Press, 1996) at 34.

[7] I use the term 'ill-treatment' to refer to cruel, inhuman or degrading treatment and punishment that does not amount to torture but is prohibited as well. Human rights treaties differ in the wording they use for these forms of abuse and they are often summarized as ill-treatment. For example, Article 7 of the *International Covenant on Civil and Political Rights* (*ICCPR*) and Article 16 of the *Convention Against Torture* refer to 'cruel, inhuman or degrading treatment or punishment', while the Common Article 3 of the four Geneva Conventions refers to 'cruel treatment' and Art. 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* refers to 'inhuman or degrading treatment or punishment'.

What are the focus, aim, and method of this article? Following the assumption that situations of crisis reveal both the uncontested and the contested meaning of a norm,[8] the article will focus on the context of counter-terrorism. I chose national and transnational debates within three states to determine similarities and differences among the supposedly unequivocal meaning of a fundamental human rights norm. The meanings of the torture prohibition are derived from claims and justifications made in domestic debates, on the one hand, and in a common transnational context (e.g. UN Committee against Torture) on the other. Three critical examples (the United States, the United Kingdom, and Israel) reveal the meanings attributed to the prohibition of torture and ill-treatment by national executives under conditions of endangered security. Why executive leaders? They are crucial in the process of norm implementation and application, as they authorize counter-terrorist measures at the expense of human rights protection. Human rights norms shall constrain their behaviour and constitute their interests. Legislative and judicial institutions undoubtedly play a significant role in the process of implementation. They construct domestic norms and limit the space for overt contestation. However, this article will not focus on decisions and rulings by (domestic or regional) courts. First, international human rights norms are rarely and often not fully applied in domestic courts[9] and, second, it usually takes some time before courts achieve legal certainty on issues such as the necessity clause.[10]

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[8] Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 Eur. J. Int'l Rel. 189 [Wiener 2004]. See also Antje Wiener & Uwe Puetter, 'The Quality of Norms is What Actors Make of It' (2009) 5 J. Int'l L. & Int'l Rel. 1. [Wiener & Puetter 2009].

[9] See Benedetto Conforti, 'National Courts and the International Law of Human Rights', in Benedetto Conforti & Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts,* (Den Haag: Martin Nijhoff Publishers, 1997) at 7 [Conforti & Francioni]; Rosalyn Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom', in Conforti & Fancioni, *ibid.* at 37; Bruno Simma *et al.*, 'The Role of German Courts in the Enforcement of International Human Rights', in Conforti & Francioni, *ibid.* at 107; Andreas Laursen, 'Israel's Supreme Court and International Human Rights Law: The Judgment on "Moderate Physical Pressure"' (2000) 69 Nordic J. Int'l L. 413 at 426-427 and 446 [Laursen].

[10] Only in 1999 did the Israeli High Court rule out the use of 'moderate physical pressure', which had been sanctioned by the Landau Commission in 1987. See *Public Committee against Torture in Israel v. Government of Israel,* (1999) HCJ 5100/94 (Sup. Ct. Israel) [*Public Committee against Torture in Israel*], available online: <http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorirm_law.pdf>; Laursen, *supra* note 9; Gershon Shafir, 'Torturing Democracies. The Curious Debate over the "Israeli Model"' in Alison Brysk & Gershon Shafir, eds., *National Insecurity and Human Rights. Democracies Debate Counterterrorism* (Berkeley: University of California Press, 2007) [Brysk & Shafir]. In the United States, courts first ruled over events in Guantanamo in 2004. See *Rasul v. Bush,* 542 U.S. 466 (2004), and David P. Forsythe,

Why these countries? The three countries are liberal democracies that have ratified the *Convention against Torture*. They share the experience of a threat to national security and have adopted measures to fight terrorism, albeit at different periods in time and to quite different extents. In the context of counter-terrorist measures, they each have to debate the implementation of human rights norms and to determine the interpretation of a norm's validity in the process of norm application.[11] As the threats to the three countries' national security took place at different periods of time, these case studies enable us to identify recurrent patterns of contestation that are by no means restricted to the Bush administration's attack on international law. The *United Kingdom* has a history of countering terrorism in Northern Ireland since 1968 and has, after 2001, been engaged in a fight against transnational terrorism as well. *Israel* has been exposed to national security threats since its founding, but authorized the use of physical pressure during the interrogation of terrorist suspects after the outbreak of the (first) Intifada in 1987. The *United States* declared an ongoing 'war on terror' in 2001 after 9/11.

The torture prohibition, as laid down in international law, is non-derogable and absolute: no circumstances whatsoever may justify the use of torture.[12] In order to determine if the torture prohibition is contested and lacks resonance in democracies countering terrorism, I look at official statements about the treatment of detainees and suspected terrorists. Special attention is paid to keywords such as the 'circumstances' to which state delegates refer, the activities that 'constitute' torture, and the 'rights' and 'obligations' to which the national executives refer when justifying certain measures against suspected terrorists.

The case studies illustrate that the text of human rights treaties should not be equated with their local meaning as to appropriate behaviour in a given situation. The contextual rendering of the ban on torture, as revealed both in national discourse and in state practice, differs from the prima facie understanding of the legal text. Hence, this article looks at 'law-in-action

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'The United States. Protecting Human Dignity in an Era of Insecurity' in Brysk & Shafir, *ibid.* at 47 [Forsythe 2007].

[11] Cf. Wiener & Puetter 2009 *supra* note 8.

[12] See for example the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Arts. 4(2) and 7.

rather than law-on-the-books'[13] in order to determine the contested and uncontested elements of the torture prohibition.[14]

We can identify three elements that point towards a contextualized re-interpretation of the torture prohibition: the implicit or explicit exception from the absoluteness of the respective prohibition (the 'ticking bomb scenario'), the distinction between torture and ill-treatment, and the reaffirmation of an absolute ban on severe acts that constitute torture (see below, section III). Despite this cross-national contestation, the meaning of the ban on torture and its surrounding rules, as held and promoted by transnational networks and legal bodies, has not changed at all. The contestations of the executives in those states that are countering terrorism have not changed the legal validity and the standard of appropriateness as upheld and promoted by transnational networks and international legal bodies (e.g. the UN Committee against Torture) and domestic human rights activists. One finds evidence of two rather unlinked discourses or debates among norm promoters and norm addressees. A key issue is the difference between the meanings that are attributed to legal texts by actors who interact in different contexts.

This article is structured as follows: It will first summarize the view that the current contestation of fundamental rights is of a new quality and is endangering the impact of the global human rights regime. As the debate on torture in the United States is not the first instance of opposition to the absolute prohibition of torture and ill-treatment, the second part of the article will be dedicated to the determination of recurrent contestation patterns. By describing what is contested in different countries and at different periods in time, the section will identify common controversies and interpretations of the content and the validity of a human rights norm (the ban on torture) in a given social context (national efforts to fight terrorism). The article then provides an empirical critique of theories of human rights diffusion and compliance and discusses the constitutive elements of norm contestation in the case of torture and ill-treatment. These are domestic norms on appropriate behaviour in a given social context, as reflected in discourse,

[13] Sanford Levinson, '"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11' (2003) 81 Texas L. Rev. 2013 at 2018.

[14] On the importance of looking at communicative dynamics and justifications in order to understand compliance and regime robustness, see Hedley Bull, *The Anarchical Society* (London: MacMillan, 1977) [Bull]; Friedrich Kratochwil & John Gerard Ruggie, 'International organization: a state of the art on the art of a state' (1986) 40 Int'l Org. 753.

practice and sometimes also domestic law, which lack congruence with the complex norms embodied in international treaty law.[15]

II. A new quality of norm contestation? Or: what seems to be at stake in the torture debate?

The contestation of human rights is a recurrent phenomenon in international politics. Although human rights norms are highly institutionalized and widely accepted on a global level, they have repeatedly been contested both in international fora and in local and national contexts.

In the 1990s, the international debate seemed to have resolved some of the most central conflicts. Among states, the validity of the *Universal Declaration of Human Rights* was hardly contested anymore: all states endorsed the notion of human rights universalism at the World Conference on Human Rights in Vienna, 1993. [16] Furthermore, ratification rates for the six core human rights treaties of the UN rose constantly during the 1990s,[17] leading some scholars to believe that human rights represent a universal ethical order or 'standard of civilization'.[18] The international debate on human rights norms shifted to establishing third generation rights and to reforming the existent human rights regime in order to make it more effective and legitimate.[19]

At the same time, scholarly interest shifted from analyzing the emergence of human rights norms to investigating their implementation and internalization. Theories of norm diffusion and compliance were discussed and applied in single case studies and comparative studies. Empirically,

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[15] On the importance of local or regional norms and the cultural match for processes of norm diffusion see Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58 Int'l Org 239 [Acharya]; Jeffrey Checkel, 'Norms, Institutions, and National Identity in Europe' (1999) 43 Int'l Studies Q. 83 [Checkel].

[16] On 25 June 1993, representatives of 171 states adopted by consensus the *Vienna Declaration and Programme of Action*, which reaffirms their commitment to the purposes and principles contained in the *Universal Declaration of Human Rights*; General Assembly, *Vienna Declaration and Programme of Action,* UN Doc. A/CONF. 157/23 (12 July 1993) at 1.

17 By the mid 1990s, each state had ratified at least one international human rights convention.

[18] See for example John Charvet, 'The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights' (1998) 27 Millenium 523; Jack Donnelly, 'Human Rights: A New Standard of Civilization?' (1998) 74 Int'l Affairs 1.

[19] Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, NY: Transnational Publishers, 2001).

these studies focused on authoritarian states and/or transformation states.[20] These investigations analyzed personal integrity rights, which were thought of as culturally uncontested and rather stable.[21] The belief was that societies and states could be socialized over time, thus allowing for a progressive realization of human rights norms. Only studies that addressed rights in more contested areas (such as women's and children's rights) also focused on traditional attitudes and local concepts that diverged from international law and were brought to the fore during the process of implementation.[22] Cultural diversity and particularism were seen as obstacles to effective implementation, yet not as dangers to international law per se.

National or local contestations in western, liberal democracies remained largely unexamined[23] until they first attracted the attention of human rights activists. In the wake of 9/11, national strategies to fight terrorism have nurtured debates on the absoluteness of human rights provisions. Although human rights norms, even in liberal democracies, have never been fully complied with, many argue that the events of September 11 have been followed by a new quality of controversies within states and societies as to the very meaning of human rights norms. What is thought to be new, however, is not only the abuse of detainees and prisoners or the curtailment of civil liberties during the Bush Administration,[24] but also the contestation of the formal validity and/or the precise meaning of international human rights law–a law with a supposedly stable and fixed meaning–by precisely this administration.[25] It is the 'pronounced shift in the global discourse about

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[20] See for example Darren G. Hawkins, 'Domestic Responses to International Pressure. Human Rights in Authoritarian Chile' (1997) 3 Eur. J. Int'l Rel. 403; Ann Kent, *China, the United Nations, and Human Rights. The Limits of Compliance* (Philadelphia: Pennsylvania University Press, 1999); Thomas Risse, Stephen Ropp & Kathryn Sikkink, eds., *The Power of Human Rights, International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) [Risse *et al.*]; Frank Schimmelfennig, Stefan Engert & Heiko Knobel, 'Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey' (2003) 41 J. Common Market Studies 495.

[21] Risse *et al*., *ibid.*

[22] Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2005) 25 Hum. Rts. Q. 130.

[23] For an exception see Laursen, *supra* note 9, who reviews the academic and legal debate on torture in Israel between 1987 and 1999.

[24] Such abuses were also witnessed in former decades, see Alfred W. McCoy, *A question of torture: CIA interrogation, from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006), and in other countries, e.g. European democracies, see Antonio Cassese, *Inhuman States: Imprisonment, Detention and Torture in Europe Today* (Cambridge: Blackwell, 1996).

[25] Gregory Hooks & Clayton Mosher, 'Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror' (2005) 83 Social Forces 1627 [Hooks & Mosher]. See also Ingo

human rights after September 11'[26] that raises concern and provokes wide criticism.

The consequences of the human rights policy of the United States after September 2001 are expected to be far-reaching: scholars and practitioners speak of a 'sea-change' in the approach to international human rights norms in general,[27] of breaking a 'taboo' with regard to the prohibition of torture,[28] and of fundamental rights' susceptibility to 'erosion'.[29] The behaviour of the United States is of particular concern to human rights organizations, because the condoning of torture in the US 'would provide a handy excuse to other governments to use torture to pursue their own national security objectives'.[30]

As this quote from Human Rights Watch suggests, human rights advocates assume that social practices and discursive interventions by norm followers change the content and the meaning of an already established normative structure in world politics. Their fear is in line with a 'critical constructivist' or 'reflexive' approach to international norms and institutions, which emphasizes that norms are variable: their meanings evolve in interaction, and practice constructs and reconstructs these meanings.[31]

Taking these fears seriously, I will try to determine how the meaning of the torture prohibition is enacted by states countering terrorism. How does norm-use effect the interpretation of the respective norm? Have collective

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Venzke, 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation' (2009) 5 J. Int'l L. & Int'l Rel. 157.

[26] Neil Hicks, 'The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective' in Richard A. Wilson, ed., *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005) 209 at 217.

[27] *Ibid.* at 209.

[28] Human Rights Watch, 'Dangerous Ambivalence: UK Policy on Torture since 9/11' (Briefing paper No. 1, November 2006) [Human Rights Watch 2006], online: Human Rights Watch <http://www.hrw.org/legacy/backgrounder/eca/uk1106/uk1106web.pdf>; Elvira Rosert & Sonja Schirmbeck, 'Zur Erosion internationaler Normen. Folterverbot und nukleares Tabu in der Diskussion' (2007) 14 Zeitschrift für Internationale Beziehungen 253; Derek Summerfield, 'Fighting "terrorism" with torture' (2003) 326 British Medical J. 773; Manfred Nowak, 'Die Aushöhlung des Folterverbots im Kampf gegen den Terrorismus' (2007) 1 Zeitschrift für Menschenrechte 1 at 5.

[29] Kees Wouters, 'Editorial: How Absolute is the Prohibition on Torture?' (2006) 8 Eur. J. Migr. & L. 1.

[30] Human Rights Watch, News Release, 'The Legal Prohibition Against Torture' (1 June 2004), online: Human Rights Watch <http://www.hrw.org/press/2001/11/TortureQandA.htm>.

[31] Christian Reus-Smit, 'Human rights and the social construction of sovereignty' (2001) 27 Rev. Int'l Studies 519 at 526. Cf. Wiener 2004, *supra* note 8; Wiener & Puetter 2009, *supra* note 8.

expectations for the proper behaviour of states countering terrorism changed in recent years and what do they look like?

III. 'Time to think about Torture'?[32] Determining meanings of a prohibition in the context of fights against terrorism

It is a sad commonplace that human rights violations increase in times of war and military conflict. Violations of human rights, such as civil liberties, political rights, religious rights, and personal integrity rights, in the so-called 'war on terror' have been documented by international human rights groups and human rights scholars and need not be described here. The focus of the following analysis will be on the arguments that were used to circumvent, interpret, and/or confirm the absolute ban on torture as laid down in international law.

The prohibition of torture and ill-treatment can be found in many international treaties and declarations, including the *Universal Declaration of Human Rights* (1948), the Geneva Conventions, the *International Covenant on Civil and Political Rights* (1966), the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (1984) and regional conventions. The *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*,[33] which was ratified by the United States, the United Kingdom, and Israel, defines torture as an act by which 'severe pain or suffering' is intentionally inflicted by a public official (or under his or her acquiescence) on a person for a specific purpose, such as obtaining a confession (Art. 1, see also section IV below). States Parties must take effective measures to prevent acts of torture and may never invoke 'exceptional circumstances', such as a state of war, as a justification of torture (Art. 2). Furthermore, they must prevent 'acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1' (Art. 16). While Article 2(2) provides that the prohibition of torture is absolute and non-derogable, the text of the *Convention* does not explicitly provide for an absolute prohibition of ill-treatment. However, the Committee against Torture has clarified on several occasions that Article 16 'must be observed in all circumstances', too.[34] It is this distinction between

[32] 'Time to think about torture' is the title of an oft-cited article by Jonathan Alter, *Newsweek* (5 November 2001) 45, online: Newsweek <http://www.newsweek.com/id/76304/page/1>.
[33] A/Res/39/46, UN GAOR, 1984, online: OHCHR <http://www2.ohchr.org/english/law/cat.htm>.
[34] See for example Committee Against Torture, *General Comment No.2: Implementation of article 2 by States Parties*, UN CAT, 39th Sess., UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (2008) at para.5 [CAT General Comment No.2].

torture, on the one hand, and acts of ill-treatment, on the other, to which much of the contested debate on 'torture light' refers.

Despite considerable variation in policies,[35] the arguments put forward by the political elites display several similarities. On the one hand, state representatives affirm the *validity of the absolute ban on torture* in transnational arenas such as the UN Committee against Torture. On the other hand, the same representatives have trivialized and/or justified non-compliance[36] with some of the various obligations included in the ban on torture in national speeches, in memoranda and in reports providing the legal basis for special interrogation methods,[37] and reports to treaty bodies.

One can identify at least three similar patterns of arguments with regard to the reinterpretation of the prohibition of torture and ill-treatment: *i*) the implicit or explicit exception from the absoluteness of the respective prohibitions in cases of emergency ('ticking bomb scenario') or the fight against terrorism in general ('times have changed'), *ii*) the trivialization of abuses and the emphasis on the prohibition of torture as opposed to the prohibition of ill-treatment, and *iii*) the reaffirmation of an absolute ban on *torture* as opposed to ill-treatment.

1. Justifying 'measures': Invoking the ticking bomb scenario

Irrespective of the claim that no policy has been adopted that would violate the ban on torture (see below), representatives of all three states have referred to a responsibility to protect their citizens—a responsibility that should be taken into consideration when discussing, or judging upon, their national human rights situations. One must note that the necessity clause, which I describe below, has been used to justify different policies in the three countries. Israeli and American executives refer to the choice between evils when legitimizing coercive interrogation methods that could be interpreted as a violation of the torture prohibition, while British officials legitimize the weakness of safeguards to prevent torture and ill-treatment. However, they

[35] See Alison Brysk, 'Human Rights and National Insecurity' in Brysk & Shafir, *supra* note 10.

[36] *Trivializing* torture and ill-treatment means that the transnational definition of torture, as found in treaties, court decisions, and views by the UN human rights committees, is not accepted. *Justifying* torture and ill-treatment means that the torture prohibition is weighed against the necessity clause.

[37] Interrogation methods in the US and in Israel were sanctioned by reports that lawyers issued in the US Department of Justice (such as the 'Bybee Memorandum'—*infra* note 48) or, in the Israeli case, the Landau Commission (headed by and named after a former president of the Supreme Court), *infra* note 40.

base their justifications on the same argument: it is necessary to balance human rights (or specific obligations under human rights treaty law) and the duty to defend national security under 'special circumstances'.

On presenting Israel's Third Periodic Report to the Committee against Torture in November 2001, the Israeli state representative, Mr. Levi, pointed to the necessity to balance one right against another. The Committee summarizes his remarks as follows:

> In the context of the terrorist threat that Israel was facing, a balance had to be struck between the human rights of detainees and the human rights of the population at large. While committed to respect for human rights and the rule of law, the State also had *a responsibility to protect* the lives of all its citizens from terrorism. The right to live without terrorism *is also a fundamental human right*, but it was one that Israeli citizens did not enjoy. … Each act or measure of alleged misconduct must be examined on its own merits and *in the light of specific circumstances*.[38]

The Landau Commission, established in May 1987, had previously tried to determine a set of interrogation measures that would secure compliance with national and international human rights norms while ensuring the effectiveness by the General Security Services (GSS).[39] Its argumentation is based on the ticking bomb scenario, according to which torture might be appropriate to prevent an attack on national security. The Report argues that it is 'reasonably necessary' to balance the duty to respect human rights with the duty to protect national security.[40]

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[38] Committee Against Torture, *Summary record of the 496th meeting: Israel 29/11/2001*, 27th Sess., UN Doc. CAT/C/SR.496 (2001) at paras.3 and 10 [emphasis added] [CAT *Summary of 496th Mtg.*].

[39] Cf. the written statement in Israel's first State Report to the CAT: Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Initial Reports of States Parties Due in 1992. Addendum: Israel*, UN Doc. CAT/C/16/Add.4 (1994) at para.35: 'The Landau Commission was aware that the issue of moderate pressure during interrogation is both a serious and a sensitive one. ... interrogation practices have been strictly defined in a manner that, in the opinion of the Landau Commission, "if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity".'

[40] The Landau Report is quoted in Amnesty International, *Israel and the Occupied Territories. Torture and ill-treatment of political detainees*, AI Index: MDE 15/03/94 (London: Amnesty International, 1994), see para.3.15 [Landau Report]. Excerpts can be found online: Amnesty International <http://www.amnestyusa.org/document.php?lang=e&id=3394319E235477E1802569A600604AD4>.

The ticking bomb scenario rests on the assumption that torture is a necessary means to effectively prevent terrorist acts. The Landau Report expresses this belief: 'We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of a tool of the interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.'[41] The United States and the United Kingdom have invoked the ticking bomb scenario as well. During the 1990s, the human rights debate over the *Prevention of Terrorism Act* (*PTA*, first adopted in 1974) in the United Kingdom focused to a large extent on the appropriateness of the measures taken to *prevent* torture and ill-treatment, and only to a lesser extent on the possible use of measures that might amount to ill-treatment while interrogating and detaining terrorist suspects in Northern Ireland.[42] Yet that the government attempted to contextualize its obligations to take such measures in light of 'special circumstances', i.e. a terrorist threat, becomes obvious in this example, too.

While the ticking bomb scenario was not invoked as explicitly and drastically as in the statement by the Israeli representative quoted above, one can find similar statements by British officials. In responding to the recommendation of the Committee against Torture (CAT) to record interrogations as a preventive measure, the British report stated in 1996:

> The Government has concluded … that the introduction of audio or video recording in police offices in Northern Ireland would not be in the overall interest of justice. *In the particular circumstances of Northern Ireland*, the electronic recording of interviews would inhibit the chances of lawfully obtaining information that would lead to the conviction of terrorists or the saving of other people's lives.[43]

This view that some 'powers' are necessary to effectively combat terrorism was reiterated two years later, when the next report justified the upholding of the emergency legislation in Northern Ireland: '… some terrorist groups on both sides remain active and a number of violent incidents have continued to occur … the Government has concluded that the security forces

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[41] *Ibid.* at para.4.6.

[42] See, for instance, the findings of the European Committee on the Prevention of Torture, which considered psychological forms tantamount to inhuman treatment; Committee on the Prevention of Torture, *Report to the Government of the United Kingdom on the visit to Northern Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 29 July 1993*, CPT/Inf (94) 17 (1994) at 37-8.

[43] Committee against Torture, *Second periodic reports of States parties due in 1994, Addendum: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CAT/C/25/Add. 6 (1996) at para.56 [emphasis added].

must continue to have available to them the powers they need to counter terrorism.'[44] In the current debate over the principle of non-refoulement,[45] the British Prime Minister, the Home Secretary, and others have likewise expressed their views that the non-refoulement treaty provisions do not apply to the particular circumstances of the war on terror.[46] For example, former Home Secretary Charles Clarke demanded that 'the right to be protected from torture and ill-treatment must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism'.[47]

In the United States, the necessity clause, which narrowed the definition of torture as set out in international treaty law (i.e. the UN *Convention against Torture*) was introduced in the Bybee Memorandum of August 2002.[48] This document claimed that harm to detainees might be unavoidable and again referred to the choice between two evils, of which one—defending national security—is less harmful than the other—protecting the human rights of terrorists: 'Clearly any harm that might occur during an interrogation would pale to insignificance *compared to* the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.'[49] This ticking bomb scenario has been explicitly invoked in several of the memos and reports that followed the Bybee Memorandum and that authorized coercive interrogation methods.[50]

2. Trivializing abuses

The second similarity between the various reports and statements of Israeli and American representatives is the wording about how far a detainee can be 'pressured'. The Landau Report does not mandate 'torture' or 'ill-treatment', but rather interrogation methods that are described or framed as 'a moderate measure of physical pressure' and 'non-violent psychological

[44] Committee against Torture, *Third periodic reports of States parties due in 1998, Addendum: United Kingdom of Great Britain and Northern Ireland and Dependent Territories*, UN Doc. CAT/C/44/Add. 1 (1998) at paras.46-8.
[45] The principle of non-refoulement demands that receiving countries refrain from returning people to their country of citizenship if they run the risk of being tortured there.
[46] Cf. Human Rights Watch 2006, *supra* note 28 at 7-9.
[47] *Ibid.* at 28.
[48] Memorandum from Jay S. Bybee, Assistant Attorney General, US Department of Justice, to Alberto R. Gonzales, Counsel to the President (1 August 2002), reprinted in Karen J. Greenberg & Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) at 172 [Bybee Memorandum].
[49] *Ibid.* at 208 [emphasis added].
[50] See *ibid.* at 308.

pressure'.[51] It is noteworthy that, although the full Landau Report was never officially published, the language respects the taboo inherent in the ban on torture; it does not suggest breaching the ban, even while it disrespects the essential idea of the prohibition of torture and ill-treatment, namely that 'no situation whatsoever' justifies the infliction of torture.

Yet state officials have openly contested what torture actually is, or referring to the definition provided by the *Convention against Torture*, how much severity of pain is necessary to rise to the level of torture. This definitional juggling can be seen as a sign for the enduring strength of the torture taboo. In 2001, still referring to the measures mandated in the Landau Report, the Israeli representative stated that:

> Nevertheless, his Government maintained that a careful reading of the Convention suggested *that pain and suffering did not in themselves necessarily constitute torture*. Interrogation procedures had to be examined taking account of the severity of the pain or suffering inflicted on a person.[52]

In the United States, the Bybee Memorandum of 2002 contained the most obvious redefinition of the torture prohibition. It argued that the American understanding of torture, as laid out in Sections 2340-2340A of the *United States Code*, covers only extreme acts:

> Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. … Because the acts inflicting torture are extreme, there is significant range of acts that though *they might constitute* cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.[53]

The interrogation techniques sanctioned in the Bybee Memorandum (and in the memorandum which superseded it and which was approved by the Secretary of Defense) are described using vague and general terms such as 'stress positions'; they are usually referred to as 'stress and duress' in official statements. Rumsfeld's remark, added to the memo approving interrogation

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[51] Landau Report, *supra* note 40 at para.4.7.
[52] Statement by Mr. Levi to the CAT as summarized in CAT *Summary of 496th Mtg.*, *supra* note 38, at para.10 [emphasis added].
[53] Bybee Memorandum, *supra* note 48, at 213-14 [emphasis added].

methods in 2004, is famous: 'I stand for 8-10 hours a day. Why is standing limited to four hours?'[54]

Apart from such trivializing remarks, it has been the official policy of the United States since ratification of the *Convention against Torture* to not fully embrace the 'vague and ambiguous'[55] definition of degrading treatment or punishment that the *Convention* provides. In its ratification instrument, the United States entered a reservation to Article 16. The US considers itself bound to this article only insofar 'as the term "cruel, inhumane or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eight, and/or Fourteenth Amendments.'[56] In the American view, several criteria have to be met for an act to amount to torture, including 'prolonged' mental harm or 'severe' pain as a result of 'specific intent'–a position criticized as stultifying the very notion of torture.[57] The silence about the validity of the prohibition of ill-treatment is telling in and of itself. Not just the Bybee Memorandum, but also subsequent memoranda (e.g. the Levin Memorandum of December 2004) distinguish between torture and ill-treatment and focus only on the criminal prohibition of torture.[58]

3. Reaffirming the prohibition of torture

Regardless of the justifications put forward, the absolute prohibition of *torture* was not officially questioned or contested in any of the three countries; that is, one cannot find any discursive interventions questioning the validity of a ban on torture as such.

American government representatives have repeatedly confirmed that the Bush Administration 'was committed to upholding national and international obligations to eradicate torture and prevent cruel, inhuman or

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[54] Quoted in Tom Malinowski, 'The Logic of Torture', *The Washington Post* (27 June 2004), B07, online: washingtonpost.com <http://www.washingtonpost.com/wp-dyn/articles/A6950-2004 Jun25.html>.

[55] Quoted in Committee against Torture, *Second periodic reports of States parties due in 1999, Addendum: United States*, UN Doc. CAT/C/48/Add.3 (2005), at para.147.

[56] *Ibid.* at para.88.

[57] Antonio Cassese, 'Are International Human Rights Treaties and Customary Rules on Torture Binding upon US Troops in Iraq?' (2004) 2 J. Int'l Crim. Justice 872 at 875 [Cassese 2004].

[58] US Department of Justice, 'Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General' (39 December 2004), excerpts reprinted in Henry J. Steiner, Philip Alston & Ryan Goodman, eds., *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2007) 255 at 256.

degrading treatment or punishment'.[59] White House Counsel Alberto Gonzales stated in June 2004, 'The administration has made it clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws.'[60] The abuses that had occurred in Abu Ghraib, for example, were not excused or defended; however, the government denied that they were the result of intent. Although it is widely believed that various memoranda, notably the infamous and later rescinded Bybee Memorandum, violated the prohibition of ill-treatment and could potentially lead to measures amounting to torture,[61] a state representative denied that anything in the Bybee or succeeding memoranda 'had changed the definition of torture governing United States obligations under the Convention [against Torture] from what had been accepted upon ratification'.[62] Accordingly, the Bybee Memorandum was not withdrawn 'because it purported to change the definition of torture', but because it exceeded the competencies of the president. [63] It is noteworthy that the American delegation did not once indicate the wish or the necessity to re-define or to re-interpret the prohibition of torture in the context of countering terrorism when discussing its State Report with the Committee against Torture, an international forum of experts established under the international human rights regime, in May 2006.[64] Instead, the controversy between the Committee and the State Delegation was about the applicability of the *Convention against Torture* in situations of armed conflict, i.e. on operations in Guantánamo, Afghanistan, and Iraq. In this regard, the United States has repeatedly stated that the Geneva Conventions are to be applied as *lex specialis* (while the UN *Convention against Torture* is not applicable).

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[59] Statement by Mr. Lowenkron to the Committee against Torture, as summarized in Committee against Torture, *Summary Record of the 703rd meeting: United States of America,* 36th Sess., UN Doc. CAT/C/SR.703 (2006), at 2 [CAT *Summary of 703rd Mtg*.].

[60] Press Briefing by White House Counsel Judge Alberto Gonzales and others quoted in Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second periodic report of States parties due in 1999, Addendum: United States of America*, UN Doc. CAT/C/48/Add. 3/Rev.1 (2005), at para.61.

[61] For this view see the joint report by five Special Rapporteurs in Commission of Human Rights, *Situation of detainees at Guantánamo Bay*, UN Doc. E/CN.4/2006/120 (2006), at 17 and 24.

[62] Statement by Mr. Bellinger to the Committee against Torture, as summarized in CAT *Summary of 703rd Mtg*., *supra* note 59 at 4.

[63] *Ibid*.

[64] A similar perspective is implicit in the 2004 Taguba Report on Iraqi Prisoner Abuse, which makes no reference to the *ICCPR* or the *Convention against Torture* and customary law outlawing torture. See Cassese 2004, *supra* note 57.

The argumentation of Israel was not identical in all these aspects but was also based on the reiterated statement that the 'special measures' applied by the Security Service were not violating international human rights norms: 'We wish to emphasize that the position of the State of Israel has been, and remains, that the authorization procedure does not conflict with the 1984 Convention against Torture or with other prohibitions in international law'.[65]

In its report to the Committee against Torture in 2003, the government of the United Kingdom denounced 'the opinion that the continuing state of emergency in Northern Ireland was a factor impeding the application of the provisions of the Convention', stating that:

> it is the view of her Majesty's Government that the security situation still warrants the continued use of emergency provisions. The provisions *are a measured and proportionate response in line with international obligations*. The United Kingdom has never used the security situation to attempt to step outside its international obligations.[66]

Similar reiterations of adherence to the prohibition of torture can be found in the British debate over the non-refoulement principle and the principle of not using third-party evidence if obtained by using torture.[67]

In comparison, the arguments put forward reveal two striking similarities: there is a generally shared acknowledgement as to the importance and validity of the torture taboo, outlined in customary and treaty law. However, and this is highly relevant to the theoretical debate on norm diffusion, in a situation where it would significantly limit (supposedly effective) measures against terrorist threats the national elites contest, albeit to different extents, the appropriateness of their duty to prohibit and/or

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[65] State Attorney's Office, Ministry of Justice (Israel), 'Response of the State Attorney's Office', as reprinted in B'Tselem–The Israeli Information Center for Human Rights and the Occupied Territories, *The "New Procedure" in GSS Interrogations and the Case of 'Abd A-Nasser 'Ubeid* (Jerusalem: B'Tselem, 1992) at 20, online: B'Tselem: <www.btselem.org/Download/199311_ The_New_Procedure_Eng.doc> and also quoted in Human Rights Watch/Middle East, *Torture and Ill-Treatment: Israel's Interrogation of Palestinians from the Occupied Territories* (New York: Human Rights Watch, 1994) at 12. Similar claims can be found in the various discussions with international treaty bodies and in responses to torture allegations put forward by national and transnational human rights organizations.

[66] Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Fourth periodic reports of States parties due in 2002, Addendum, United Kingdom of Great Britain and Northern* Ireland, UN Doc. CAT/C/67/Add.2 (2004) at para.14 [emphasis added].

[67] See Human Rights Watch 2006, *supra* note 28 at 14.

prevent (torture and) ill-treatment. Hence, politicians advance a contextualized interpretation, which is also backed by a significant segment of public opinion and academic discourse (see below).

4. The end of the taboo?

Although subject to contestation, the international prohibition of torture has neither been renegotiated nor reformulated. Rather, there are signs of a strengthening of international law on the issue. Even after 9/11, ratification rates are rising. In December 2002, an Optional Protocol to the *Convention against Torture* was adopted, which allows for the inspection of detention facilities in the member states, and in 2005 the Commission on Human Rights established the mandate of a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Both the UN treaty bodies and the Special Rapporteurs and Chairpersons of working groups (as mandated by the UN Commission on Human Rights) have issued a series of resolutions and reminders in which they reaffirm the prohibition of torture and other forms of ill-treatment in the context of anti-terrorism measures. Further signs of a strengthening of the prohibition can be found at the regional level.[68] In June 2002, the Organization of American States adopted the *Inter-American Convention against Terrorism*, which demands that 'any person who is taken into custody ... shall be guaranteed fair treatment including the enjoyment of all ... applicable provisions of international law.'[69] In the same year, the Council of Europe's Committee of Ministers adopted a guideline (IV on the absolute prohibition of torture), which states, 'The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities ...' [70] Two other guidelines–XV on possible derogations and XIII on extradition–reaffirm the absoluteness of the prohibition of torture and ill-treatment and the principle of non-refoulement, i. e. the prohibition against extraditing someone who is

[68] The following examples are taken from the 2003 Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/58/120 (3 July 2003), paras.17-22.

[69] OAS, General Assembly, 2d Sess., *Inter-American Convention against Terrorism*, OR AG/Res. 1840 (XXXII-O/02) (2002) at Art. 15(3).

[70] Council of Europe, Committee of Ministers, 804th Mtg., *Guidelines on Human Rights and the Fight against Terrorism*, H (2002) 4 (2002) at 4.

at risk of being tortured or subjected to inhuman or degrading treatment or punishment.[71]

With regard to the fear of a norm change as voiced by human rights activists, it must also be noted that not one single state challenged the absolute prohibition of *torture* in an international forum, such as the Committee against Torture's discussion of State Reports. On the contrary, presidents and state officials have reaffirmed the ban on torture (see above), which reveals that the norm cannot be contested all the way down.

As I will show in the next section, most theories of norm diffusion and compliance have a hard time dealing with norm contestation. First, these theories do not anticipate contestation and lack a conceptualization of re-interpretation of a norm in a given situation. Secondly, they work with the assumption of a logic of appropriateness, which is based on the content of transnational norms, not on the practice of norm followers.

IV. Contested meaning as a challenge for approaches on norm diffusion and compliance in international relations and international law

The contestation of a supposedly consensual norm remains unaddressed in the prominent approaches on human rights change and norm diffusion. Although rationalist and constructivist explanations of human rights change and norm diffusion vary considerably with regard to the mechanisms they identify and the changes they expect,[72] neither seriously considers controversies over the meaning of a given norm after the stage of formal norm acceptance (i.e. ratification). It is hence fair to say that the theory of international human rights law and its diffusion has widely overlooked processes of norm-contestation in national contexts after formal norm acceptance. The top-down approach treats international law as the place where the meaning of norms as standards of behaviour first becomes fixed, and from where, afterwards, norms obtain meaning. Methodologically, scholars following this approach derive the meaning of norms neither from public debate and discourse nor from the social practice itself, but rather from the legal discourse with reference to the text of a treaty. In these

[71] *Ibid.* at 6 and 7.

[72] See for example Ryan Goodman & Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 Duke L. J. 621 [Goodman & Jinks]; Schmitz & Sikkink, *supra* note 5; Beth Simmons, 'Compliance with International Agreements' (1998) 1 Ann. R. Pol. Sci. 75 [Simmons].

studies, norms are treated as the independent variable and characterized by a more or less specific set of convergent expectations about proper state behaviour. Convergent, not divergent, expectations are at the centre of norm definition in constructivist and rationalist institutionalism alike. Norms and institutions are widely understood as 'collective expectations for the proper behaviour of actors with a given identity'[73] or as 'a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations'.[74] Similarly, the consensus definition of a regime as brought forward by neoliberal, i.e. rational, institutionalism in the 1980s defined regimes as 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations *converge* in a given area of international relations'.[75]

Empirically, the literature on human rights change (and the broader literature on international regimes as well) has equated the text of law with the meaning of norms, and transfers the assumptions about 'convergence' and 'intersubjectivity' to human rights law. In their prominent model of the norm cycle, Finnemore and Sikkink even establish that, once a norm has been accepted, e.g. a law has been ratified, chances are actors will conform to the norm 'almost automatic[ally]'.[76] The idea is that norms become 'so widely accepted that they are internalized by actors and achieve a "taken-for-granted" quality'.[77]

Theories on human rights norms, such as the norm cycle model and the spiral model,[78] the legalization debate,[79] or the mechanism based approaches in human rights research—notably on acculturation and persuasion[80]—hardly account for the observed processes of contestation by Western

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[73] Peter Katzenstein, 'Introduction: Alternative Perspectives on National Security' in Peter Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press, 1996) at 5.

[74] James G. March & Johan P. Olsen, 'The Institutional Dynamics of International Political Order' (1998) 52 Int'l Org. 943 at 948.

[75] Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983) at 1 [emphasis added].

[76] Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887 at 904 [Finnemore & Sikkink].

[77] *Ibid.* at 895.

[78] See *ibid.*; Thomas Risse & Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices' in Risse *et al.*, *supra* note 20 [Risse & Sikkink].

[79] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, 'The Concept of Legalization' (2000) 54 Int'l Org. 401 [Abbott *et al.*].

[80] Goodman & Jinks, *supra* note 72.

democracies. Contestation poses a challenge for these approaches in at least four ways, outlined as follows.

(1) In realist and Gramscian accounts alike, it is widely believed that international law in general, and human rights law in particular, reflect the interests, values and worldviews of powerful states.[81] Considering the United States' hegemonic role in setting the normative structure of the international system after World War II and its leadership in drafting and ratifying the *Convention against Torture*,[82] it should especially be expected to comply with and rhetorically embrace civil and political rights and personal integrity rights. Furthermore, American foreign policy has a long history of providing incentives for human rights improvements, notably through the *Foreign Assistance Act*.[83] The United States is also the only country that publishes annual human rights reports, which scrutinize compliance with personal integrity rights, political and civil rights, and worker rights in almost every state worldwide.[84] Given this, how has the overt contestation of a human rights norm by the Bush administration been possible?

(2) It is widely believed that confident norm followers generally identify with broader normative structures, such as those represented by a liberal community or even a society of states, and embrace the norms of the

[81] Tony Evans, *US Hegemony and the Project of Universal Human Rights* (New York: Saint Martin's Press, 1996); Stephen D. Krasner, 'Sovereignty, Regimes, and Human Rights' in Volker Rittberger, ed., *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993) 139.

[82] Jane Mayer, *The Dark Side. The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008) at 150 [Mayer].

[83] *Foreign Assistance Act of 1961*, Pub.L. 87-195, 75 Stat. 424 (1961), (codified as amended at 22 U.S.C. § 2151 (2007)). In sections 116 and 502B, the *Foreign Assistance Act* links foreign aid to the observance of internationally recognized human rights. E.g. sec. 116 reads: 'No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or de-grading treatment or punishment ...' According to the sec. 101(2) FAA, US development cooperation policy (i.e. USAID) shall encourage 'development processes in which individual civil and economic rights are respected and enhanced'.

[84] The Country Reports on Human Rights Practices are released by the Bureau of Democracy, Human Rights, and Labor and submitted to the Congress by the Department of State in compliance with Sections 116(d) and 502B(b) of the *Foreign Assistance Act of 1961* (FAA), as amended. The first report, in 1977, covered 82 countries receiving US aid, while the most recent report, released in March 2008, covered 196 countries. See US Department of State / Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2007* (Washington, DC: US Department of State, 2008), online: U.S. Department of State <http://www.state.gov/g/drl/rls/hrrpt/2007/index.htm>.

community even if compliance is costly.[85] If norms matter for actors with a shared identity, one would expect liberal democracies to uphold rather than to contest liberal human rights norms. Furthermore, contestation of particular provisions of the *Convention against Torture* (and other treaties or provisions of customary law) challenges the notion that democracies are in general more likely to comply with international obligations. One would normally expect the '"enmeshment" of international commitments into domestic politics and political institutions', resulting in significant domestic constraints on state leaders, for example, by domestic interest groups.[86] How is it possible that liberal democracies, which are deeply embedded in international society, contest core human rights norms?

(3) According to the legalization approach, there are three distinct characteristics of law that international institutions and norms may possess: obligation, precision, and delegation.[87] The assumption that certain features of a rule promote a high degree of effectiveness and compliance can be found in both rationalist and constructivist perspectives on international institutions.[88] Precision in particular is explicitly viewed as enhancing voluntary compliance and limiting voluntary non-compliance: 'A precise rule specifies clearly and unambiguously what is expected of a state or other actor … in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation'.[89] Contested compliance with the prohibition of torture is puzzling for those following the legalization approach, since the degree of obligation, precision and delegation of the prohibition of torture and ill-treatment can be ranked comparatively high from the standpoint of human rights:

First, the sense of *obligation* created by the prohibition is very strong. The ban on torture is enshrined in 28 human rights documents, including the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights*, the UN *Convention against Torture*, and several regional

[85] Bull, *supra* note 14; Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); Frank Schimmelfennig, 'The Community Trap. Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union' (2001) 55 Int'l Org. 47.
[86] Simmons, *supra* note 72 at 84.
[87] Abbott *et al*., *supra* note 79.
[88] Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview Press, 1989); 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) at 4-5; Jeffrey Legro, 'Which norms matter? Revisiting the "failure" of internationalism' (1997) 51 Int'l Org. 31 [Legro].
[89] Abbott *et al*., *supra* note 79 at 412. See also Abram Chayes & Antonia Handler Chayes, 'On Compliance' (1993) 47 Int'l Org. 175.

human rights instruments—instruments that have high ratification rates. The Article 3 provisions common to the four Geneva Conventions of 1949 also outlaw 'cruel treatment and torture' as well as 'outrages upon personal dignity, in particular humiliating and degrading punishment'. This prohibition is part of customary law, and it is one of the few human rights that have attained the status of *jus cogens*.[90] Moreover, the prohibition of torture is non-derogable. Thus, even in times of war or crisis, states are obliged to prevent and punish any act of torture. Article 2 of the *Convention against Torture* holds that 'no exceptional circumstances whatsoever may be invoked as a justification of torture'.

Second, the prohibition of torture is rather *precise*. Article 1 of the *Convention against Torture* defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Different obligations such as effective legislative, administrative, judicial or other measures to prevent acts of torture are laid out in the *Convention* as well. It includes the principle of non-refoulement (Art. 3), the obligation to investigate alleged violations promptly (Art. 12), the prohibition of using evidence obtained through torture in legal proceedings (Art. 15), and other obligations of the States Parties.[91]

Finally, the degree of *delegation* is comparatively high. Under the *Convention*, the supervision of compliance, decisions on interstate and individual complaints (leading to non-binding 'views'), and the specification of obligations are delegated to the Committee against Torture. Recently, a mandatory system of inspection for national detention facilities was

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[90] As a peremptory norm (*jus cogens*), the prohibition of torture will render any treaty null and void that authorizes torture or is in any other conflict with the torture prohibition itself. On the legal consequences of *jus cogens* see Erika de Wet, 'The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law' (2004) 15 Eur. J. Int'l L. 97. As customary law, it binds states, even if they have not ratified any particular treaty.

[91] While comparatively precise, the *Convention* is nevertheless rather complex, which might impede its effectiveness, cf. Finnemore & Sikkink, *supra* note 76 at 907.

introduced as well.[92] How is it possible, then, that one of the most legalized human rights norms is contested?

(4) Sequenced analyses of norm diffusion, such as in the 'spiral model'[93] or the norm 'life cycle',[94] assume that norm followers are either pressured or persuaded into norm acceptance. Once the norm has been accepted, habitualization and iteration become the dominant modes of action in a norm-following state. Members of domestic bureaucracy, issue-area-related professions, law bureaucracies, and courts secure compliance with a norm. How is it possible that norm contestation takes place at such a late stage of the norm cycle?

V. How is contestation possible?

What are the conditions of this process of norm contestation? What insights can we gain from the reconstruction of the applied meaning of the torture prohibition in the context of threats to national security?

An excellent point of departure is Acharya's work, which explains the contestation of transnational norms with strong and unchallenged local norms, beliefs and practices. Contestation occurs when local actors doubt the utility of a transnational norm and when local actors fear that the transnational norm may undermine existing practices.[95] His concept of localization emphasizes the '"mutual constitutive" relationship' of transnational and local norms, in which external norms may be redefined to meet local beliefs and practices.[96] Which local beliefs and practices condition the full acceptance of the prohibition of torture and ill-treatment?

One observation is that contestation is only possible on the condition that political discourse constructs the necessity clause. Given the normative strength of the torture taboo, this clause is linked to the elites' argument that they are able to construct lawful measures that fall short of what is forbidden under international and domestic law. The clause is based on public fears

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[92] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, GA Res. A/RES/57/199, 42 I.L.M. 26 (entered into force 22 June 2006).
[93] See Risse & Sikkink, *supra* note 78.
[94] See Finnemore & Sikkink, *supra* note 76.
[95] Acharya, *supra* note 15, at 248 and 251.
[96] *Ibid.* at 251.

and the resulting demand that politicians take action against terrorism.[97] Furthermore, discourse draws a line between 'them' (the 'terrorists', the 'enemy') and 'us' (innocent citizens), and thus defines two separate groups and identities. In the constructed dilemma of weighing the rights of the one group against the rights of the other group, the answer is obvious:[98] the identifiable norm hierarchy is based on the norm of state security and the belief that the 'terrorists' do not have the right to full human rights protection. On these grounds, the construction of the necessity clause creates a situation of 'misfit' or incompatibility for the absolute prohibition of torture and ill-treatment and its complex system of rules. Contestation and resistance to compliance with the many provisions of international treaty law then stem from their (perceived) incongruence with the belief that the state shall protect its citizens effectively. Not surprisingly, local agents have been slow in challenging the necessity clause.

In the United States, politicians from both the Democrat and Republican camps and academics have trivialized cases of torture and ill-treatment or argued that they were *justified*,[99] and—at least until 2004—the American Congress was accused of reluctance to investigate accusations of abuse.[100] American public opinion is also said to have reflected on torture and human rights abuse only to a low degree.[101] According to Forsythe, particularly in the period between 2002 and 2004, neither American society as a whole nor a 'sizable public movement' protested the Bush administration's policies towards detainees.[102] According to Jane Mayer, the secrecy of the measures taken within these policies and the CIA's program itself meant that neither the public nor Congress had the means to argue against the Bush administration's claim that the torture prohibition had been respected.[103] Still, opinion polls reveal that 35 per cent of the Americans interviewed in September 2006 supported the use of torture in order 'to get information from a suspected terrorist' and 38 per cent supported 'more forceful

[97] Cf. Richard Goldstone, 'Combating Terrorism and Protecting Civil Liberties' in Richard Ashley Wilson, ed., *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005) at 166.
[98] Cf. Hooks & Mosher, *supra* note 25.
[99] For examples see *ibid*.
[100] *Ibid*. Cf. Forsythe 2007, *supra* note 10.
[101] Hooks & Mosher, *supra* note 25, at 1628.
[102] David P. Forsythe, 'United States Policy toward Enemy Detainees in the "War on Terrorism"' (2006) 28 Hum. Rts. Q. 465 at 480.
[103] Mayer, *supra* note 82 at 151.

interrogation techniques than the Geneva Convention standards'.[104] The percentages had hardly changed from an autumn 2001 poll that found 32 per cent support for 'torture of suspects held in the U.S. or abroad'.[105]

In a study on 'the social response to torture in Israel', Stanley Cohen also identifies patterns of trivialization and justification in different political factions of the Israeli government, none of which opposed the measures sanctioned by the Landau Report.[106] It was not until 1999, after several years of petitioning, that the Israeli High Court finally determined the unlawfulness of a general invocation of the necessity clause by the Landau measures, and reaffirmed that 'international law treaties – to which Israel is a signatory' prohibit the use of torture and ill-treatment: 'These provisions are "absolute". There is no exception to them and there is no room for balancing'.[107] Nonetheless, even the Court left a legal loophole for any interrogation officer who applied 'physical interrogation methods' for the purpose of saving human life: 'Our decision does not negate the possibility that the "necessity defense" will be available to GSS investigators—either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought.'[108]

The ticking bomb scenario has further support among some scholars (and has been vehemently criticized by others). Even before 9/11, Winfried Brugger, a German professor of law, saw an 'unavoidable clash of respecting versus protecting opposite constitutional demands, with innocent victims and a lawbreaker being the parties in question'.[109] Consequently, he proposed 'an internal exception clause in the provisions outlawing the use of

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[104] CBS News/New York Times Poll, September 15-19, 2006 (N=1,131 adults nationwide, Margin of Error ± 3); USA Today/Gallup Poll, September 15-17, 2006 (N=1,003 adults nationwide, Margin of Error ± 3); available at: <http://www.pollingreport.com/terror2.htm>.

[105] Figure taken from Abraham McLaughlin, 'How far Americans would go to fight terror', *The Christian Science Monitor* (14 November 2002), online: The Christian Science Monitor <http://www.csmonitor.com/2001/1114/p1s3-usju.html>. Asked if they could 'envision a scenario in the war against terrorism in which [they] would support any of the actions taken by the US or not' 32 per cent of the interviewees responded positively with regard to 'torture of suspects held by the US or abroad'. The Christian Science Monitor/TIPP was conducted from Nov. 7 to 11 (2002), and surveyed 920 adults nationwide. The margin of error is ± 3.

[106] Stanley Cohen, 'The Social Response to Torture in Israel' in Neve Gordon & Rachuma Marton, eds., *Torture. Human Rights, Medical Ethics and the Case of Israel* (London: Atlantic Highlands, 1995) 20.

[107] *Public Committee Against Torture in Israel*, *supra* note 10 at para.23.

[108] *Ibid.* at para.40.

[109] Winfried Brugger, 'May Government Ever Use Torture? Two Responses from German Law' (2000) 48 Am. J. Comp. L. 661 at 676.

torture unconditionally',[110] as means to allow for the 'only method of preventing a catastrophe or other grave illegalities, and that is to extract the necessary information from the terrorist'.[111] In a series of publications, Alan Dershowitz, professor of law at Harvard University, made the highly controversial suggestion to issue a judicial warrant that would review the necessity and at least increase accountability[112] for those cases in which 'torture is in fact being used and/or would in fact be used in an actual ticking bomb mass terrorism case'.[113]

As these comments illustrate, the invocation of effective methods to prevent terrorist attacks and to save the lives of innocent citizens may significantly weaken domestic opposition to a watering-down of international human rights norms. There is evidence of a contextualized standard of appropriateness, or a local belief, that is shared by many decision makers, academia, and public opinion irrespective of party position. Hence, the divide as to the meaning of human rights norms does not simply run between ruler and ruled or the military/police and civil society. A clear mapping of types of actors that hold the same meaning is thus difficult to maintain.

Another observation is that the identity of states as members of the international community and as 'civilized' nations is not constituted by the precise text of international human rights law, as a behaviourist version of constructivism would suggest. Claims for appropriate behaviour are not drawn from the views of the transnational human rights community, including the UN committees or other representatives of the global human rights regime. Apart from the already mentioned local norms and practices, it is the practice of other liberal democracies countering terrorism that serves as the point of reference and standard of appropriateness. For example, the spokesman of the Israeli government, Moshe Fogel, stated in 1999: 'What I have to tell you is that Western democracies, in similar situations to that which Israel finds itself, have used similar methods. And I think that *the proper standard to judge Israel is, of course, by Western standards – but Western standards which apply in wartimes.*'[114] Thus, what one will find when looking

[110] *Ibid.* at 674.
[111] *Ibid.* at 676.
[112] Alan M. Dershowitz, *Why Terrorism Works. Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002). See Chapter 4.
[113] Alan M. Dershowitz, 'The Torture Warrant. A Response to Professor Strauss' (2004) 48 N. Y. L. Sch. L. Rev. 275 at 277.
[114] Quoted in David Gollust, 'Israel/Torture' *Voice of America* (13 January 1999) [emphasis added], online: FAS <http://www.fas.org/irp/news/1999/01/990113-israel.htm>.

at domestic debates is a reinterpretation of the prohibition of torture and ill-treatment that deviates from the understanding upheld by human rights advocates and within international organizations. Depending on the respective discourse that is seen to reflect the 'true' meaning of the norm, states engage either in a contestation or a reinterpretation of the practical implications of the norm. The ticking bomb scenario and the necessity clause are powerful constructions in all of these discourses and are shared by many politicians, members of academia, and a substantial portion of society.

Finally, the applied meaning of the torture prohibition reveals a hierarchy between torture on the one hand, and ill-treatment on the other. Torture has a special stigma, is considered as a particularly grave human rights violation,[115] and is thus distinguished from ill-treatment in many human rights treaties, the rulings of domestic courts, and the European Court of Human Rights. Although case law and legal comments have emphasized the prohibition of both, the problem remains that the 'definitional threshold between ill-treatment and torture is often not clear'.[116]

In sum, we find that transnational norms are redefined to match local norms and practices and the norms and practices of peer-states.

VI. Conclusion

This article has collected evidence on norm contestation in several national contexts under conditions of the war on terror. Situations of internal and external crisis are particularly well suited to determine the legitimacy and the meaning of a norm. Through comparison, the arguments put forward reveal that actors feel bound by a principal obligation to refrain from torture (and ill-treatment), while the exact meaning of ill-treatment and the validity of Article 2 of the *Convention against Torture* (the absolute prohibition under all circumstances) and other articles (e.g. non-refoulement) are contested and redefined. As described, national elites have contested the appropriateness of an absolute prohibition of ill-treatment when it limits measures asserted to be effective against terrorist threats. Hence, politicians have advanced a contextualized interpretation that is clearly not provided for in international law, yet has support from a significant segment of public opinion and academic discourse, and fits past practices.

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[115] Manfred Nowak, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 Hum. Rts. Q. 809.

[116] CAT General Comment No.2, *supra* note 34, at para.3.

As the case studies illustrate, we find contextualized meanings of the transnational norms, i.e. reinterpretations of the prohibition of torture and ill-treatment. These are enacted to different degrees when state executives decide upon measures to counter terrorism. The reinterpretation can be summarized as follows: some forms of ill-treatment or some exceptions from the many provisions outlined in international treaty law to which these states are parties are deemed to be necessary in order to effectively counter threats to the civil population under a given state's jurisdiction. This does not mean that the torture taboo has ceased to exist. There are several techniques and historical motives for torture that have not been contested; hence one may conclude that torture is still thought of as inappropriate in order to terrorize people into submission, punish criminals, or as 'victor's pleasure'.[117]

The prohibition of torture and ill-treatment is characterized by a relatively high degree of precision, obligation, and delegation, which still have not been able to prevent non-compliance and contextualized interpretation. Yet, one other characteristic of law seems to be partially lacking. Because some of the norms surrounding the ban on torture are not considered to be useful and/or applicable in states of emergency, these norms lack legitimacy, an essential source of compliance[118] and social recognition. In particular, the prohibition of ill-treatment and the principle of non-refoulement lack congruence with official actions and past practices. Furthermore, they do not match the values of a significant share of society.

The implication for theories of norm diffusion and compliance is that human rights norms, even the most institutionalized ones, are not internalized or taken for granted to the full degree that the dominant model of human rights diffusion holds them to be. The explanatory power of the mechanisms identified most prominently in constructivist theories of norm diffusion, i.e. persuasion, social and cognitive pressure, and arguing/rhetorical self-entrapment, are all confronted with the challenge of how to deal with the construction of a necessity clause.

Theory-guided and mechanism-based research on human rights change could hence further specify its scope and conditions in situations of norm contestation. The mechanism of persuasion and socialization must specify the relevant domestic actors that need to be persuaded in order to make the transnational norm congruent with national or local norms. The mechanisms

[117] David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 Va. L. Rev. 1425 at 1432ff.
[118] Martha Finnemore & Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 Int'l Org. 743; Checkel, *supra* note 15; Legro *supra* note 88.

of social and cognitive pressures or 'acculturation'[119] could specify which agent or group may successfully pressure the executive in a situation in which the validity and meaning of a norm are contested in public debate (e.g. national courts). And the strength of a mechanism based on the logic of arguing, such as rhetorical entrapment,[120] which is explicitly based on 'a common life world' could be re-evaluated in a world of incongruent belief systems and diverse life views.

A theoretical background in (critical) constructivism offers the underlying assumption of norm flexibility, contestation, and change. In particular, sociological institutionalism has elaborated on 'decoupling' in situations of divergent or competing expectations in organizational environments; an approach that has been applied to states as well.[121] And Acharya has advanced a theory of norm localization, which suggests that norm acceptance depends on the local context, e.g. the legitimacy of norm-takers and the credibility and prestige of local agents.[122] Brought together, these approaches teach us that we need a better understanding of the persistence and dynamics of local norms and the mechanisms by which local norms are challenged from within. As indicated in this article, there have been some judgments by domestic and regional courts in cases of alleged torture and ill-treatment or related violations that narrow the field of legitimate meanings. The necessity construct as such has, however, not been entirely challenged.

[119] See for example Goodman & Jinks, *supra* note 72 at 518.
[120] Thomas Risse, '"Let's argue!" Communicative Action in World Politics' (2000) 54 Int'l Org. 1.
[121] John W. Meyer & Brian Rowan, 'Institutionalized Organizations. Formal Structure as Myth and Ceremony' (1977) 83 Am. J. of Soc. 12; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).
[122] Acharya, *supra* note 15 at 269.

Contested Compliance in a Liberal Normative Structure

The Western Hemisphere Idea and the Monitoring of the Mexican Elections

ARTURO SANTA-CRUZ*

I. Introduction

In August 1994, a vast network of national and foreign observers and United Nations (UN) officials—over 81,000 in total—was present at the Mexican presidential elections.[1] This throng was larger than in any previous monitoring experience. But more than the sheer number of monitors, it was their mere presence that was significant. No observation effort had taken

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[1] Instituto Federal Electoral, *Memoria del Proceso Electoral Federal* (Mexico City: IFE, 1995) at 259, 278.

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place in the previous 1988 presidential elections. Moreover, in 1990 president Carlos Salinas had declared that Mexico's democracy was 'not subject to external evaluation.'[2] Similarly, the following year Mexico's representative at the Organization of American States (OAS) had stated, 'The Mexican government considers as a matter of national sovereignty the organization and vigilance of its electoral processes, and is opposed to the participation of foreign observers.'[3] Thus, when in 1992 the OAS General Assembly voted to amend its *Charter* to allow suspension from the Organization of a government that has overthrown a democratic regime, Mexico cast the only dissenting vote. As late as December 1993, Mexico expressed its opposition to foreign election monitors at the UN. Even in early in 1994, Salinas' party turned down an American proposal to send observers to the upcoming Mexican elections.[4] As Robert Pastor noted, 'There is no country in the world which is more sensitive to U.S. efforts to influence it than Mexico, and no country as successful in resisting American influence.'[5] For Mexico, therefore, accepting foreign observers in 1994 was a major breakthrough. What accounts for this about-face of one of the staunchest supporters of the traditional conception of state sovereignty?

True, during the first months of 1994—with the Zapatista uprising and the assassination of the government party's presidential candidate—the Mexican regime faced one of its most serious credibility crises, and the acceptance of foreign monitors was no doubt a calculated move on the part of the Salinas government. It seemed logical to resort to an institutionalized network of foreign observers to enhance its legitimacy—domestically and internationally—by stamping a seal of approval on the impending electoral process. Interestingly, Mexico had consistently opposed the creation of the very network to which it was now reaching—but that is a paradoxical anecdote. What is more intriguing is that the Mexican government was able to resort to such a network. A decade earlier that network did not exist, at least not at the level of the mid-1990s. Likewise, at the global level, the monitoring norm had not developed to the extent it had by 1994. For

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[2] Mark A. Uhlig, 'Mexico's Salinas Rains on His Own Parade' *New York Times* (25 November 1990), A3.

[3] René Delgado, 'Observando a los observadores' in J. Alcocer and R. Morales, eds., *La organización de las elecciones. Problemas y proyectos de solución* (Mexico City: Porrúa 1994) at 131 [Delgado] [translated by author].

[4] Jaqueline Mazza, *Don't Disturb the Neighbors: The United States and Democracy in Mexico, 1980-1995* (New York: Routledge, 2001) at 108 [Mazza].

[5] Robert Pastor & Jorge Castañeda, *Limits to Friendship: The United States and Mexico* (New York: Vintage Books, 1989) at 10.

instance, UN Secretary-General Javier Pérez de Cuellar noted in 1988 that the UN 'does not send observers to elections' in sovereign states.[6]

Pérez de Cuellar's comment reflects the belief that in the modern state system issues of domestic governance in sovereign states have traditionally been placed outside the realm of international action. In the postwar period national elections are considered to fall within Article 2(7) of the UN *Charter*, which establishes that the organization and its member states cannot intervene 'in matters which are essentially within the domestic jurisdiction of any state.' However, this doctrine is not as strong in the Americas. The OAS has taken part in the domestic affairs of its member states through the monitoring practice since the early 1960s. Mexico had remained one of the unfaltering defenders of traditional conceptions of state sovereignty and so, as noted, had opposed foreign monitoring of electoral processes. By accepting the international monitoring norm by the time of the 1994 electoral process, therefore, Mexico can be considered to have transformed into a 'designated norm follower.'[7] The questions that arise from this development relate not only to the swift diffusion of the monitoring practice, but also to the development of the inherent contestation process of this particularly difficult case.

The context of the 1994 Mexican elections, then, was framed in terms of the convergence of two usually separate international monitoring problematiques: a protracted transition to democracy and state sovereignty. Furthermore, the Mexican case study epitomizes the complex interaction of state and non-state actors, both at the domestic and international levels, characteristic of the normalization process of International Election Monitoring (IEM). I consider Mexico's acceptance of election monitoring in light of the wider normative structure of the western hemisphere, which I argue played an important role both in this specific development and in the emergence of IEM. My hypothesis is that by engaging in IEM in 1994, Mexico partially redefined its sovereignty. During this process, both state and non-state actors engaged in a two-level game; making strategic moves on the external front to use the gains obtained there on the domestic front,

[6] Quoted in David Stoelting, 'The Challenge of UN-Monitored Elections in Independent Nations' (1992) 28 Stan. J. Int'l L. 371 at 372.

[7] Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 Eur. J. Int'l Rel.189 at 197 [Wiener 2004].

and vice versa.[8] The tactical character of the endeavour, though, was consistently framed within the normative structure of the continent. Actors constantly resorted to the 'stock of interpretive patterns' developed in the region.[9] The existence of this patterned practice made it possible for an international norm to spread—though not without contestation—in this groundbreaking way.

Furthermore, I argue that election monitoring partially altered Mexico's national interests. International norms do not just float over the international system; they are rooted in state practices and state interests. As the link between the international system and the sovereign states that compose it, norms affect the continuous process of mutual reconstitution in which they (the system and states) are engaged. A new international norm thus creates a new kind of relationship among the constitutive units of the system. Hence, I venture that sovereign states, including the hard cases of designated norm followers such as Mexico, have agreed in the last decades to have their elections monitored by international organizations both because of the pressure of non-governmental actors ('social influence'), and because they have come to conceive of the new contract among sovereign states as beneficial to their interests ('socialization').[10] The last point is important; it suggests that learning exists and that actors' preferences do change. In the case at hand, Mexican authorities' conception of IEM was dramatically altered by the 1994 experience, as demonstrated by the four subsequent electoral processes in the country, as well as the participation of Mexican monitoring missions abroad ever since.

A focus on norm contestation usefully sheds light both on the changing meaning of norms and on the legitimacy-building process. It is, after all, primarily through conflicting interaction that the legitimacy of the normative structure—be it domestic, national or supranational—is created. As Wiener and Puetter note, 'norm contestation is a necessary component to improve norm acceptance.'[11] As Mexico was both a reluctant and a strategic norm follower, tracing the process of normative contestation should prove useful in elucidating the meaning of the monitoring practice. My approach echoes

[8] Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 Int'l Org. 427.

[9] Jürgen Habermas, *The Theory of Communicative Action, Volume Two. Lifeworld and System: A Critique of Functionalist Reason* (Boston: Beacon Press, 1989) at 10 [Habermas].

[10] Alistair Iain Johnston, 'Treating International Institutions as Social Environments' (2001) 45 Int'l Stud. Q. 487.

[11] Antje Wiener and Uwe Puetter, 'The Quality of Norms is What Actors Make of It' (2009) 5 J. Int'l L. and Int'l Rel. 1. [Wiener and Puetter 2009].

what has been called 'critical' constructivism. In this framework, discursive interventions are constitutive of social norms and meanings; the emphasis is placed on interaction-based change.[12] It is through the interplay between norm-setters and norm-followers that social change occurs, and that a structure of meaning-in-use emerges.[13] Therefore in the account below I stress discursive interventions such as policy statements, political debates and interviews with the central players of the Mexican experience with IEM.

I support the proposition that states, and more precisely Mexico, have accepted IEM both because of social influence and because of a novel understanding of their self-interest in two ways. First, I demonstrate how NGOs campaigned for international monitors before the Mexican government agreed to allow their presence. Second, I look for discursive interventions in which state officials justify their change of mind regarding international observers (either to hard-liners within the regime or to the public at large). The selection of both the Mexican election as the case study and the chosen interviewees was straightforward. The first was chosen because of the importance of the event, as the 1994 experience has been widely recognized as a watershed in the monitoring practice in Mexico. Regarding the second, the reconstruction of what transpired in order to make the foundational argument possible is best achieved by talking to its main actors. By means of a contextualized approach, I show how social practice contributed to the acceptance of the IEM norm by a designated norm follower.

This article is organized as follows. In the first section I introduce my general argument on the normative structure of the Americas as 'lifeworld', on state sovereignty, and on IEM as an issue area. In the second I look at the emergence of election monitoring in Mexico; considering the evolution of this practice is important because it sheds light on the specificities acquired by the 1994 election. In the third section I consider in more detail the 1994 electoral process, focusing on the three main actors involved in its monitoring: Alianza Cívica (Civic Alliance; henceforth AC), the UN, and the Carter Center (CC). In section four I briefly review the unfolding of this

[12] Antje Wiener, 'Constructivist Approaches in International Relations Theory: Puzzles and Promises', online (2006) ConWEB 5 at 12, 23 <http://www.bath.ac.uk/esml/conWEB/Conweb %20papers-filestore/conweb5-2006.pdf>. See also Karin Fierke, 'Constructivism' in Tim Dunne, Milja Kurki & Steve Smith, *International Relations Theory: Discipline and Diversity* (Oxford: Oxford University Press, 2006).

[13] Wiener and Puetter 2009 *supra* note 11.

practice in the four ensuing electoral processes in Mexico (1997, 2000, 2003, and 2006). I conclude by highlighting the theoretical implications of this study.

II. The Western Hemisphere's Normative Structure, IEM, and State Sovereignty

The combination of a series of systemic and domestic factors in the Americas made the environment in that hemisphere particularly conducive to the emergence of IEM; and its claim to be the region where this practice emerged is noteworthy.[14] The notion of the Americas as a region is closely related to what has come to be known as the 'Western Hemisphere Idea' (WHI). As early as 1813, Thomas Jefferson wrote that the governments to be formed in the nascent states

> will be *American* governments, no longer to be involved in the never-ceasing broils of Europe. The European nations constitute a separate division of the globe; their localities make them a part of a distinct system... America has a hemisphere to itself. It must have a separate system of interest which must not be subordinated to those of Europe.[15]

According to Arthur P. Whitaker, Jefferson's statement was 'the first flowering' of the WHI.[16]

By WHI, Whitaker refers to 'the proposition that the peoples of this Hemisphere stand in a special relationship to one another which sets them apart from the rest of the world.'[17] By producing and reproducing both the fundamental—and often contradictory—values holding the region together, and a social order among the members of the hemisphere, this interplay gave rise to a distinctive conception of state sovereignty. This idea of sovereignty allowed IEM to emerge in the Americas before anywhere else, because the composite understanding of sovereignty in the Americas had two constitutive elements: representative government (and later human rights broadly speaking) and non-intervention. For instance, for all the importance

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[14] Arturo Santa-Cruz, 'Constitutional Structures, Sovereignty, and the Emergence of Norms: The Case of International Election Monitoring' (2005) 59 Int'l Org. 663.
[15] Quoted in Wilfrid Hardy Calcott, *The Western Hemisphere: Its Influence on United States Policies to the End of World War II* (Austin: University of Texas Press, 1968) at 14 [emphasis added].
[16] Arthur P. Whitaker, *The Western Hemisphere Idea: Its Rise and Decline* (Ithaca: Cornell University Press, 1954) at 29 [Whitaker].
[17] *Ibid.* at 1.

Latin American and Caribbean states attached to the non-intervention principle, at the 1928 Havana Pan-American Conference the Cuban representative warned that '[if] we declare in absolute terms that intervention is under no circumstance possible, we will be sanctioning all the inhuman acts committed within determined frontiers.'[18] In a similar vein, Uruguayan Foreign Minister Alberto Rodríguez Larreta wrote in his famous 1945 note, 'The purest respect for the principle of non-intervention of one state in the affairs of another ... does not protect unlimitedly the notorious and repeated violation by any republic of elementary rights of man.'[19] Article 5 of the 1948 OAS *Charter* makes this composite understanding of sovereignty explicit. While it notes that "[t]he solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy,' it also states that "[i]nternational order consists essentially of respect for the personality, sovereignty and independence of States.' It was the OAS as the institutional manifestation of the continental normative structure that allowed the states of the hemisphere to become the pioneers in IEM. Not incidentally, Whitaker notes that the WHI was 'a laboratory and proving ground for policies, institutions, and experiences that were later applied with advantage in the broader field of world affairs.'[20]

Since the early nineteenth century, the American states had been constructing what Jürgen Habermas calls a 'lifeworld'. By this the German political theorist means 'a culturally transmitted and linguistically organized stock of interpretive patterns.'[21] In Habermas' conception, the lifeworld has three structural components. The first, culture, is 'the stock of knowledge from which participants in communication supply themselves with interpretations as they come to an understanding about something in the world.'[22] Society, the second element, has to do with 'the legitimate orders through which participants regulate their membership in social groups and thereby secure solidarity.'[23] Personality, the third structural component of the lifeworld, refers to 'the competences that make a subject capable of

[18] Quoted in Kathryn Sikkink, 'Reconceptualizing Sovereignty in the Americas: Historical Precursors and Current Practises' (1997) 19 Hous. J. Int'l L. 705 at 708.
[19] Quoted in C. Neale Ronning, *Law and Politics in Inter-American Diplomacy* (New York: John Wiley and Sons, 1963) at 68.
[20] Whitaker, *supra* note 16 at 177.
[21] Habermas, *supra* note 9 at 124.
[22] *Ibid.* at 138.
[23] *Ibid.*

speaking and acting, that put him in a position to take part in processes of reaching understanding and thereby to assert his own identity.'[24] As Thomas Risse-Kappen notes, 'the degree to which a common lifeworld exists in international relations varies considerably according to world regions and issue-areas.'[25] I would argue that the American states have developed not only a shared stock of knowledge and distinct and recognized personalities, but also a sense of belonging to a distinct society—the one demarcated by the WHI.[26]

It was the ever-present tension between the two components of the regional understanding of sovereignty (representative government and non-intervention) that allowed the states in the hemisphere to embark early on in IEM. IEM thus emerged as an issue area specific to the region thanks to the WHI. Within this context, the agency of (state and non-state) actors acquired specific meaning. It was thus in the space created by the normative structure that the practice of IEM, which involved the network of INGOs as well as American states and intergovernmental organizations, emerged in the 1980s.

Within this issue area, states adopted specific identities and played certain roles. But these roles and identities were not merely idiosyncratic, nor did they correspond to completely discrete agents. They were part of a structure and therefore should be considered as a manifestation of structural determinants.[27] In this framework, the states' foreign policy regarding IEM acquires a structural component. It ceases being mere process, as in most systemic IR theories. The state, or more concretely, its domestic structure,[28] becomes process—a process in which both state and non-state actors interact and contribute to create IEM as a new area of practice.

Thus, in the western hemisphere the regional organization—the OAS–sent groundbreaking missions to Costa Rica and the Dominican Republic in 1962.[29] The monitoring practice continued sporadically in the following

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[24] *Ibid.*

[25] Thomas Risse-Kappen, '"Let's Argue!" Communicative Action in World Politics' (2000) 54 Int'l Org. 1 at 16.

[26] The WHI might be thought of as the Americas' non-legalized version of the European *acquis communautaire*.

[27] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 258.

[28] See Thomas Risse-Kappen, 'Bringing Transnational Relations Back In: Introduction' in Thomas Risse-Kappen, ed., *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge: Cambridge University Press, 1995).

[29] Although, it should be noted, by current standards the observation carried out back then was more symbolic than real.

years, with the OAS having undertaken over twenty missions by the mid-1980s.[30] This tradition of continental engagement on issues of democratic governance allowed the OAS to establish the Unit for the Promotion of Democracy (UPD), in 1990. Among the UPD tasks is the monitoring of elections in member states that so request. Furthermore, at the twenty-first regular session of its General Assembly the following year, the foreign ministers of the OAS adopted a declaration entitled the *Santiago Commitment to Democracy and the Renewal of the Inter-American System*. Noting that the end of the Cold War had brought 'new opportunities and responsibilities', the member states declared their renewed and expanded commitment to the promotion and defense of representative democracy and human rights. Going further, the next day the organization passed Resolution 1080, which creates a mechanism to react to 'the sudden or irregular interruption of the democratic political institutional process' in any member state.[31]

With the 1991 Santiago Commitment and Resolution 1080, as Domingo Acevedo notes, 'For the first time, an international organization has explicitly ruled that governments should be held internationally accountable to the regional community for the means by which they have taken and secured power.'[32] Among other things, the new institutional setting reinforced the underlying rationale for observing elections: issues of democratic governance are part and parcel of the continental understanding of state sovereignty. IEM's effect on the construction of sovereignty has thus been straightforward: the recognized rights of states are now explicitly delimited by an international element. As UN Secretary-General Boutros Boutros-

[30] See João Clemente Baena Soares, *Profile of a Mandate: Ten Years at the OAS* (Washington, D.C.: Organization of American States, 1994) at 141-151.

[31] OAS, General Assembly, 5th Sess., *Representative Democracy*, OR AG/RES.1080 (XXI-0/91) (1991) at para.1.

[32] Domingo E. Acevedo, 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy' in Lori Fisler Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations, 1993) at 141. Emphasizing this trend, in December 1992 the OAS General Assembly approved the *Protocol of Washington*, which provides that a state 'whose democratically constituted government has been overthrown by force may be suspended' from participation in the regional organization by a two-thirds vote of the member States (entered into force in October 1997); OAS, General Assembly, 16th Sess., *Protocol of Amendments to the Charter of the Organization of American States "Protocol of Washington"*, OR OEA/Ser.A/2, add.3 (1992). Going even further, on 11 September 2001 the General Assembly of the OAS adopted the *Inter-American Democratic Charter,* OR OEA/Ser.P/AG/Res.1 (XXVIII-E/01), which establishes procedures to follow not only in the case of a democratic rupture, but also when a democratic regime is seriously altered or at risk.

Ghali put it in 1992, 'The sovereignty of states must be considered under the sovereignty of human rights.'[33]

In the Mexican example, the right to free and fair elections was widely recognized by the early 1990s as a human right—and Mexico had implicitly become a designated norm follower. As noted, this change in the system-wide understanding of human rights and sovereignty had its origins in the Americas, where IEM resonated with the normative structure of the continent—the WHI. Furthermore, it was in the Americas where NGOs started to systematically monitor elections. For example, the Washington Office on Latin America (WOLA) began watching elections in 1978, sending observers to Bolivia. Two years later it observed the Guyana elections; in 1981 the electoral process in Honduras; and in 1983 WOLA observers monitored the elections in Argentina. That same year the International Human Rights Law Group (henceforth Law Group) established its Election Observer Project, working with activists in target states. In 1984, WOLA and the Law Group jointly observed the elections in Nicaragua and Uruguay.[34] The Law Group also observed the elections in Grenada that year and those in El Salvador and Guatemala in 1985. These organizations' pioneering work was in part made possible by the continental discourse on human rights and democracy.

It was only after the entrance of NGOs into IEM—often by interacting with inter-governmental organizations—that this practice became 'real' (in the sense of being performed thoroughly), and that an IEM network emerged. Further, by turning electoral processes into international events, sovereignty was partially redefined. Previous IEM practice, enshrined in the continental lifeworld, paved the way for the Mexican experience both by consolidating the network to which the Mexican government would subsequently resort, and more fundamentally, by pushing the monitoring norm to the international arena.

III. The Origins of Election Monitoring in Mexico

Election monitoring got off to a rough start in 1991. That year, the leftist Party of the Democratic Revolution (PRD) invited four members of Canada's

[33] Quoted in Inter-American Dialogue, *Convergence and Community: The Americas in 1993* (Washington: The Aspen Institute, 1992) at 31.

[34] International Human Rights Law Group and Washington Office on Latin America, *From Shadow into Sunlight: A Report on the 1984 Uruguayan Electoral Process* (Washington, D.C.: International Human Rights Law Group-Washington Office on Latin America, 1985).

New Democratic Party to observe the February 1991 elections in the southern state of Morelos. But the experience was hardly a success. The observers did not speak Spanish, their arrival to Morelos took place two days before the elections, and they did not even visit the polling sites. Nonetheless, the observers' presence caused strong adverse reactions. Alfonso Martínez Domínguez, a Senator of the ruling Institutional Revolutionary Party (PRI) and former party leader, said the observers were 'unacceptable'.[35] Antonio de Icaza, who had just left his position as Mexico's representative to the OAS declared, 'we do not have anything to hide, but we are not going to submit to anybody nor do we accept any kind of tutelage.'[36] Manuel Barquín, a magistrate counselor at the Electoral Federal Institute (IFE) went further, arguing, '[the observers'] presence can even be dangerous for the political process.'[37] After that first experience, the PRD—as well as other opposition parties—abandoned the idea of inviting foreign observers. But Mexican NGOs did not forget.

Later that year, a group of NGOs started election monitoring in a more consistent fashion. The Democratic Assembly for Effective Suffrage, the National Accord for Democracy, the Study Center for a National Project, and the Mexican Academy of Human Rights (AMDH), observed the 1991 electoral processes[38]–some being inspired by the civic undertaking of the Chileans three years earlier. As two leaders of the Mexican monitoring efforts put it,

> The success achieved by the Chilean civil society [in the 1988 plebiscite] contrasted with the experience of Mexican society, which in 1988 was subjected to the most incredible and huge vacuum of information decreed by the government … Following the steps of the Chilean effort, several not-party affiliated citizen groups started to organize monitoring efforts [in 1991.][39]

The monitoring practice in other latitudes thus had an effect in Mexico.

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[35] Quoted in Homero Campa, 'Los observadores canadienses informarán de testimonios recibidos, pero no opinarán' *Proceso* 750 (18 March 1991) at 28.

[36] *Ibid.*

[37] *Ibid.*

[38] Delgado, *supra* note 3 at 136-139.

[39] Enrique Calderón Alzati & Daniel Cazés, 'La observación ciudadana del proceso electoral' in Enrique Calderón Alzati & Daniel Cazés, eds., *Las elecciones presidenciales de 1994* (Mexico City: La Jornada Ediciones-UNAM, 1996) at 145 [Calderón Alzati & Cazés].

Of the organizations just mentioned, the AMDH would constitute itself into one of the leading actors in the 1994 monitoring exercise within the umbrella organization AC, having observed fifteen local elections between 1991 and 1993.[40] During its foundational experience as an election-watch organization in the state of San Luis Potosí, the AMDH joined forces with a local NGO, the Potosino Center for Human Rights, so that more than 300 domestic observers monitored the San Luis Potosí gubernatorial elections in 1991. Interestingly, part of the funding for that drive came from the Canadian International Centre for Human Rights and Democratic Development, with which Elizabeth Spehar, later head of the OAS' UPD, was involved.[41] But perhaps more significant is the way the human rights agenda was expanded so as to include the electoral aspect. As AMDH's Sergio Aguayo recollects,

> I had been candidate to the presidency [of the AMDH] with a platform in which I had spelled out very clearly that I wanted to be president to include the issue of civil rights, electoral rights, political rights. And that is the way I won. So I arrived [to the presidency] with the clarity that I was going to do something. Now, I did not have any idea of how I was going to push the agenda.[42]

Then the CC invited him to observe the 1990 elections in Haiti. By then, the main rationale for election monitoring had settled in: 'the idea that elections could be an instrument for change.'[43] And in the process of recognizing the importance of elections as a means for change, according to Aguayo, the experiences of other countries was fundamental.[44]

Thus, the next year Aguayo, on behalf of eight Mexican observer groups, invited the CC, through Robert Pastor, to accompany them in observing the state elections in Chihuahua and Michoacán.[45] But the CC also wanted a government invitation. Pastor tried to convince Salinas, whom he had met at Harvard when both were graduate students, to extend one, but Salinas

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[40] Sergio Aguayo Quezada, 'A Mexican Milestone' (1995) 6 J. Democracy 6 157 at 159 [Aguayo Quezada 1995].

[41] Interview of Sergio Aguayo (8 May 2002) [Aguayo, Interview 2002]. See also *ibid*.

[42] Aguayo, Interview 2002, *ibid*. [translated by author].

[43] *Ibid*. [translated by author].

[44] Interview of Sergio Aguayo, (16 August 2000) in Mexico City [Aguayo, Interview 2000].

[45] Interestingly, Genaro Arriagada, who played a crucial role both in the 1988 Chilean plebiscite in general and in its international monitoring in particular, was a mission-member. As he recalls, 'there were op-eds in the newspapers asking that we be expelled… Salinas' advisors met with us [but] it was a drag, with people following us, with guards at the hotel.' Interview of Genaro Arriagada (9 August 2001) in Santiago [translated by author].

would not accept foreign observers in a Mexican electoral process. Pastor suggested a compromise: the CC's group would simply 'witness the observation of the elections in Michoacán and Chihuahua' in July 1992, but it would not comment on the elections themselves.[46] By that time, the Mexican government was well aware that the idea of IEM was hovering around Mexico. In February 1990, President Salinas had declared that 'a Country that leaves the organization and sanction of its internal political processes to foreign forces, is giving away its sovereignty.'[47] More to the point, the day after Salinas' declaration appeared, the head of the IFE (the electoral body) asserted that 'nobody certifies Mexicans.'[48] It was, as Jorge Chabat put it at the time, 'as though the Mexican states's [*sic*] traditional concept of sovereignty has found its last refuge in the ballot box.'[49] And in October 1990, foreign minister Fernando Solana declared that the country's problems regarding democracy would need to be solved by Mexicans 'and not by importing specialized observers from Atlanta or Milwaukee who tell us how to do things.'[50]

Nevertheless, people from Atlanta were present in Chihuahua and Michoacán two years later. Trying to persuade his former graduate fellow to let foreign observers in for future occasions, Pastor went back to Mexico City after the elections, and told Salinas that although in his judgment the elections had gone reasonably well, 'I can't say anything about the elections because you told me [not to comment on them], so all we can do is talk about the election observers, and that's what we are going to do.'[51] Salinas was not moved. His government continued to refuse foreign observers in Mexico. For example, an electoral reform passed in 1993 did not even mention foreign observers.

But the government was not the only body resistant to receiving foreign observers. In a pioneering study, 'International Observers: The Citizenry's

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[46] Todd A. Eisenstadt, *Electoral Justice in Mexico: From Oxymoron to Legal Norm in Less Than a Decade: A Case-Based Analysis of the Evolution of Mexico's Federal Electoral Courts (1988-1997*) (Atlanta: Carter Center Working Papers, 1998) at 4.

[47] Quoted in Rodrigo Vera, 'Ante la presión de Estados Unidos, Colosio anunció lo que rechazaba el presidente: se aceptarán observadores electorales extranjeros' *Proceso* (14 March 1994) 10 at 11 [translated by author].

[48] Quoted in Delgado, *supra* note 3 at 130 [translated by author].

[49] Jorge Chabat, 'Mexico's Foreign Policy in 1990: Electoral Sovereignty and Integration with the United States' (1991) 33 J. Interam. Stud. & World Affairs 1 at 17.

[50] Quoted in *ibid.* at 14.

[51] Interview of Robert Pastor, (5 September 2000) in Atlanta [Pastor, Interview 2000].

Perception,' José Antonio Crespo found that 63 per cent of those polled (in November 1990) rejected the presence of foreign observers in Mexican elections.[52] In this sense, as Crespo observes, 'the official [i.e. governmental] justification for rejecting foreign supervisors [*sic*] has fallen in fertile soil.'[53] As political analyst René Delgado put it in the early 1990s, 'promoting the presence of foreign observers in elections, at the moment, is not completely advisable … the practice of election observing, for the moment, should be carried out by national groups.'[54] There was thus widespread suspicion of foreign monitoring.

Furthermore, the international environment was relatively benign vis-à-vis the Mexican government's position. This was not just the traditional benign neglect of the United States toward the state of democracy of its southern neighbour.[55] There was a true fascination in the United States with the Salinas administration's touted modernization of Mexico—and the Mexican president had explicitly noted that he did not want foreign 'meddling' in Mexican politics. As Crespo points out, 'the international pressure so that transparent electoral processes in our country take place, without being nonexistent, shows a much lower intensity than the one registered in other cases, such as that of Chile during the Pinochet dictatorship or that of Sandinista Nicaragua.'[56] Thus, in the dawn of the Salinas administration, as Crespo surmises, 'neither are the pressures on the government to invite international observers so strong, nor is the internal political situation so chaotic, nor is the PRI's confidence in winning over its competitors in a completely clean manner sufficient.'[57]

As a matter of fact, in the early 1990s not even opposition forces were convinced about the advantages of inviting foreign observers to domestic elections. After the timid 1991 precedent in the state of Morelos, the PRD pretty much dropped the matter; hence, it did not invite foreign observers to that year's mid-term elections. Still, in May 1992, future presidential candidate (1988) Cuauhtémoc Cárdenas travelled to Atlanta, where he talked to former president Carter about international observers. Nevertheless,

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[52] José Antonio Crespo, *Observadores internacionales: la percepción ciudadana, Documento de trabajo 3* (Mexico City: CIDE, 1992) at 9 [translated by author] [Crespo].
[53] *Ibid.* at 10.
[54] Delgado, *supra* note 3 at 140 [translated by author].
[55] Cf. Lorenzo Meyer, 'Mexico: The Exception and the Rule' in A. F. Lowenthal, ed., *Exporting Democracy: The United States and Latin America* (Baltimore: Johns Hopkins University Press, 1991).
[56] Crespo, *supra* note 52 at 8 [translated by author].
[57] *Ibid*.

inviting foreign observers was not popular in the PRD. Cárdenas did not pursue the issue further.[58]

Similarly, the conservative National Action Party (PAN) took an ambiguous position vis-à-vis foreign observers—although in a way it was this party that introduced the issue, if indirectly.[59] After considering that it had been the victim of electoral fraud in the 1986 gubernatorial elections in the state of Chihuahua, and in the municipal elections in the capital city of the state of Durango, the PAN had taken an unprecedented action: to take its case to the Inter-American Commission on Human Rights. In 1990, the Commission ruled in favour of the PAN,[60] but by that time the PAN seemed to have decided not to emphasize the issue of foreign assistance anymore. Bringing electoral matters to an international forum had caused strife within the party. In 1991, Luis H. Álvarez, its national leader and one of the key figures in the 1986 Chihuahua protest movement, declared that the PAN had no official position regarding the presence of foreign observers in Mexico. He noted, however, 'The issue is being amply debated by different groups, and it is understandable that it be that way, since the presence of observers in electoral processes is already a universal practice. Only very few countries are still reluctant to such vigilance.'[61] The PAN's ambivalence was in part due to fear that, as a co-architect of the 1990 electoral reform, its endorsement of external observers could somehow be taken as its recognition that the reform was flawed—as the PRD maintained.

In any case, Mexican NGOs continued their relationship with the CC. After Mexican observers pointed out to CC delegates during their 1992 visit to Mexico that, while the CC roamed the world observing elections and giving advice to others they had never invited foreigners to do the same in their country, the CC decided to invite a Mexican delegation to observe that year's American presidential election.[62] The CC intended the mission to be plural, so in addition to representatives from observer groups and an independent political analyst, it also invited representatives from Mexico's

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[58] Jorge Castañeda, *Sorpresas te da la vida: México 1994* (Mexico City: Aguilar, 1994) at 53 [Castañeda 1994].

[59] Rodrigo Morales, 'Observadores electorales, una evaluación' in J. Alcocer, ed., *Elecciones, diálogo y reforma* (Mexico: Nuevo Horizonte-CEPNA, 1995) at 145.

[60] *Cases 9768, 9780 and 9828: Mexico* (1990), Inter-Am. Comm. H.R. No.01/90, *Annual Report of the Inter-American Commission on Human Rights 1989-1990*, OEA/Ser.L/V/II.77/rev.1/doc.7.

[61] Quoted in Delgado, *supra* note 3 at 132 [translated by author].

[62] Aguayo, Interview 2002, *supra* note 41.

three main parties—PAN, PRD, and PRI. Significantly, the latter declined to send delegates.[63]

But for the Mexicans who agreed to participate in the observation, this was not an easy decision. As they noted in their report, 'Accepting this invitation in a country like Mexico is not exempt from complications.'[64] That was not an overstatement. One was advised by a high Mexican government official not to take part in the monitoring effort because his presence in the mission was 'contrary to the [Mexican] national interest.'[65] Similarly, the government-owned newspaper *El Nacional* ran an article criticizing 'our naïve observers' whose 'protagonic aim will not contribute at all to improve the quality of the electoral process in that country [the United States].'[66] It was clear the government did not want the delegation to be used as a stepping-stone by their hosts to make inroads in Mexico.

And that had been precisely the CC's intention. As Pastor recalls, inviting the Mexicans to observe elections in the United States was the second step in a strategy he had devised to be able to observe elections in Mexico; the first being to invite them to observe elections elsewhere (e.g. AMDH's Sergio Aguayo to Haiti in 1990; PAN's 1988 presidential candidate Manuel Clouthier to Panama in 1990).[67] At least some of the Mexican observers were well aware of the way their visit could be construed. For instance, before departing for Atlanta, Aguayo told a Mexican newspaper that the AMDH's position was 'not to invite international observers to elections, because democracy is fundamentally the task of Mexicans.'[68] Once in Atlanta, he wrote an op-ed for another Mexican newspaper in which he rhetorically asked,

> Could this observation mission be used in the future by the U.S. to interfere in our electoral affairs? The answer is negative since one of

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[63] Eric Bord, *The International Observation of U.S. Elections* (Atlanta, GA: The Carter Center of Emory University, 1992) at 7 [Carter Center 1992], online: The Carter Center <http://www.cartercenter.org/
documents/1210.pdf>.

[64] *Ibid.* at 31.

[65] *Ibid.* at 55.

[66] Miguel Ángel Velázquez, 'Política: EU elige presidente; *Mirones* mexicanos', *El Nacional* (3 November 1992) [translated by author]. 'Protagonic aim' is a literal translation from the Spanish that does not necessarily correspond directly to an English equivalent. It refers to a desire to 'stand out,' much like the protagonist in a play.

[67] Pastor, Interview 2000, *supra* note 51.

[68] Alfredo Grados, 'Invitan a 15 mexicanos como observadores de los comicios de EU; los eligieron al azar', *El Universal* (31 October 1992) [translated by author].

> the criteria for carrying out an election observation in another country is that the mission be based on an invitation from the political parties and from the government.[69]

And in a later article Aguayo openly stated his opposition to having foreign observers in Mexican elections.[70]

In any case, when the time came to make an official pronouncement on the American presidential elections at the end of their brief (2-4 November) monitoring exercise, the Mexican observers were rather reluctant to express their opinion. Pastor had to insist, telling them that the CC would feel insulted if they did not present a report on the American election.[71] In their report, the observers were careful to specify, 'We have no interest in interfering in the American political system. We offer these criticisms and suggestions in the same spirit of friendship and openness with which we were invited and with a strong belief that all sides benefit from the free flow of ideas and information.'[72]

The government was adamant in its position regarding foreign observers. In October 1993, on the eve of the formal start of the 1994 presidential race, Foreign Minister Fernando Solana declared, 'the Mexican government will not allow foreign observers in the electoral processes, only Mexican ones. The most fundamental exercises of sovereignty are the elections, which should always be in the hands of the citizens of Mexico.'[73] But the momentum gained by IEM since the 1990 Nicaraguan elections was palpable. Thus, Rosario Green, a Mexican diplomat at the UN at the time, recognized, 'Even though Mexico has always been opposed to international organisms having the capacity to intervene on issues that are in the exclusive

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[69] Sergio Aguayo, 'Observadores en EU: el interés mexicano', *La Jornada* (3 November 1992) [translated by author].

[70] Sergio Aguayo, 'Clinton y la unidad nacional' *La Jornada* (7 November 1992) at 5.

[71] Interview of Robert Pastor (4 December 2001) in Atlanta [Pastor, Interview 2001]. Interestingly, Pastor notes that the observations the Mexicans made 'presage all the problems that occurred in 2000,' in the U.S. presidential elections.

[72] Carter Center 1992, *supra* note 63 at 33.

[73] Raúl Benítez Manaut, 'La ONU en Mexico. Elecciones presidenciales de 1994' (1996) 36 Foro Internacional 533 at 539 [translated by author] [Benítez Manaut].

domain of states, it is a fact that the recent evolution of these fora tends to consolidate such tendency.'[74]

International pressure on the Mexican government was thus increasing. The North American Free Trade Agreement (NAFTA), on which Salinas had staked his presidency, was going to be voted on in the United States Congress in November. Moreover, by that time the bifurcated political economy of the Salinas administration (in which economic openness went hand-in-hand with political guardedness) was flagrant, thus creating problems for the Mexican government. As the IFE's director for international affairs remarked, around 1994 'we seemed very open in the economic aspect, very open in trade matters, but a dike in political-electoral matters.'[75] Nevertheless, as Monica Serrano has noted,

> In spite of Salinas' efforts to administer and control political change, the opening and internationalization of domestic politics undermined the capacity of the system to respond, simultaneously, both to the demands by new actors as well as those of the *priista* family who had been affected by the new dynamics.[76]

On the internal front, Salinas faced pressures to designate the PRI's candidate. But he did not want to do so before the fate of NAFTA was decided in the United States. Thus, it was only after the House of Representatives voted in favour of NAFTA that Luis Donaldo Colosio's nomination was announced.[77] Everything was going well for Salinas; with NAFTA scheduled to go into effect on 1 January 1994, and Colosio as his very likely successor, his legacy—and the permanence of the political system—seemed secured. As noted in the introduction, by December 1993—confident that he was in control of the political situation—Salinas' government expressed its opposition to foreign electoral assistance by voting for UN Resolution 48/124.[78] The designated norm follower was still able to

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[74] Rosario Green, 'El debate ONU-OEA: ¿Nuevas competencias en el ámbito de la paz y la seguridad nacionales?' in O. Pellicer, ed., *Las Naciones Unidas hoy: visión de México* (Mexico City: Fondo de Cultura Económica, 1994) at 101 [translated by author].

[75] Interview of Manuel Carrillo (30 October 2001) in Mexico City [translated by author] [Carrillo, Interview].

[76] Mónica Serrano Carreto, 'La herencia del cambio gradual. Reglas e instituciones bajo Salinas' (1996) 35 Foro Internacional 440 at 453 [translated by author].

[77] Jorge Castañeda, *La herencia: Arqueología de la sucesión presidencial en México* (Mexico City: Alfaguara, 1999) at 288.

[78] Benítez Manaut, *supra* note 73 at 541. UN Resolution 48/124 reaffirms the UN principle of non-interference in domestic matters such as electoral processes, and explicitly affirms that 'there is no universal need for the United Nations to provide electoral assistance to Member States, except in special circumstances'; *Respect for the principles of national sovereignty and non-interference*

resist the dictates of the continental lifeworld as it regarded the monitoring practice. As I have shown, by this time state-sanctioned electoral observation of the 1994 electoral process was far from being a foregone conclusion—even if non-state actors were planning to engage on it. The next section will make clear that as political developments unfolded in the electoral year, the WHI would acquire new salience for both Mexico's conception of sovereignty and for its democratic transition.

IV. The Road to the 1994 Elections

Mexico's political environment was totally altered as election year opened. On 1 January 1994, the same day NAFTA went into effect, an armed uprising broke out in the southern state of Chiapas. As the Zapatista Front of National Liberation, named after 1910 revolutionary leader Emiliano Zapata, gained popular sympathy throughout the country, the Salinas administration was led not only to initiate peace talks with the guerrillas, but also to restructure his cabinet and eventually to offer a new electoral reform. Thus on 10 January, Salinas removed Interior Minister Patrocinio González, a hard-liner, and replaced him with Jorge Carpizo, a widely respected lawyer and human rights advocate with no party affiliation. At the same time, Salinas designated Manuel Camacho—whom after being passed over for the PRI's presidential candidacy had been appointed as foreign minister–as commissioner for peace negotiations with the rebels. To replace Camacho at the foreign ministry, Salinas appointed a career diplomat, Manuel Tello. Along with the cabinet reshuffle, Salinas also declared a unilateral cease-fire.

That same month, the main political forces and the government signed what came to be known as the Barcelona Agreements, in which they agreed to change the structure of the electoral bodies at the federal, state, and district level. The third electoral reform of Salinas' administration was pending.[79] Since the political campaigns had already started, this meant that the rules would be changed in the middle of the game.

The rationale for such an extemporaneous initiative was clear: the government wanted to restore the legitimacy of non-violent means for

in the internal affairs of States in their electoral processes, GA Res. 48/124, UN GAOR, Supp. No. 49, UN Doc. A/48/49 (1993) at para.4.

[79] Here I draw on Arturo Santa-Cruz, 'From Transition to Consolidation: Mexico's Long Road to Democracy' (2002) 22 Revista de Ciencia Política 90 [Santa-Cruz 2002].

political contestation. As Jorge Alcocer, then adviser to Interior Minister Carpizo, stated,

> If the PRD, in its most radical wing, moved to positions openly supporting the Zapatistas, the August 1994 election could get enormously complicated. In those conditions… one of the first issues that Dr. Carpizo put forward was how to achieve an accord with the PRD and with the PAN without the PRI opposing it.[80]

The electoral process needed to be presented as the only viable and acceptable way to gain power. Hence, in the next four months a constitutional amendment and forty-one changes to the electoral law were passed. Thanks to the former, the IFE was to be formed by six 'citizen counselors' (approved by consensus among the PRI, PAN, and PRD), two representatives from each house of Congress, and the interior minister. Neither the president nor his party controlled the electoral body anymore. Furthermore, the interior minister could not use his vote to break a tie. The electoral institution had thus become a different body, one in which independent citizens played a cardinal role. As a WOLA-AMDH joint report on the 1994 Mexican elections put it, 'The "citizenization" of the IFE is the most important reform of all.'[81]

The changes introduced to the electoral law were significant too. They improved the status of national observers and allowed the presence of foreign observers under the semantic guise of 'international visitors'. At this point, both NGOs and the Mexican government were deeply engaged in their respective two-level games. The rarefied political environment had made the potential validation that observers provided of the August electoral process a highly valued item for the government. For instance, Salinas, through an intermediary, sought the leadership of AC to ensure that their organization was going to monitor the elections. According to Aguayo, 'it is not that they [high governmental officials] were pleased with us, but they said, "well, there they are."'[82] Furthermore, in order to insure that domestic monitoring actually took place, the government set up public funding (more on this below) and allowed foreign financing of Mexican NGOs. As Aguayo recalls, 'in '94 the issue of foreign financing changes completely because the government stops worrying about it. There is a

[80] Interview of Jorge Alcocer (12 November 2001) in Mexico City [translated by author] [Alcocer, Interview].

[81] Washington Office on Latin America and Academia Mexicana de Derechos Humanos, *The 1994 Mexican Election: A Question of Credibility* (Washington, D.C.: WOLA, 1994) at 19 [WOLA].

[82] Aguayo, Interview 2002, *supra* note 41 [translated by author].

fundamental turn because of the Zapatista rebellion … and because of the appointment of Carpizo as interior minister.'[83] Thus, in February the IFE approved the 'Guidelines for the Accreditation and Development of the Activities of the Mexican Citizens who will act as Observers during the Electoral Process of 1994', and in May Article 5 of the electoral law was amended to extend the observing period from election day to the electoral campaign.[84]

Regarding 'international visitors', the issue was more complicated. Although the change in the government's position seemed unavoidable, there was no consensus among high government officials and PRI leaders; Salinas' cabinet indeed debated the issue several times.[85] The eventual acceptance of foreign observers was not immediate. For instance, when in January Santiago Oñate, secretary of international affairs of the PRI, was approached by American government officials regarding the possibility of Mexico accepting OAS electoral monitors, he refused.[86] As Pastor notes, 'the Mexicans had always constructed an elaborate philosophical and legalistic basis' of national sovereignty; 'only the Mexicans do this kind of thing.'[87] 'Sovereignty' remained a principled issue for most of the Mexican political class.

But the topic of foreign observers was on the agenda right from the start of the new negotiations. According to Alcocer, 'what triggers the need for international observation is the EZ [Zapatista Army].'[88] In fact, the issue of foreign observers was on the forefront of Carpizo's agenda—even though he was personally averse to it. Alcocer, for example, recalls that despite resistance from both government and public opinion (due to sovereignty concerns), Carpizo devoted significant attention to the question of foreign observers.[89] But there were segments both within the opposition parties—particularly the PRD—and the government that favoured the IEM of Mexican elections. Interestingly, the single PRD member who most strongly

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[83] *Ibid*.

[84] Eduardo Olguín Salgado, 'La observación electoral durante los comicios presidenciales de 1994' in by M. Larrosa and L. Valdés eds. *Elecciones y partidos políticos en México, 1994* (Mexico City: UAM-Iztapalapa, 1998) at 453.

[85] Pastor, Interview 2000, *supra* note 51. Pastor debriefed several cabinet members on this issue.

[86] Mazza, *supra* note 4 at 108.

[87] Pastor, Interview 2001, *supra* note 71.

[88] Alcocer, Interview, *supra* note 80 [translated by author].

[89] *Ibid*.

pushed for international observers—and indeed the one who came up with the idea of calling them 'international visitors' in order to get around constitutional Article 33—was Porfirio Muñoz Ledo, a former PRI president who had left the party with Cárdenas back in 1987.[90]

Concurrently there was a team within the IFE that had been advocating a change of policy regarding IEM since late 1993. Manuel Carrillo, head of IFE's international affairs office, states that Carpizo's predecessor—Patrocinio González Garrido—on whose ministry the IFE still depended, 'had a vision, let's say strict, orthodox, of sovereignty.'[91] But with the 1994 electoral reforms, the situation began to change for this group of people, headed by IFE's director Arturo Núñez. During the IFE's internal debate in late January, still in the midst of the political upheaval brought about by the Zapatistas, recalls Carrillo, 'somebody comes and says: "look at this video, from El Salvador. Can you see that [foreign] observers are substituting the people at the [voting] tables? They say that is observation." The reasoning was devastating.'[92] Allowing foreign observers was still far from being a forgone conclusion.

However by that time it was not really up to Salinas (i.e. the government) to decide the issue.[93] As Alcocer has written,

> 'Knowing that the eyes of the international community would continue to be focused on Mexico, and that the August elections had provided the impetus for the EZLN [the Zapatista Army] rebellion, Colosio recognized that it would be foolish to employ Mexico's traditional attitude rejecting international election observers.'[94]

Colosio had already sent some signals that he was more open to electoral observation than Salinas had been, at least regarding domestic observers. For instance, on 8 December, Colosio said, 'I am in favor of a plural group of

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[90] Alcocer notes that Muñoz Ledo was the one who brought the issue of international observers to the table; *ibid*.

[91] Carrillo, Interview, *supra* note 75 [translated by author].

[92] *Ibid*.

[93] According to Jorge Castañeda, Mexican writer Carlos Fuentes convinced Salinas to accept foreign observers on 23 December 1993. But subsequently, when Fuentes tried to arrange a meeting between Cárdenas and Colosio to talk about the issue, Cárdenas showed some resistance to meet with his counterpart, and the issue fell apart. Salinas did not pursue it further. Castañeda 1994, *supra* note 58 at 30-5.

[94] Jorge Alcocer, 'The International Observation of Elecoral Processes: The Mexican Experience in 1994' (1997) 19 Hous. J. Int'l L. 689 at 696 [Alcocer 1997].

impartial and prestigious national observers, made up by citizens proposed by all parties.'[95] However, international observers were never mentioned. But with the new political environment developing by the next year, Colosio (and Salinas) perceived the need to cooperate with international observers. Furthermore, by inviting observers rather late in the electoral process, as Jennifer McCoy—head of the CC's team for the 1994 elections—has noted, the government 'had the positive thing of getting international legitimacy, having observers coming to election day, and saying, "well election day looked very good." I think … there was a emerging norm, and recognizing the practice … [I]t was a recalculation of interests, of national interests.'[96]

Colosio seemed to have made up his mind on the issue around February. Interestingly, during the negotiations held by the interior minister that month between the PAN, PRI, and PRD, only the last, through its representative Porfirio Muñoz Ledo, openly favoured the presence of international observers in the August elections. The PAN had no official position yet, and the PRI was still against it.[97] Toward the end of February or early March, though, Colosio went to Washington to meet with NDI leaders. Patrick Merloe, who participated in the meeting, recalls Colosio reiterating his view that 'there should be international observers in Mexico's elections', while he invited the NDI to help AC in the August elections.[98]

Around that time, on 6 March, Colosio said in a campaign rally,

> [The elections'] transparency demands the participation of observers, and it does not exclude the possibility that anybody gives an extensive testimony about it, not only on the part of our citizens but also on the part of international visitors. By no means should we regard with fear those that wish to learn about the nature of our democratic processes. Our elections, and I say this with full conviction, will have no shame to conceal.[99]

From then on, there was a noticeable change in the government's position on foreign observers. A week after Colosio's speech, Mexico's ambassador to the UN declared that accepting foreign observers 'does not mean

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[95] Quoted in *ibid*.
[96] Interview of Jennifer McCoy (8 September 2000) in Altlanta [McCoy, Interview].
[97] Alcocer 1997, *supra* note 94.
[98] Interview of Patrick Merloe (7 December 2001) in Washington [Merloe, Interview].
[99] Quoted in Benítez Manaut, *supra* note 73 at 547.

abandonment of sovereignty, but declaring that there is nothing to hide and that electoral processes in Mexico can be observed freely.'[100] Nevertheless, not everybody within the government was equally convinced. Foreign Minister Tello declared in early April, 'I have yet to be persuaded about the necessity of having people from abroad coming to observe the [electoral] process.'[101] In the end, the foreign minister did not need to be convinced; he was not involved in negotiating the issue of foreign observers, as his role was limited to issuing the invitations. As Tello put it, 'The one who negotiated everything was Carpizo.'[102] The interior minister certainly played a key role in bringing about the acceptance of foreign observers ('international visitors')—although in his words, 'not without sadness.'[103] But even Carpizo's pragmatic position could not have materialized had Colosio not agreed to it. For Alcocer, 'If the PRI candidate had said no, not even Carpizo would have been able to pull the [international] observers issue off.'[104]

By March, the political environment started to acquire a relative sense of calm again. During the first week, Peace Commissioner Camacho signed a preliminary peace agreement with the Zapatistas, and on the twenty-third, the constitutional reforms that came out of the negotiations among the main three parties and the government were approved by Congress. But then Mexico again entered a state of commotion, as Colosio was assassinated that same day. This was a most extraordinary event in Mexico; it had been seven decades since an event of equivalent import had occurred. As a result of the rarefied political environment, the rebels suspended peace talks. In the midst of internal strife, Salinas had to hurriedly designate a second PRI candidate: Ernesto Zedillo, a former cabinet member who had quit to become Colosio's campaign manager.

Nevertheless, the agreements regarding foreign observers remained untouched. Furthermore, in April the Mexican government officially approached the UN, inviting it to play a role in the forthcoming electoral process (more on this below). The reformed IFE decided to leave the drafting of the official invitation to the six citizen counselors, who took their seats on 3 June. Twenty days later, and only two months before election day,

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[100] *Ibid*.

[101] Judyth S. Guevara, 'Calificar las elecciones, exclusividad de mexicanos: Tello' *Excelsior* (10 April 1994) 4 at 47 [translated by author].

[102] Interview of Manuel Tello (12 November 2001) in Mexico City [translated by author] [Tello, Interview].

[103] Jorge Carpizo, 'La reforma federal electoral de 1994' in J. Alcocer ed., *Elecciones, diálogo y reforma: Mexico 1994 / I* (Mexico City: Nuevo Horizonte, 1995) at 30 [translated by author].

[104] Alcocer, Interview, *supra* note 80 [translated by author].

the IFE issued the guidelines for 'international visitors'. As José Woldenberg—then one of the six citizen counselors and later counselor president of the IFE—recalls, the counselors decided to issue a 'generic' invitation (i.e. not to make a list of invited organizations) so as not to offend anyone; political parties and NGOs could then issue particular invitations.[105] The guidelines of course kept the term 'international visitor', which for Woldenberg was 'an intermediate formulation' between the guardedness mandated by constitutional Article 33 and complete transparency. Nevertheless, Woldenberg recognizes that 'once groups or individuals from abroad come to follow the elections, what are they? Observers. They are international observers, there is no way around it.'[106]

It is thus clear that the WHI as lifeworld, and more specifically electoral monitoring as a legitimate issue area, had permeated the Mexican political environment. I now turn to consider in detail the work of the three most prominent organizations in the monitoring of the 1994 Mexican elections: AC, the UN, and the CC. The work they developed—apart and in tandem—should illustrate the extent to which, in the monitoring practice, state and non-state actors, international and domestic, were interacting—and thus pushing the traditional meaning of state sovereignty.

1. Alianza Cívica

AC was established in April 1994 as an umbrella organization formed by more than 300 NGOs. But the decision to embark on an observation project had been taken months before, in November 1993, when the AMDH and five other organizations (Citizen Movement for Democracy, Convergence of Civil Organizations for Democracy, National Accord for Democracy, Council for Democracy, and the Arturo Rosenblueth Foundation) first had the idea to launch a monitoring effort for the August 1994 elections.[107] As Aguayo recalls,

> We decided to monitor the 1994 elections in Yucatan. We were observing the [state] elections… it was the day Colosio was *destapado* [unveiled, i.e., nominated] … those of us who would later form Alianza Cívica were talking and decided to do the

[105] Interview of José Woldenberg (30 October 2001) in Mexico City [Woldenberg, Interview]. The IFE was reformed again in the 1996.
[106] *Ibid*. [translated by author].
[107] Calderón Alzati & Cazés, *supra* note 39 at 146.

> observation of the presidential election. Knowing that we would not have money, we said, "we have to do it, even if it is symbolic, even if Colosio is going to win, even if… it doesn't matter, let's do it anyway."[108]

The founding NGOs were still trying to reach a consensus on a myriad of issues, such as whether or not to accept foreign funding, when the Zapatista rebellion broke out. Everything changed for the nascent monitoring project from then on. As noted earlier, president Salinas approached its leaders to make sure that they would carry out their monitoring project, to set up public funding for observation efforts, and to relax restrictions on foreign financing. Furthermore, the amendments to the electoral laws enhanced both the legitimacy and the opportunities to carry out observation activities. Suddenly, the long neglected and despised observer organizations seemed to have become the government's darlings. But while the enhanced legal status and more open access to external sources made the work of the still nascent AC and other monitoring organizations easier, the sudden change in the government's attitude toward them also entailed risks. The most obvious danger was potential government interference in what had originally been conceived of as an independent citizen effort.

But the leaders of the seven organizations continued to work on their own, building a consensus plan for the August elections. By the end of February 1994, the preliminary project was concluded and presented for discussion in several states. AC's legal establishment and a national meeting in Mexico City to approve the final scheme took place that April.

In the meantime, AC's project was also taken to Washington D.C., in order to request funds from sympathetic foundations and NGOs.[109] Thus, AC received an $820,000 grant from NDI.[110] That NDI gave financial aid to AC was rather unusual, since NDI usually provided technical rather than financial assistance. But the case of AC was different. Aguayo recalls his organization's dealing with NDI:

> I told them, "we need support in cash, not in kind; we don't need training nor technical assistance, nor that you tell us how to observe elections. We know how to do that. What we need is that you support us financially." … NDI understood that [and] they

[108] Aguayo, Interview 2002, *supra* note 41 [translated by author].
[109] Calderón Alzati & Cazés, *supra* note 39 at 147.
[110] WOLA, *supra* note 81 at 34. Total foreign funding to AC reached $2 million. Aguayo Quezada 1995, *supra* note 40 at 162.

> even provided us with resources without providing technical assistance. I don't know how they managed [to do this] with their board of directors.[111]

In fact, the decision to provide funds to AC through NDI seems to have come from higher up—from the State Department.[112]

AC's relationship with NDI was completely different from the one it had with the UN. For Enrique Calderón and Daniel Cazés, two of AC's leaders, the UN envoys 'thought they could manipulate' AC; Calderón and Cazés charge the UN with trying to make AC '[give] up on any serious observation effort.'[113] Going even further, Aguayo characterizes the relationship with the UN as a 'nightmare'.[114] The root cause of the problem, according to Aguayo, was that the world organization 'wanted to have a place under the universe of Mexico's democratization, and that we [AC] had taken that place that they in a natural manner, should have had.'[115] The difficulties arose because the assistance that the government had requested the UN provide put the international organization in a position of power vis-à-vis domestic NGOs (below). AC resented this.

Nguyen Huu-Dong, who coordinated the 1994 UN mission, recognizes the problems his team had with AC. According to him, two factors underlay the heated discussions over methodological issues: the 'lack of communication and lack of trust' between AC and the UN mission, and that national observers tend to be inherently more aggressive or suspicious of the government's intention in the electoral process than international observers are.[116]

Nevertheless, working with the UN was important for AC, for two reasons. The most obvious was the financial support it would receive from the international organization. As noted, the government had set up a fund to be distributed among monitoring organizations—and the UN was in charge of managing the resources (more on this below). But arguably more important than the fund was the legitimacy with which the UN could invest

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[111] Aguayo, Interview 2002, *supra* note 41 [translated by author].
[112] Mazza, *supra* note 4 at 113.
[113] Calderón Alzati & Cazés, *supra* note 39 at 157 [translated by author].
[114] Aguayo, Interview 2002, *supra* note 41 [translated by author].
[115] *Ibid*.
[116] Interview of Nguyen Huu-Dong, (22 November 2001) in Mexico City [Nguyen, Interview].

AC. The neutrality of AC had become an issue early on; it was constantly accused of being partial to the PRD. This kind of criticism led Aguayo to characterize the problem as a 'battle for legitimacy', and to realize that because of this, UN presence was necessary.[117] AC was playing a two-level game.

AC focused its effort on putting together a comprehensive monitoring plan for the whole electoral project, which included the establishment of a media-watchdog project, opinion polls, a study of Mexican electoral laws, as well as a program to denounce illegal electoral activities (such as the use of government funds in political campaigns). AC actually mounted the largest organized, independent citizen effort in Mexico's history. The consolidation of Mexico's civil society since the late 1980s was crucial in this respect. It was the solidarity of Mexican civil society that made the monitoring effort in Mexico different from those carried out previously, such as the Nicaraguan experience in 1990. This solidarity reduced the centrality of the role played by international observers.[118]

The fact that Mexicans had the leading role in the monitoring effort was important for AC. As Aguayo explains, AC took the position that foreign observers were there only to complement it work, and not to direct its decision-making.[119] This is not to say that AC was closed to foreign observers—only that it wanted to coordinate the activities of the foreign NGOs that had offered to work with it, such as WOLA. In fact, AC had invited about half of the 777 foreign observers present on election day. The profusion of invitations issued by AC was not accidental. It had to do with the work many of the NGOs of which it was composed had done to establish links with sister organizations abroad. Without these previous relationships, AC would have not invited foreigners to monitor the elections. 'If the '94 observation had taken place in '82, we would never had invited foreigners… it was unthinkable,' notes Aguayo.[120]

On 21 August, AC had 18,280 Mexican observers, and 450 'foreign visitors' distributed throughout the country.[121] By midnight that night, AC had put out its first report based on a sample of 2,168-polling places, assessing the legitimacy of the election. An hour after midnight, and based

[117] Aguayo, Interview 2002, *supra* note 41 [translated by author].
[118] Aguayo, Interview 2000, *supra* note 44; McCoy, Interview, *supra* note 96; Pastor, Interview 2000, *supra* note 51.
[119] Aguayo, Interview 2002, *supra* note 41.
[120] *Ibid*.
[121] Aguayo Quezada 1995, *supra* note 40 at 165.

on a smaller sample, AC released the results of its quick count: Ernesto Zedillo—the PRI candidate—was well ahead in the electoral race, with a 20-point difference from his closest competitor, the PAN candidate. Although the election was certainly far from being a model one, it was the most open Mexico had ever had. Tellingly, there was no widespread post-election mobilization, as had happened six years before. Furthermore, on this occasion the irregularities did not seem to have affected the outcome of the presidential election. The results for the presidential election were: 48.7 percent for Zedillo (PRI), 25.9 percent for Fernández de Cevallos (PAN), and 16.6 percent for Cárdenas (PRD). As AC's report put it,

> The quantitative impact of [the documented irregularities] cannot be calculated with certainty and precision. It is likely that they did not alter the outcome of the presidential election. Nevertheless, they did alter the correlation of the national forces at the national, regional, and local levels, the composition of the Chamber of Deputies, and possibly that of the Senate, generating an overall impression of governing-party predominance.[122]

Thus, while certainly not perfect, at least the most important election in a country with a tradition of having a strong executive power—the president—received the approval of the most important monitoring groups.

2. The United Nations

Around February 1994, the Mexican government, through the IFE, furtively approached the UN about the August general elections. As Manuel Carrillo—since that time head of IFE's international affairs office—recalls,

> We got in touch with the United Nations around February '94, in order to have a first approach [in which] we arranged a visit by a UN team to Mexico … we were having meetings. Imagine, in February and March [1994] I was having breakfast with somebody at the United Nations in order to talk about the monitoring issue; I mean, I was not going to do it just like that. I had to have important [political] support.[123]

[122] *Ibid.* at 166.

[123] Carrillo, Interview, *supra* note 75 [translated by author].

Nguyen Huu-Dong, then director of the UN Electoral Assistance Division, subsequently visited Mexico. As he remembers, 'I talked with the authorities at the Interior Ministry… because at that time IFE's president was the Interior Minister.'[124]

According to Carrillo, by mid-March negotiations with the UN were going well, if slowly. The UN's reaction when the Mexican government first approached it was one of caution, if not reluctance. As the PRI's foreign affairs secretary said in a forum in Washington two months before the elections, the UN had advised Mexico not to present a formal request for electoral support, citing bureaucratic reasons.[125] The UN stated that it would not consider sending an observation delegation to Mexico because it was too late, because the country was too big, and because it was not clear that Mexico met the criteria required by the UN for countries to receive observer missions.[126] Similarly, Jorge Alcocer, who along with Interior Minister Carpizo wrote the letter asking for UN assistance in the electoral process, notes that when the Mexican ambassador to the UN presented the letter to Boutros Boutros-Ghali, the Secretary-General asked, 'Are you sure you want to do this? We don't really want to be in Mexico.'[127] Huu-Dong confirms this account, adding that the UN was reluctant to get involved in a constitutional election where the problem was one of mistrust rather than illegitimacy or illegality.[128]

Nevertheless, the assassination on 23 March of the PRI's candidate hastened the negotiating process. According to Carrillo, it 'initiate[d] a process of acceleration … by that time [Interior Minister] Carpizo was much more flexible.'[129] In a preliminary visit to Mexico, UN Electoral Assistance Officer Horacio Boneo told Carrillo that UN observation of the Mexican elections was out of the question because the country was so large. This was despite Carrillo's concerns about what to do with the numerous national and international observers already there.[130] Thus, in his 10 May letter to the UN Secretary-General, Carpizo requested the UN, (*a*) 'to send a mission of experts in electoral matters so that it can know the Mexican electoral system, and it can put out a technical report' on the matter, and (*b*) 'to collaborate by

[124] Nguyen, Interview, *supra* note 116.
[125] Castañeda 1994, *supra* note 58 at 53.
[126] The Carter Center, *Elections in Mexico: Third Report* (1994), online: The Carter Center <http://www.cartercenter.org/documents/1154.pdf> at 29.
[127] Alcocer, Interview, *supra* note 80 [translated by author].
[128] Nguyen, Interview, *supra* note 116.
[129] Carrillo, Interview, *supra* note 75 [translated by author].
[130] *Ibid*.

providing technical assistance to the groups of national observers that request it … in order to ensure their professionalism, independence, and impartiality.'[131] In the end, Mexico did not request the UN to send an election-monitoring mission. Nevertheless, the mere act of contacting the world organization in order to request its assistance in an electoral matter was a turning point in Mexico's foreign policy.[132] Manuel Tello, foreign minister at the time, accepts that inviting the UN was a qualitative change for Mexico.[133] Without approval from the General Assembly, the UN accepted Mexico's request for the technical assistance described above.[134]

The five-member UN team conducted its mission from 28 June to 9 July. In its report, it stated that 'Mexico has lived in a permanent reform on electoral matters' since the late 1970s, and noted that the last electoral reform—the one carried out as a result of the Zapatista uprising—'has been the only one of the three [during the Salinas administration] approved with the support of the [political] forces with the greatest electoral power.'[135] The evaluation of the Mexican electoral system, in which the latest electoral reform weighed heavily, was positive. Thus, the UN team concluded that 'the structure of the electoral system is able to carry out free and fair elections' in August 1994.[136] This view obviously irritated opposition parties and some observer groups. But as Horacio Boneo, co-leader of the UN mission, noted before the elections, there was no way to prevent the Mexican government from using the report from the UN experts to legitimize the electoral process.[137] Nevertheless, the UN mission was careful to point out that although the Mexican electoral system possessed a rather complex and well articulated legal structure, 'it has to be taken into account that the norm, by itself, does not presuppose that the situation which it aims to regulate and

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[131] 'Carta de Jorge Carpizo, secretario de Gobernación, a Boutros Ghali,' *La Jornada*(12 May 1994), 3; quoted in Benítez Manaut, *supra* note 73 at 551 [translated by author].

[132] As the *New York Times* put it: 'Trampling an ancient political taboo in pursuit of new legitimacy, for Mexico's coming presidential vote, the Government has invited the United Nations to evaluate its electoral system and help organize independent groups of election observers.' Tim Golden, 'Mexico Invites U.N. to Attend Election to Observe the Observers' *New York Times* (13 May 1994), A9.

[133] Tello, Interview, *supra* note 102.

[134] No General Assembly authorization was required because no electoral observers were being sent.

[135] United Nations, *Análisis del sistema electoral mexicano. Misión técnica de la ONU* (México: Instituto Federal Electoral, 1994) at 38 [translated by author] [United Nations].

[136] *Ibid.* at 60.

[137] Benítez Manaut, *supra* note 73 at 559.

the objective it pursues will take place by the established and desired means.'[138]

More conspicuous than the UN five-member team, though, was ETONU-MEX, the UN group set up in early June to provide assistance to domestic observers.[139] With a staff of about fifty, ETONU-MEX provided assistance to sixteen organizations—the most important of which was AC.[140] As noted, the government entrusted a fund to assist monitoring groups to the UN mission. Thus, ETONU-MEX managed about three million dollars, of which AC received half.[141] The UN sent an expert to each state of Mexico to serve as its representative with local and electoral authorities, and as a liaison with local NGOs. As Aguayo noted, this expert presence caused irritation among AC activists. On election day, UN representatives did not visit the polling places; instead they visited the offices of the domestic observers.

With the exception of AC, the relationship between the UN mission and Mexican monitoring NGOs was smooth. The performance of the UN mission is generally considered a success, cited by people both within and outside the UN as the birth of a 'Mexican model'. ETONU-MEX co-leader Huu-Dong recognizes that 'this was a new experience' for the UN, while Boneo pointed out that the UN Electoral Assistance Unit would be able 'to use [the kind of tasks assigned to it in Mexico] in the future as one of our tools.'[142] The Mexican experience thus had a qualitative impact on the nature of IEM. However, talking about the effectiveness and legitimacy of AC, Vikram Chand notes, 'Had Mexican civil society not been as developed, it is unlikely that [the UN] mission would have been as successful.'[143] Paradoxically, then, the success of the UN effort was directly related to the success of the organization with which it experienced conflict: AC.

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[138] United Nations, *supra* note 135 at 59 [translated by author].

[139] ETONU-MEX stands for 'Equipo Técnico de las Naciones Unidas en México.'

[140] Other monitoring groups included Coparmex—an umbrella business organization, the Teachers National Organization for Electoral Observation, the Education Workers' National Union—an organization closely associated with the PRI, and the Institute for Democratic Transition Studies, an independent think tank.

[141] Benítez Manaut, *supra* note 73 at 559; Vikram K. Chand, 'Democratization from the Outside in: NGO and International Efforts to Promote Open Elections' (1997) 18 Third World Q. 543 at 553 [Chand].

[142] Nguyen, Interview, *supra* note 116; Boneo quoted in Pedro Enrique Armendares, 'Horacio Boneo: Mirones de Palo' *Voz y Voto* (August 1994), 52 [translated by author]. Alcocer similarly agrees that the Mexican elections provided a new model for the UN; Alcocer, Interview, *supra* note 80.

[143] Chand, *supra* note 141 at 553.

Therefore, due to the existence of AC and other domestic monitoring groups, ETONU-MEX became a prominent actor in the Mexican electoral process. That is, by putting the UN between the state and civil society, in 1994 the Mexican government transformed the traditional role of the UN as external judge, into one of being another player in the elections. This is not to suggest that the UN mission played a leading role in the electoral process—far from that. But it did become an actor alongside the government, the political parties, and civil society. The pull that held the relationship among the domestic actors in 1994 was, of course, the deep suspicion of the fairness of the electoral process. And it was that pull that brought the UN into Mexico. As Huu-Dong said at the time, 'The fraud hypothesis is the basic reason of electoral observation.'[144]

The UN was in Mexico to vouch for the fairness of the electoral process. That is why it became another political actor, although of a peculiar nature, in the electoral process. This was certainly not an easy job for ETONU-MEX. On the one hand, it had to deal with leaders of NGOs such as AC claiming that it had an ignoble pact with the government, or that the fairness of the election was not its main concern; and on the other it had to be vigilant to not offend the Mexican government.[145] As Huu-Dong later commented, 'The relationship with each of the governments represents ... a problem: how to convince them that we work for them.'[146] In the final analysis, according to Huu-Dong, 'I would say that our contribution [was] not to improve the Mexican system at all, but to shed a little bit of light into the system.'[147]

3. The Carter Center

The CC's involvement in the 1994 Mexican electoral process was very different from the other experiences of the semi-official organization, or at least from what could have been expected at the time. On the one hand, the prestige and international authority of its head, Jimmy Carter, as well as the impressive record the CC had built by 1994 in the field of election

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[144] In Alberto Aguirre *et al*., 'Las elecciones del 21 de agosto bajo el signo de la sospecha', *Proceso* No. 928 (15 August 1994), at 7 [translated by author].

[145] Cf. 'Informe Alianza Cívica – Observación 94. La elección presidencial; entre el escepticismo y la esperanza' *La Jornada* (21 August 1994). See also Aguayo Quezada 1995, *supra* note 40 at 162; Pedro Enrique Armendares, 'Sergio Aguayo ¿Alianza para qué?' *Voz y Voto* (November 1993), 54-5.

[146] 'Nguyen Huu Dong (interview)' *Voz y Voto* (July-August 2000), at 9 [translated by author].

[147] Nguyen, Interview, *supra* note 116.

monitoring, suggested the organization could play an important role in Mexico during that momentous year. Furthermore, the personal relationship between Carter's chief aide on election monitoring matters, Robert Pastor, and Mexico's president Carlos Salinas, as well as the vast network of contacts Pastor had with academics, activists, and political leaders from the opposition parties reinforced the expectation of a leading role for the CC in the monitoring of the 1994 elections.

But on the other hand the CC had an indelible mark that made playing a visible role in any Mexican elections extremely unlikely: Carter himself. As president, he had a few unfortunate experiences and a series of disagreements on a number of issues with his Mexican counterpart López Portillo that made the bilateral relationship rather sour.[148] From then on, as Aguayo puts it, Carter 'produced urticaria' in the ruling party. Aguayo notes that Pastor was part of the problem as well. Pastor was not particularly appreciated by many in the NGO community, perhaps because of his closeness to Salinas: 'He caused animadversion in some people; I knew him and I know the kind of character he is, so he did not cause me problems, but he did indeed generate tensions.'[149]

Immersed in this contradictory environment, the CC ended up playing a relatively discreet role in the Mexican 1994 elections. As Vikram Chand, a member of the CC delegation to Mexico that year, has put it,

> [The CC] council's approach was low-key … [it] chose not to bring Carter to Mexico at all … Of all the three major political parties, only the PRD was willing to consider inviting Carter … Mexican political actors … were simply unwilling to turn to an ex-US President to sort out their differences. What was possible in Nicaragua was impossible in Mexico; and the Council had to adjust its strategy accordingly.[150]

The CC involvement in the August 1994 elections began almost a year in advance. In September 1993, a four-person team visited Mexico in order to analyze the electoral reforms being discussed at the time. Two months later, it published a report, *Electoral Reform in Mexico*. The document included specific recommendations, some of which were later enacted. Therefore, the CC was already involved in the Mexican electoral process by the end of 1993,

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[148] See Sergio Aguayo Quezada, *Myths and [Mis]Perceptions*, trans by J. Brody (San Diego: University of California, San Diego-El Colegio de México, 1998).
[149] Aguayo, Interview 2002, *supra* note 41 [translated by author].
[150] Chand, *supra* note 141 at 555.

albeit more as a bona fide consulting firm or a think tank than as a monitoring organization. But then came the Zapatista uprising in January 1994, which pulled the CC closer to the action. Salinas himself contacted his former graduate fellow to request the presence of the CC in the electoral process. As Pastor recollects, around March or April Salinas called him and, repeating by heart an argument Pastor had used (unsuccessfully) in the past to convince him to invite foreign observers to Mexican elections, told him, 'I think you have a point, but you know we can't invite international observers because the Mexican people won't accept it, you know it will offend their nationality [*sic*], but what we'll do, we'll permit international visitors.'[151] With that decision, as Pastor notes, Salinas had 'obviously crossed the threshold.'[152]

At that time, though, it was too late for the CC to form the large monitoring team that the Mexican case required, so it did not properly monitor the elections—at least not to the extent to which the organization was accustomed. Instead, it sent 'study missions', produced four reports on Elections in Mexico, and carried out a reduced monitoring effort. For this, the CC joined forces with NDI and the International Republican Institute (IRI), 'because we knew we would be too small for a big country like Mexico to have the same effect that we had in Nicaragua or Panama,' recalls Jennifer McCoy.[153] Part of the strategy of the combined mission was to work in tandem with Mexican observers. As NDI's Merloe, a 1994 delegation-member, puts it, 'When we engage in a country like Chile or a country like Mexico … where civil society is extraordinarily well organized [NDI offers its assistance] on any terms, whatever the terms.'[154] The joint CC/NDI/IRI delegation totalled eighty members from seventeen countries.

Interestingly, although the IFE was supposed to issue only a 'generic' invitation and not individual ones, NDI was specifically invited by the electoral organization to attend the general elections. As Merloe recalls, Carrillo called them to tell them the IFE would appreciate their presence in Mexico, and then faxed the invitation.[155] The CC team was composed of eleven members, including former Costa Rican president Rodrigo Carazo,

[151] Pastor, Interview 2000, *supra* note 51.
[152] *Ibid*.
[153] McCoy, Interview, *supra* note 96.
[154] Merloe, Interview, *supra* note 98.
[155] *Ibid*.

former Guatemalan president Vinicio Cerezo, former Canadian prime minister Joseph Clark, and Harry Barnes, the former ambassador to Chile at the time of the 1988 plebiscite. It arrived in Mexico City four days before the election, and then most members joined with NDI/IRI mission-members to travel in pairs to twenty-five states, while a few stayed in the Federal District. In total, the combined delegation visited about 500 polling places, and witnessed the vote count in thirty-four polling sites.[156] Two days later, it issued a favourable preliminary report, noting, 'This election represents a significant step forward for the Mexican democratic process.'[157]

Five months later, the CC issued its own detailed report on the Mexican elections.[158] Although mostly approving of the way the electoral process had been conducted, the CC report was guarded in its endorsement of the Mexican political system. Referring to the AC electoral report on the election, the CC report notes that, 'a number of irregularities were observed which may have had an effect on congressional or local races, and which continue to raise questions about the legitimacy of the outcome.' Nevertheless, and also in keeping with the tone of AC report, the CC's account recognizes, 'Our delegation received no evidence that irregularities were sufficiently serious or widespread to have affected the outcome of the presidential race.' The report states that 'further reforms were needed to raise credibility and address the inordinately unequal campaign conditions in the future,' and it underscores 'the active and effective role played by civic groups in election-monitoring.'[159] Regardless of the specific weight of the CC or of any other foreign mission in Mexico, it is important that they were involved in the monitoring effort at all. As McCoy notes, 'For Mexico [the electoral process of] '94 was landmark ... in terms of Mexico inviting observers ... the international observers didn't play a crucial role ... but for Mexico, one of the most nationalistic states, to allow what they call visitors, to witness the election' was what made it a milestone.[160]

V. IEM in Mexico after 1994

Although the watershed for electoral observation in Mexico was the 1994 electoral process, election monitoring also figured prominently in the

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[156] The Carter Center, *The August 21, 1994, Mexican National Election: Fourth Report* (Atlanta: The Carter Center, 1995) at 8 [Carter Center 1995].

[157] Preliminary report reproduced in *ibid.* at 31.

[158] The NDI-IRI delegation, on the other hand, did not deliver its final report. Mazza, *supra* note 4 at 122.

[159] Carter Center 1995, *supra* note 156 at 11-12.

[160] McCoy, Interview, *supra* note 96.

congressional mid-term elections, and particularly in the inaugural (and concurrent) election for the mayorship of Mexico City in 1997. In order to monitor the electoral process in the capital city, Civic Alliance obtained a $300,000 grant from the European Union. Significantly, after the Ministry of Foreign Affairs tried to prevent the funds from reaching the NGO, the IFE was able to assert its autonomy (see below) and jurisdiction over electoral observation, thus allowing the funds to flow.[161] In any case, the overall 1997 electoral process involved 391 accredited international visitors from thirty-three countries, and 24,291 national observers registered at the IFE—considerably less than in 1994.[162]

But before the mid-term elections took place, the manufacturing of another electoral reform had been necessary. After August 1994, there was still a widespread perception that the electoral process had not been fair.[163] Thus, Ernesto Zedillo suggested in his 1 December 1994 inaugural address the need for yet another electoral reform. Less than two months into his administration, and less than a month after the devaluation of the peso had sparked the worst economic crisis in post-revolutionary Mexico, a document called 'Commitments for a National Political Accord' was signed by the political parties and the government.

Nineteen months later, all political parties represented in Congress passed by consensus an initiative amending the constitution in order to make possible the farthest-reaching electoral reform ever. Among the most significant changes of this amendment was the exclusion of the executive branch of government from the IFE. Rather, the IFE's governing body—the General Council—is comprised of eight 'citizen counselors', a president (an independent citizen approved by two-thirds vote of the lower house), and two representatives from the legislature—one from each house. The 1996 constitutional amendments also established that in the 1997 elections the

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[161] Jean-Francois Prud'home, 'The Instituto Federal Electoral (IFE): Building an Impartial Electoral Authority' in Mónica Serrano, ed., *Governing Mexico: Political Parties and Elections* (London: Institute of Latin American Studies, 1998) at 153-4.

[162] Luisa M. Parraguez Kobek, 'The Electoral Process in Mexico: An Analysis from an International Visitor's Point of View' (1997) 5 J. Latin Amer. Affairs 26 at 27.

[163] President Zedillo himself would later recognize that the 1994 electoral process had been clean but not fair; see Jaime Sánchez Susarrey, 'El santo grial' *Reforma* (19 January 2008), online: Grupo Reforma <http://www.reforma.com/editoriales/nacional/424/846202/default.shtm>.

mayor of Mexico City would be chosen by the people for the first time, rather than appointed by the president.

The mid-term elections that took place on 6 July 1997 completely transformed the political landscape of Mexico, arguably ending the country's protracted transition to democracy.[164] With 39 per cent of the congressional vote, for the first time the PRI no longer held an absolute majority in the lower house: it had only 239 of the 500 seats. The PAN obtained 121 seats, the PRD 125, and the recently created Green Party 8. Thus, by making a congressional alliance, these three parties were able to effectively prevent the PRI from taking control of the government bodies of the lower chamber, and to vote as a bloc on some issues. With the principle of proportional representation having been introduced in the Senate in the last reform, the opposition came to control 53 of its 128 seats. Furthermore, Cárdenas won the election in Mexico City with more than 40 per cent of the votes, and his party (the PRD) won 38 of the 40 plurality-winner seats on the city council.

It has been widely recognized that the IFE successfully organized its first elections as an autonomous body. Days after the 1997 elections, 85 per cent of those polled expressed their satisfaction with the performance of the IFE.[165] Furthermore, more transparent electoral processes have effectively served to bring out Mexico's plurality. Whereas in 1982 the PRI controlled 91 per cent of elected positions (including the presidency, seats in congress, governorships, local congresses, and mayoralties), in 1997 it controlled only 54 per cent.[166] Thus, as John Bailey and Arturo Valenzuela pointed out shortly after the mid-term elections,

> Mexico, in contrast to the transitional regimes of Eastern and Central Europe and South American countries such as Brazil and Peru, is experiencing a democratic opening that features fairly coherent parties. The three largest parties—the PRI, the PAN, and the PRD—combined for more than 80 percent of the vote in July 1997, heralding the emergence of a "three-plus" party system that will serve as a stabilizer of political expression.[167]

This emergent plurality and consolidation was corroborated in the 2 July 2000 elections. Not only did Vicente Fox, as the candidate of the combined

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[164] Santa-Cruz 2002, *supra* note 79.

[165] IFE poll in 'Prueba superada' *Voz y voto* (September 1997), 35.

[166] María Amparo Casar & Ricardo Raphael, 'Las elecciones de 1998: La distribución del poder político en México' *Nexos* (July 1998) 41 at 42.

[167] John Bailey & Arturo Valenzuela, 'The Shape of the Future' (1997) 8 J. Democracy 43 at 47.

PAN and Green Party's 'Alianza por el Cambio', win the presidency with only a plurality;[168] as well, no party emerged as the absolute winner in Congress.[169]

Lending credibility to this process was again a myriad of national and international observers. Over 30,000 national and 862 international observers distributed all over the country monitored the elections. By this time the government's attitude vis-à-vis foreign observers had changed substantially. For instance, the Zedillo administration explicitly requested the presence of Carter himself in the electoral process.[170] Leading the CC's mission, Carter met in the days previous to the elections with the three main contenders to the presidency, and was assured that they would respect the election results.[171] This time the CC developed a new monitoring strategy, working closely with the three main political parties.[172] Global Exchange, WOLA, and other international NGOs, on the other hand, did not engage in a comprehensive effort to monitor the presidential elections.

But by this time the Mexican understanding of sovereignty had also changed. As Shelly McConnell, assistant Director of the CC's Latin American Program and a member of the its 2000 delegation, said,

> the elections are only a signal of what had taken place between '94 and 2000, which is a reformulation of what is Mexican sovereignty … Mexico's sovereignty today is so strong that they can have a former US president show up and render an opinion about a sovereign process, an election, symbolic of sovereignty in a sense, and they are glad to have him there.[173]

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[168] 42.5 per cent, vs. 36.1 per cent for the PRI's candidate Francisco Labastida, and 16.6 per cent for Cárdenas, running as the candidate of the 'Alianza por México', formed by the PRD and four small parties.

[169] In the lower chamber the PRI won 211 seats, the PAN 207, the PRD 50, and the Green Party 17 (the other four small parties that supported Cárdenas got 15 seats all together). In the Senate, the PRI received fifty-nine seats, the PAN forty-five, the PRD seventeen, and the Green Party five (two of the small parties that joined the PRD got one seat each). Similarly, the PAN won the two governorship elections on 2 July (Guanajuato and Morelos), and the PRD kept Mexico City (although it lost the majority in the legislative body).

[170] Interview of Shelly McConnell (4 December 2001) in Atlanta [McConnell, Interview].

[171] 'Los candidatos aceptarán los resultados, dice Carter' *Público* (2 July 2000), 18.

[172] Robert A. Pastor, 'Exiting the Labyrinth: Mexico's Path Toward Democratic Modernity' (2000) 11 J. Democracy 20 at 21.

[173] McConnell, Interview, *supra* note 170.

Accordingly, by the end of the twentieth century the presence of foreign monitors at an electoral process no longer stirred passions. Merloe noted that in fact, the presence of internationals felt 'superfluous' because of the generally high level of confidence in the process, and suggested the FDI would probably decline to even participate in future observation missions.[174] Pastor concurs: 'You don't need to observe elections everywhere, you just need the right to do so ... I dare say Mexico is not going to need international observers in six years ... because people trust the system; IFE passed the test, the PRI passed the test.'[175] And Woldenberg adds that while the IFE will continue to issue generic invitations to international monitoring organizations, as the election process in Mexico normalizes, he suspects that the attention on Mexico will decrease.[176]

It surely did. In the 2003 mid-term (lower house) elections, only a few foreign observers were present on election day, and their presence was hardly noticed. The IFE did issue a call for foreign visitors after November 2002, having asserted in a previous resolution that it 'values, in all its extension, the interests of representatives of diverse institutions and foreign organizations in knowing and learning' about the 2003 elections.[177] But few foreign observers came. For instance, neither the CC nor the NDI sent missions, nor did the OAS, and the UN played only a limited role in coordinating registered observers (as it had done in 2000). The work of domestic observers was also rather modest. AC, for example, did not mount a comprehensive network of observers as it had done in the past. It monitored elections in only ten states and Mexico City.[178] The electoral results confirmed once again both the plurality of the Mexican electorate and the consolidation of a three-party system, with the PRI, the PAN and the PRD winning 94 per cent of the seats.[179]

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[174] Merloe, Interview, *supra* note 98.

[175] Pastor, Interview 2000, *supra* note 51.

[176] Woldenberg, Interview, *supra* note 105.

[177] See 'Acuerdo del Consejo, General del Instituto Federal Electoral por el que se establecen las bases y criterios con que habrá de atender e informar a los visitantes extranjeros que acudan a conocer las modalidades del proceso electoral federal de 2003', online: IFE <http://www.ife.org.mx/documentos/TRANSP/docs/consejo-general/acuer-resol/21OCT02/211002ap5_1.htm>.

[178] See Alianza Cívica, 'Boletín de Prensa. Observación de la Calidad de la Jornada Electoral', online: Alianza Civica <http://www.alianzacivica.org.mx/>.

[179] The PRI won 222 seats, the PAN 151, and the PRD 96. The Green Party got seventeen seats, whereas Labor and Democratic Convergence received five seats each. Four seats were not assigned, since the elections in two districts were annulled (which affected also the distribution of proportional representation seats).

Further, with only 693 international observers present, the 2006 presidential elections confirmed that Mexico's democratic transition had reduced international interest in the country. Whereas in 1994, 653 observers came from the United States alone to monitor the electoral process, and 415 came for the 2000 elections, by 2006 there were only 219.[180] Beyond the especially pronounced decrease in American interest in Mexico, it is clear that the country no longer elicits as much interest as it used to as an IEM target.[181] Further, it is arguable that the domestic value of foreign observer opinion has actually increased. This may seem ironic, given the extremely close results of the 2006 presidential election, in which PAN's presidential candidate Felipe Calderón beat PRD's Andrés Manuel López Obrador by a mere 0.58 per cent of the vote.[182] López Obrador refused to accept the election results, and after the head of the European Commission observers declared that the electoral process had developed 'satisfactorily' in a 'transparent and competitive environment', and called on the parties to abide by the IFE's results, López Obrador retorted that the European observers 'had not observed anything.'[183] Because the margin of victory was so small, it was especially important to Calderón and to the IFE, as the arbiter, that outside parties validated the election as free and fair. With this validation, and despite López Obrador's objections (and those of his supporters—about a third of the electorate), the election results were accepted and Calderón declared the winner. Thus it seems clear that in the volatile post-electoral political environment, the relative political weight of the monitoring missions has grown. In any case, the main monitoring missions concurred that the elections had been free and fair.[184] Leaving aside the role of foreign observers in Mexican politics, the last electoral process does suggest that Mexico has largely 'graduated' from IEM.

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[180] Instituto Federal Electoral, *Elecciones Federales 2006. Encuestas y Resultados Electorales* (Mexico City: IFE, 2006) at 46, 50, 51 [IFE 2006a].

[181] Likewise, the number of domestic observers was less than half that of twelve years earlier: 25,321.

[182] The PRI's Roberto Madrazo came a distant third, with 22 per cent of the votes (thirteen points behind both Calderón and López Obrador). In the Senate, the PAN obtained fifty-two seats, the PRI thirty-three, and the PRD twenty-nine (and fourteen went to the other four parties). In the lower chamber, the PAN got 206 seats, the PRD 126 and the PRI 104 seats (with sixty-four seats assigned to five other parties). IFE 2006a, *supra* note 180.

[183] In Sergio Ramos, 'Presenta AMLO nuevos videos con presuntas irregularidades' *El Universal* (11 July 2004) [translated by author], online: El Universal <http://www.el-universal.com.mx/notas/361634.html>.

[184] Instituto Federal Electoral, *Elecciones Federales 2006. La Jornada Electoral del 2 de Julio de 2006* (Mexico City: IFE, 2006) at 54-9.

Moreover, and also attesting to the change in the understanding of the country's identity and national interests, Mexico started sending observers abroad—a significant departure from its traditional policy. Hence, since 1996 the IFE has sent sixty-six missions to twenty-three countries (eighteen in the western hemisphere), and democracy has become an important item on the foreign ministry's agenda since 2000.[185] It has thus become clear that the protracted contestation process with which the country had been involved regarding the monitoring field had translated into increased legitimacy for the emergent norm. As Antje Wiener notes, 'contestation is central for establishing the legitimacy of compliance processes; indeed, it is constitutive towards social legitimacy.'[186]

VI. Conclusions

The 1994 Mexican elections epitomize the nature of IEM. State and non-state actors in both the domestic and the international contexts interacted intensively to make the monitoring of the electoral process possible. The most interesting part of their interaction, though, was the novel normative structure in which it was inscribed. Only six years before, this structure was not present—and no interaction leading to a monitoring effort took place. For instance, there was no UN Electoral Assistance Office for de la Madrid's administration to resort to. Furthermore, the Mexican experience is interesting not only because domestic observers took the leading role in the monitoring of the electoral processes, but precisely because, despite their late entrance into electoral monitoring, they were able to play such a prominent role. But again, it was the international structure that made the entrance of Mexican NGOs into monitoring activities possible in the first place.

The Chiapas rebellion was certainly what triggered monitoring of electoral processes, but the issue was already in the air—and even without the uprising some independent groups would undoubtedly have monitored that election. (It should be remembered that the organizations that eventually formed AC decided to watch the election in November 1993, and that the CC initiated its involvement in the 1994 electoral process in September 1993). Just as certainly, though, the UN would have not been present in Mexico. Nevertheless, it was the institutionalization of IEM at the international level that allowed the government to respond to the challenge

[185] See Instituto Federal Electoral, 'Relación de participaciones del IFE en misiones de observación electoral', online: IFE <http://www.ife.org.mx/portal/site/ife/menuitem.24>.
[186] Wiener 2004, *supra* note 7 at 218.

posed by the rebels. So the trigger itself, important as it was for this and other events in the Mexican political economy, was a contingent factor.

By this time, an IEM network was already active, becoming an important actor in the Mexican electoral process—and in its foreign policy. That is why the international monitoring of the 1994 electoral process marked a breakthrough in Mexico's history—and why it meant so much more for Mexico than the subsequent four electoral experiences with this practice. After 1994, the Mexican state not only started to see the practice of election monitoring differently, but also came to conceive of its sovereignty as being partially defined by the international community. In other words, as mentioned in the introduction, a socialization process had taken place. Thus, 1994 was the turning point. By the mid-1990s the understanding of sovereignty enshrined in the WHI and instantiated in IEM as an accepted issue area had permeated the international system; after an extended contestation process the designated norm follower simply caught up. Foreign observers are now fully recognized in Mexican politics.

The Mexican case was of course part of a wider context in which state and non-state actors made both principled and strategic use of the discursive resources (culture, society, and personality) with which the continental lifeworld had endowed them. Arguments consistent with this stock of knowledge figured prominently in the actualized notion of sovereignty. Absent this hemispheric understanding, IEM would most likely not have emerged in the Americas earlier than anywhere else—and in Mexico later than in most other cases on the continent. This is not to suggest that without the WHI, IEM would have never taken place in the western hemisphere. After all, activists, states, and intergovernmental organizations in other regions also got in the habit of monitoring elections in the late 1980s and early 1990s. In the same way that IEM became an 'export' commodity of the new 'system of interests' (that is, of the Americas), it could just as well have been imported by this region had it emerged elsewhere.

But it did not—and that is my point: the regional lifeworld that is capable of accounting for the emergence of IEM at the time it did is the WHI and no other. Only the western hemisphere lacked any ontological gap between this practice and the wider normative structure. IEM did not occur when the WHI was absent. It is in this sense that the WHI was a necessary condition for the development of IEM; the practice is indeed contextually

linked to it. I do not claim that the hemispheric normative structure was a sufficient condition for the appearance of international observation; this case study shows that the emergence of IEM was contingent on the actions of a myriad of actors. Whitaker's remark on the WHI being a 'laboratory' for novel practices later tried somewhere else does indeed seem prescient.[187] As the approach used here suggests, the analysis of social practice in context allows us to draw meaning out of the discourse, and, perhaps more importantly for students of international politics and international law, to assess the legitimacy of international norms.

[187] See Whitaker *supra*, note 16 at 177.

The World Bank, Dams and the Meaning of Sustainable Development in Use

SUSAN PARK*

Our understanding of sustainable development will undoubtedly change over time as new insights modify, or even redefine, the multilateral consensus.[1]

I. Introduction

In 1987 the World Commission on Environment and Development (WCED) stated that sustainable development aims 'to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs.'[2] Although there are voluminous and competing definitions of sustainable development, that of the WCED dominates

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[1] Mukul Sanwal, 'Trends in Global Environmental Governance: The Emergence of a Mutual Supportiveness Approach to Achieve Sustainable Development' (2004) 4 Global Env. Pol. 16 at 21 [Sanwal].

[2] World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 8 [WCED].

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international politics.[3] This article posits that because there is broad international consensus in favour of sustainable development, but confusion over what it constitutes in practice, sustainable development is an example of a fundamental norm that lacks specificity and is therefore open to contestation. A fundamental norm is a highly general but overarching shared belief within a community, in this case the international community of states. Fundamental norms may come from states' constitutions, or they may be basic procedural norms of international relations, where sustainable development fits the latter category.[4] Importantly however, sustainable development pertains to more than just states. As a result, the norm is best understood in the context of specific issue areas such as international development, where sustainable development as a normative structure acquires 'meaning-in-use' by non-state practitioners like the World Bank.[5] As will be argued throughout, a norm's 'meaning is likely to differ according to experience with "norm use"' in different contexts (from inter-state negotiations to non-state actor implementation for example).[6] The article therefore argues that the fundamental norm of sustainable development is constituted through practice, and its meaning is attributed via interaction amongst relevant members of a group or community. In this case, sustainable development takes on a specific meaning in relation to the practices of international development lenders and developers.

International norms are validated in three ways: they acquire formal or legal validity in treaties, constitutions, contracts, and organizational policies; they are socially recognized through interactions amongst relevant members of a group or community to become social facts; and international norms acquire cultural validity where they are enacted in domestic contexts, such that a norm acquires meaning in culturally specific social interactions.[7] This

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[3] There are literally hundreds of thousands of books written on sustainable development and there are numerous journals devoted to the issue. Internationally and domestically states, business, and non-government organisations are implementing sustainable development through creating departments, divisions, action plans and strategies.

[4] Antje Wiener, 'Contested Meanings of Norms: A Research Framework' (2007) 5 Comp. Eur. Pol. 1 at 9 [Wiener 2007a].

[5] Jennifer Milliken, 'The Study of Discourse in International Relations: A Critique of Research and Methods' (1999) 5 Eur. J. Int'l R. 225 at 230 [Milliken]; Antje Wiener & Uwe Puetter, 'The Quality of Norms is What Actors Make of It' (2009) 5 J. Int'l L. & Int'l Rel. 1 [Wiener & Puetter 2009].

[6] Wiener 2007a, *supra* note 4 at 4; 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) at 18.

[7] Wiener 2007a, *supra* note 4 at 7; Antje Wiener, 'The Dual Quality of Norms and Governance Beyond the State: Sociological and Normative Approaches to Interaction' (2007) 10 Crit. Rev.

article traces the first two processes in relation to the implementation and validation of the international norm of sustainable development. First, it examines how sustainable development became formally valid within the context of United Nations (UN) conferences and commissions. It then traces how sustainable development took on a specific meaning-in-use through the practices of the World Bank in international development, which were reconstituted through contestation between environmentalists and states. The World Bank is privileged because of its size and influence in promoting sustainable development norms internationally.[8] Despite the proliferation of direct foreign investment,[9] the Bank still diffuses sustainable development to borrowers, to other multilateral development banks, to private sector banks through the Equator Principles, and most recently to bilateral export credit agencies.[10] Using the World Commission on Dams (WCD) as an example, the paper then documents how the meaning-in-use of sustainable development was challenged in relation to large dam energy projects. Here the social recognition of the meaning of sustainable development remains contested by divergent development actors. The process of norm contestation exemplifies how specific understandings of sustainable development for international development lending came to be considered appropriate. The case is important because it traces how international norms begin to acquire a meaning-in-use within the 'flexible world of governance beyond the state'.[11]

The article proceeds as follows: First, the theoretical argument is made that norms should be understood in terms of their normative structure of meaning-in-use; where norms takes on a specific meaning as a result of operationalizing it within a defined group or community that may not be understood in the same way compared to other communities. Constructivists often focus on the structural quality of norms at the expense of examining

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Int'l Soc. & Pol. Phil. 47 at 65 [Wiener 2007b]; Antje Wiener, *The Invisible Constitution of Politics* (Cambridge: Cambridge University Press, 2008) at 202 [Wiener 2008].

[8] Diane Stone, 'The "Knowledge Bank" and the Global Development Network' (2003) 9 Global Governance 43; Susan Park, 'Norm Diffusion within International Organizations: A Case Study of the World Bank' (2005) 8 J. Int'l Rel. & Dev. 14 [Park 2005].

[9] United Nations Conference on Trade and Development, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New York: United Nations, 2007), online: UNCTAD <http://www.unctad.org/en/docs/wir2007_en.pdf>; Development Centre for the Organisation for Economic Co-operation and Development, *Financing Development: Whose Ownership?* (Paris: OECD Global Forum on Development, 2008); Michael Goldman, *Imperial Nature: The World Bank and Struggles for Social Justice in the Age of Globalization* (New Haven: Yale University Press, 2005) [Goldman].

[10] Independent Evaluation Group, The World Bank, *Environmental Sustainability: An Evaluation of World Bank Group Support* (Washington: The World Bank, 2008) at 59 [World Bank 2008].

[11] Wiener 2007b, *supra* note 7 at 63; Wiener & Puetter 2009, *supra* note 5 at 6; Wiener 2008, *supra* note 7 at 202.

their reflexive, contingent and divergent meanings. Second, the article traces how the norm of sustainable development became formally valid through inter-state negotiations at UN conferences, which would shape future multilateral environmental agreements by states with non-state actor influence.[12] While the norm of sustainable development became formally valid, its meaning-in-use is enacted by disparate international and transnational actors. As a result, the third section analyses how a particular actor influential in a specific context—the World Bank in international development—interpreted the norm of sustainable development from its root-context in inter-state negotiations.[13] This article explores how the normative structure of sustainable development acquired a specific meaning-in-use by the Bank (challenged by member states and environmentalists), which in turn led the Bank to enact new organizing principles such as environmental and social safeguards and internal operating procedures.[14]

The final section argues that changes in the Bank's practices were only the beginning in spreading recognition over the need for environmental and social mitigatory measures within international development. As a result of social pressure from environmentalists, the Bank and the World Conservation Union (IUCN) created an independent World Commission on Dams (WCD). These interactions, between the Bank, environmentalists, anti-dam proponents and industry, demonstrate the importance of social recognition for constructing the meaning of sustainable development in use for international development, particularly in relation to energy generation.[15]

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[12] Michele M. Betsill & Elisabeth Corell, *NGO Diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations* (Cambridge: MIT Press, 2008). To be clear, a fundamental norm where states generally agree upon shared understandings of an issue area through international agreements does not imply jus cogens. Most international environmental agreements are soft law.

[13] Wiener & Puetter, *supra* note 5. International organizations like the World Bank are increasingly recognised as having autonomy and authority in undertaking their mandates; Michael Barnett & Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, N.Y.: Cornell University Press, 2004) [Barnett & Finnemore].

[14] Antje Wiener identifies three levels of norms: fundamental general norms, lower order organizing principles that are more specific and less contested and detailed specific standardized procedures; Wiener 2007a, *supra* note 4 at 8.

[15] The World Bank would also be challenged on its role in the extractive industries leading to the Extractive Industries Review (EIR, 2001-2003). While this is also an area where the Bank, environmentalists and project-affected peoples tried to establish shared understandings of how to enact the fundamental norms of sustainable development, the Review was established after the WCD and was less autonomous than the WCD. Indeed the EIR accorded more with the interaction between the Bank and environmentalists (detailed in section three) and is therefore not examined here. For more see the Extractive Industries Review, *Striking a Better Balance: The World Bank Group and the Extractive Industries – Final Report of the Extractive Industries Review* (Washington, D.C.: EIR, 2003), online: The World Bank <http://web.worldbank.org/WBSITE/

The article concludes with an assessment of the creation, actions and recommendations of the WCD in relation to reconstituting sustainable development's meaning-in-use for development practitioners.

II. Constructivism and the Normative Structure of Meaning-in-Use

Constructivist accounts of the importance of international norms are now commonplace. International norms have been documented as shaping state and non-state actor behaviour across every area of international relations—from security to international political economy, foreign policy, human rights, and the environment.[16] Norms, defined as 'shared expectations about appropriate behavior held by a collectivity of actors',[17] are social, intersubjective facts within international society.[18] In proving that the constructivist research agenda on norms could compete with rationalist accounts of change, arguably less attention has been paid to some of the basic insights of early constructivist work. Specifically, what has been overlooked is the contingent, historically situated and contextually specific nature of norms.[19] This article recaptures and applies the theoretical strength of constructivism by examining not only the structural power of international norms in shaping actors' behaviour and identity, but also how norms are made meaningful within specific contexts. This basic insight into the nature of international norms is crucial to understanding what it means for norms to be diffused within international relations.

EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20306686~menuPK:592071~pagePK:148956~piPK:216618~theSitePK:336930,00.html>.

[16] See Emanuel Adler & Michael Barnett, eds., *Security Communities* (Cambridge: Cambridge University Press, 2005); Steven F. Bernstein, *The Compromise of Liberal Environmentalism* (New York: Columbia University Press, 2001) [Bernstein 2001]; Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996); 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].

[17] Jeffrey T. Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe' (1999) 43 Int'l Studies Q. 83 at 83.

[18] Martha Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press, 1996) at 22-3 [Finnemore]; John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995) at 24-7.

[19] Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Theory* (London: Macmillan, 1979) [Giddens]; Stefano Guzzini, 'A Reconstruction of Constructivism in International Relations' (2000) 6 Eur. J. Int'l R. 147. See also Jeffrey Checkel, 'The Europeanization of Citizenship?' in Maria Green Cowles, James Caporaso & Thomas Risse, eds., *Transforming Europe: Europeanization and Domestic Change* (Ithaca, N.Y.: Cornell University Press, 2001) 180 [Checkel 2001]; Finnemore, *ibid.*; Risse, Ropp & Sikkink, *supra* note 16.

Analyzing how norms acquire meaning in divergent contexts means going beyond an examination of how a norm emerged to influence actors' behaviour, including how it became recognized as appropriate within specific social contexts. Documenting this process in relation to sustainable development involves tracing its implementation from inter-state negotiations to the World Bank, and then between the Bank, environmentalists and member states. However, the normative structure of the meaning-in-use is also vital for an appreciation of how norms are then enacted *beyond* the World Bank. Examining the creation of the WCD goes some way towards addressing how 'culturally divergent' actors tried to create a meaning-in-use for sustainable development through social interactions within international development.[20] In other words, industry, environmentalists and the Bank agreed to negotiate new meanings for sustainable development in relation to dams, where energy generation is fundamental to the normative structure of sustainable development.

To explain, understanding norms as structured by their meaning-in-use is based on three underlying assumptions.[21] The first assumption is that norms have a dual quality. This recognizes that norms are often stable enough that we can take them as given at any point in time, but they are also flexible and can evolve over time.[22] Much of the 'modern' constructivist literature examines how norms exert force in the international system by shaping actors' behaviour. Norms then become 'locked in' or become stable enough to be taken as given.[23] Examples include the acceptable use of types of weapons in warfare, the emergence of human rights, the practice of humanitarian intervention, and development.[24] Constructivists have demonstrated how norms are transposed from the international to domestic contexts, including how norms spread by international organizations and non-state actors influence states.[25]

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[20] Wiener 2007b, *supra* note 7 at 11.

[21] Uwe Puetter & Antje Wiener, 'Accommodating Normative Divergence in World Politics: European Foreign Policy Coordination' (2007) 45 J. Common Market Studies 1063 at 1069.

[22] Audie Klotz, 'Can We Speak a Common Constructivist Language?' in Karin M. Fierke & Knud Erik Jørgensen, eds., *Constructing in International Relations: The Next Generation* (Armonk, N.Y.: M.E. Sharpe, 2001) 223 at 229; Wiener 2007a, *supra* note 4 at 4.

[23] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 188.

[24] Richard M. Price, *The Chemical Weapons Taboo* (Ithaca N.Y.: Cornell University Press, 1997); Barnett & Finnemore, *supra* note 13; Risse, Ropp & Sikkink, *supra* note 16.

[25] Judith Kelley, 'International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions' (2004) 58 Int'l Org. 425; Ronald H. Linden, ed., *Norms*

However, this only tells part of the story. Norms emerge and exert influence on actors, but actors' practices in turn reconstitute international norms. The reconstitution of norms is often 'bracketed' once the norm has effected a change in actors' behaviour. Yet the basic constructivist insight is that norms have a dual quality: while they exert influence over actors' behaviour, they also evolve over time as a result of social interactions. Norms thus 'are both structuring and socially constructed through interaction'.[26] By demonstrating how the norm of sustainable development emerged at the international level, and how it was (re)interpreted by a development institution, the recursive nature of international norms is revealed. Further, once sustainable development was (re)interpreted by the Bank as a result of contestation with states and environmentalists, this then lead to the creation of the WCD which in turn created new meanings-in-use for sustainable development. This accords with the second assumption underpinning this approach: that social life is recursive and constituted through practice.[27] Norms are constituted and reconstituted through a continual process of interaction between agents and structures such that social structures 'are nothing more than routinized discursive and physical practices' that define the meaning of actions in any given context.[28]

The third and final assumption—and this is where the normative structure of meaning-in-use approach adds value—is that while norms such as sustainable development may be established through general agreement, contestation is revealed through examining how norms are practiced in specific contexts. Earlier I mentioned that constructivists have explored how international norms transpose to domestic contexts. However, the assumption is that there is a common meaning for 'fundamental norms' such as human rights, democracy, citizenship, and the rule of law. As Antje Wiener points out, fundamental norms 'keep a community together' within the context of the sovereign state.[29] At the international level such fundamental norms as sovereign equality are stable enough to be taken as given.[30] Other fundamental international norms however, such as human rights and sustainable development arise from states agreeing to international conventions, treaties and declarations where a range of

and Nannies: The Impact of International Organizations on the Central and East European States (Lanham, Md.: Rowman & Littlefield, 2002).

[26] Wiener 2007b, *supra* note 7 at 15.

[27] Giddens, *supra* note 19 at 5.

[28] Richard Price & Christian Reus-Smit, 'Dangerous Liaisons? Critical International Theory and Constructivism' (1998) 4 Eur. J. Int'l R. 259 at 267.

[29] Wiener 2007a, *supra* note 4 at 9.

[30] *Ibid*.

interpretations remain open. As such, state and non-state actors may create shared agreement over an international norm such as sustainable development but may disagree over the form and content of sustainability in relation to specific activities.

While much of the narrowing of the understanding of what constitutes sustainable development emerges from increasing scientific knowledge and narrower, more specific multilateral agreements and international organization policies, in areas like international development actors may agree to do as little ecological harm as possible but may continue to disagree over what this means. As a result, despite the formal validity of sustainable development, without social recognition amongst a group of relevant actors over the normative structure of sustainable development *in use* divergent and contestable practices will remain. The creation of the WCD is a case in point: controversies over dams led to 'white hot political conflict, social protest, even violence'.[31] The establishment of multi-stakeholder dialogues rather than further state-based treaties or organizational (read World Bank) policies was aimed at generating shared understandings of the meaning of sustainable development for all actors involved in international dams, beyond purely World Bank operations.

III. Norm Implementation: The Formal Validity of Sustainable Development

As argued above, sustainable development emerged at the international level through inter-state negotiations. This process is detailed before examining how the norm was taken up by the World Bank. Substantial scholarship already exists on the World Bank's environmental activities, although this tends to be disconnected from the international context where the norm of sustainable development first emerged.[32] In some ways this is

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[31] Ken Conca, *Governing Water: Contentious Transnational Politics and Global Institution Building* (Cambridge, Mass.: MIT Press, 2006) at 28 [Conca 2006].

[32] See for example Dana Clark, Jonathan Fox & Kay Treakle, eds., *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (Lanham, Md.: Rowan & Littlefield, 2003) [Clark, Fox & Treakle]; Jonathan A. Fox & L. David Brown, eds., *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, Mass.: MIT Press, 1998) [Fox & Brown]; Tamar L. Gutner, 'Explaining Gaps between Mandate and Performance: Agency Theory and World Bank Environmental Reform' (2005) 5 Global Env. Pol. 10 [Gutner 2005a]; Tamar L. Gutner, 'World Bank Environmental Reform: Revisiting Lessons from Agency Theory' (2005) 59 Int'l Org. 773 [Gutner 2005b]; Tamar L. Gutner, *Banking on the Environment: Multilateral Development Banks and Their Environmental Performance in Central and Eastern Europe* (Cambridge, Mass.: MIT Press, 2002) [Gutner 2002]; Daniel L. Nielson & Michael J. Tierney, 'Theory, Data, and Hypothesis Testing: World Bank Environmental Reform Redux' (2005) 59 Int'l Org. 785

understandable; the World Bank began to respond to environmental issues from the 1970s, prior to norm contestation by environmental groups and member states in the 1980s. Yet broader inter-state negotiations influenced World Bank management in terms of signaling the direction (member) states were already taking on environmental problems. Within inter-state fora, states encouraged the Bank's use of market-based solutions as appropriate responses compared to economic and political alternatives.[33] The broader social context is therefore important for understanding what sustainable development meant for the World Bank.

Sustainable development, which attempts to reconcile environmental preservation with economic development and social justice, is relatively new. Over time the environmental discourse has shifted towards sustainable development.[34] From the 1940s to the 1960s a conservation approach dominated international environmental policy making, but this shifted to sustainable development from the late 1960s to the enshrining of the WCED definition, mentioned at the outset of this paper, in 1987.[35] Increased scientific understanding of environmental damage from rapid economic growth provided further impetus for detailed international policy responses, triggering intellectual debates over finite resources and catapulting the environment to the top of the international agenda.[36]

The precise meaning of sustainable development is open ended as a result of evolving international policy responses to natural resource use and environmental degradation.[37] In responding to environmental constraints

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[Nielson & Tierney 2005]; Daniel L. Nielson & Michael J. Tierney, 'Delegation to International Organizations: Agency Theory and World Bank Environmental Reforms' (2003) 57 Int'l Org. 241 [Nielson & Tierney 2003]; Park 2005, *supra* note 8; Bruce Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment and the Crisis of Development* (Boston: Beacon Press, 1994) 26 [Rich]; Robert Wade, 'Greening the Bank: The Struggle over the Environment, 1970-1995' in Devesh Kapur, John P. Lewis & Richard Webb, eds., *The World Bank: Its First Half Century*, Vol. 2 (Washington, D.C.: Brookings Institution, 1997) 611 [Wade].

[33] For example there were no major political decisions to revise how international development practices were organized, such as shifting to limited small scale renewable development activities or preferencing command and control regulatory approaches.

[34] Adil Najam, 'Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement' (2005) 5 Int'l Env. Agreements 303 at 304-5 [Najam].

[35] Rosalind Irwin, 'Posing Global Environmental Problems from Conservation to Sustainable Development' in Dimitris Stevis & Valerie J. Assetto, *The International Political Economy of the Environment: Critical Perspectives* (Boulder, CO: Lynne Rienner, 2001) 15 at 17 [Irwin].

[36] Tony Brenton, *The Greening of Machiavelli: The Evolution of International Environmental Politics* (London: Earthscan, 1994) at 18, 22-3 [Brenton].

[37] René Kemp & Pim Martens, 'Sustainable Development: How to Manage Something that is Subjective and Never can be Achieved?' (2007) 3 Sustainability: Science, Practice & Policy 5 at 7.

and state differences, states constructed the norm through international treaties, agreements and commissions. Sustainable development emerged as a means of overcoming divisions between the industrialized North's concern for environmental conservation and pollution prevention and the developing South's economic needs that were evident at the United Nations Conference on the Human Environment (UNCHE) in Stockholm in 1972. It was endorsed by states because it represented the 'idea that development could be reconstructed as a (newly sustainable) common social project between North and South'.[38] General agreement therefore emerged between states to overcome the seemingly irreconcilable differences between environment and development.[39]

In the 1980s the WCED was established to bridge this gap between North and South, and its definition of sustainable development became dominant.[40] The 1987 WCED report became the 'preferred vehicle for the institutionalization of sustainable development'[41] because it clarified the link between poverty and environmental degradation, addressed the need for integration across various issue areas and disciplines, and established the need to weigh long-term environmental problems such as climate change against inter-generational inequities.[42] As a result, sustainable development became a 'useful, necessary and effective metanarrative for reconciling economic development with environmental and natural resource protection'.[43]

Pursuant to these objectives, much of the WCED report further interpreted sustainable development as ecological modernization, identifying 'science and technology as central institutions for ecological reform' while seeking to 're-orient technological innovation towards solving environmental problems rather than creating them'.[44] This goal was pursued

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[38] Irwin, *supra* note 35 at 28-9.

[39] Najam, *supra* note 34 at 308.

[40] This definition existed prior to the WCED but the WCED gave it international legitimacy. Bernstein 2001, *supra* note 16 at 58; Ian Moffatt, *Sustainable Development: Principles, Analysis and Policies* (New York: Parthenon, 1996) at 27.

[41] Irwin, *supra* note 35 at 32.

[42] Daniel G. Esty, 'A Term's Limits' (2001) 126 Foreign Policy 74 at 74.

[43] Robert F. Durant, 'Reconceptualizing Purpose' in Robert F. Durant, Daniel J. Fiorino & Rosemary O'Leary, eds., *Environmental Governance Reconsidered: Challenges, Choices and Opportunities* (Cambridge, Mass.: MIT Press, 2004) 29 at 30.

[44] Keith Stewart, 'Avoiding the Tragedy of the Commons: Greening Governance Through the Market or the Public Domain' in Daniel Drache, ed., *The Market or the Public Domain: Global Governance & the Asymmetry of Power* (New York: Routledge, 2001) 202 at 208 [Stewart]. For an opposing view see Oluf Langhelle, 'Why Sustainable Development and Ecological Modernization Should Not be Conflated' (2000) 2 J. Env. Pol. Planning 303 at 305 [Langhelle].

on the basis that 'the current development trajectory can be maintained in an environmentally safe manner through relatively minor modifications'.[45] Efficient economic development was therefore prioritized while natural resources and environmental goods were seen as 'essentially substitutable in the production of consumption goods and as a direct provider of utility'.[46] The sustainable development norm became pervasive because it is general enough to allow for both ecological modernization and environmental ideas that go beyond technological responses, although state (and industry) interpretations ruled out recognizing the limits to economic growth.[47]

Environmental concerns became a mainstream in the 1990s once the shift from environmental protection to 'sustainable development' occurred.[48] Norm-setting states favoured market dynamics to reconcile environmental degradation and economic growth.[49] Inter-state negotiations increasingly reflected ecological modernist interpretations of sustainable development but where halting environmental degradation was often subordinated to economic growth and development. Bernstein locates sustainable development within a much broader norm-complex based on state sovereignty, the shifting of the political economy from Keynesian to neoliberalism, and the promotion of environmental management approaches.[50]

Sustainable development was however further institutionalized at the United Nations Conference on Environment and Development (UNCED) in 1992. The UNCED conference heralded the importance of international cooperation on environmental issues through the Rio Declaration, the Agenda 21 blueprint for action, and the 'promotion of multilateral environmental agreements as a way to make environment and development possible'.[51] At UNCED states 'established a range of behaviours and

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[45] Marc Williams, 'In Search of Global Standards: The Political Economy of Trade and the Environment' in Dimitris Stevis & Valerie J. Assetto, *The International Political Economy of the Environment: Critical Perspectives* (Boulder, CO: Lynne Rienner, 2001) 39 at 42.

[46] Eric Neumayer, *Weak Versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms*, 2nd ed. (Northampton, Mass.: Edward Elgar, 2003) at 1 [Neumayer].

[47] Irwin, *supra* note 35 at 33.

[48] Bernstein 2001, *supra* note 16 at 2-4, 29.

[49] See Stewart, *supra* note 44 at 208. If sustainable development had been interpreted as 'strong sustainability', international political and economic structures—including those in international development—would look very different. That strong sustainability was not taken up points to the historically situated nature of inter-state negotiations in the 1980s and 1990s. On strong sustainability see Neumayer, *supra* note 46.

[50] Neumeyer, *ibid.*, see Chapter 2.

[51] Sanwal, *supra* note 1 at 17.

appropriate policy practices for dealing with global environmental problems that then set the pattern for action on specific environmental problems, and rights and responsibilities involved'.[52] In other words, norm setters[53] (states negotiating at UNCHE and UNCED and delegating to the WCED) formally validated the norm of sustainable development for themselves, and their agents such as the World Bank, to obey.[54] States would reaffirm these commitments within the United Nations General Assembly in 1997 (the Rio+5 Summit) and the World Summit for Sustainable Development (WSSD) held in Johannesburg in 2002.

Assuming that sustainable development has indeed created shared understandings about appropriate behaviour among a group of actors, how might this be assessed? For constructivists, norms must entail 'recognizable and hence enforceable prescriptions for behaviour'.[55] How is the norm of sustainable development enforced or violated? For states, collective compliance is assessed in light of the Stockholm, Rio and Johannesburg Declarations, the Stockholm Plan of Action, Rio's Agenda 21, the Rio+5 Program for Further Implementation of Agenda 21, and the Johannesburg Plan of Implementation. States are further assessed against these commitments in specific environmental treaty negotiations such as the conventions and protocols on climate change, ozone depletion, and desertification.[56] Norm setting and following is therefore an ongoing process of inter-state cooperation within each specific environmental problem or policy area.[57]

Thus far, I have argued that the norm of sustainable development emerged to balance environmental preservation with economic growth and social justice within the context of inter-state agreements. But norms also exert structural pressure on actors at any given point in time. The next section examines how the World Bank began to implement the norm of sustainable development though international development lending.

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[52] Bernstein 2001, *supra* note 16 at 70-1; see also 68-9,108-9.
[53] Wiener 2007a, *supra* note 4 at 6.
[54] Langhelle, *supra* note 44 at 310.
[55] Wiener 2007a, *supra* note 4 at 6; Checkel 2001, *supra* note 19 at 182.
[56] On state compliance in MEAs see Abram Chayes & Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1998).
[57] States' behaviour varies across different environmental treaties according to their interests and identity. See Dimitris Stevis & Hans E.A. Bruyninckx, 'Looking through the State at Environmental Flows and Governance' in Gert Spaargaren, Arther P.J. Mol & Frederick H. Buttel, eds., *Governing Environmental Flows: Global Challenges to Social Theory* (Cambridge, Mass.: MIT Press, 2006) 107.

IV. Norm Implementation through Social Recognition: The World Bank's Sustainable Development

States gave only general prescriptions for the World Bank in their articulation of sustainable development in international fora. For example, the 1972 Stockholm Plan of Action states that the World Bank should be prepared to 'assist the less industrialized countries in solving the environmental problems of development projects,' including the planning of human settlements with respect to infrastructure (housing, transport, water, and community services).[58] Absent specific state sanctioned rules over how to address environmental issues within international development lending, sustainable development is best understood as a normative structure of meaning-in-use: the Bank enacts sustainable development through its operations in international development.[59] As argued below, the Bank undertook its own initiatives in response to inter-state negotiations, and so 'set the pace and standard for other international organizations whose behavior has environmental consequences'.[60] Indeed, other multilateral development banks now emulate the World Bank.[61]

The World Bank took a 'rhetorically positive although cautious position to ecologically sound development'.[62] Responding to increased pressure for international action on environmental issues in the lead up to Stockholm, the Bank viewed the environment through an ecological modernization approach, such that its early work focused on health and 'brown' issues such as pollution, energy utilization and end-user efficiency.[63] Brown issues matched the skill sets of the Bank's engineers.[64] This fits the argument that an organization will take up norms more readily if they fit the organization's culture or identity.[65] At the UNCHE in 1972, President McNamara stated that

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[58] *Report of the United Nations Conference on the Human Environment (Stockholm 1972)*, UN Doc. A/CONF.48/14/Rev.1 (1973), see 'Action Plan for the Human Environment', section B. Recommendations for action at the Environmental Level: Planning and Management of Human Settlements for Environmental Quality, Recommendation 1.

[59] Milliken, *supra* note 5 at 230; Wiener & Puetter 2009, *supra* note 5.

[60] Susan Baker, *Sustainable Development* (London: Routledge, 2006) at 181.

[61] Wade, *supra* note 32.

[62] Lynton Keith Caldwell, *International Environmental Policy*, 2nd ed., (Durham: Duke University Press, 1990) at 110.

[63] Philippe Le Prestre, *The World Bank and the Environmental Challenge* (Selinsgrove: Susquehana University Press, 1989) [Le Prestre].

[64] Michelle Miller-Adams, *The World Bank: New Agendas in a Changing World* (New York: Routledge, 1999); Wade, *supra* note 32.

[65] Daniel L. Nielson, Michael J. Tierney & Catherine E. Weaver, 'Bridging the Rationalist-Constructivist Divide: Re-engineering the Culture of the World Bank' (2006) J. Int. Rel. & Dev. 107.

the Bank had each project evaluated by its environment staff and that there were guidelines for environmental protection for its development operations.[66] Operationally, however, the Bank had difficulties in reconciling environmental aims and lending priorities, and divisions between environmental and other staff emerged.[67] The World Bank's initial 'do no harm' approach was a means of grappling with the policy and organizational implications of adding sustainability to its economic development activities.[68]

The Bank enacted sustainable development through extolling the environmental benefits of market-based approaches to its borrowers. In the early 1980s environmental groups began to challenge the World Bank's understanding of sustainable development because of its neglect of natural resource issues[69] and its lack of compliance with its own limited guidelines.[70] The main criticism of the World Bank's sustainable development practices were demonstrated via 'case study' project campaigns, which environmentalists used to detail the impact of the World Bank's ecological modernization approach.[71] Points of contestation between the World Bank and environmental groups included the opening up of pristine areas for development rather than environmental preservation or conservation; the building of major infrastructure in ecological systems without proper environmental and social assessment; and the Bank's ongoing support of the dam and extractive industries.[72]

In 1987 when the WCED report was released, the Bank responded to environmentalist pressure and member state demands by upgrading the Office of the Environment to the Environment Department, creating stand-alone environmental loans and agreeing to strengthen the Bank's environmental policies. It retained, however, its commitment to

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[66] Wade, *supra* note 32 at 636.
[67] *Ibid.*; Rich, *supra* note 32.
[68] Le Prestre, *supra* note 63.
[69] Brenton, *supra* note 36 at 125; Barbara J. Bramble & Gareth Porter, 'Non-Governmental Organizations and the Making of US International Environmental Policy' in Andrew Hurrell & Benedict Kingsbury, eds., *The International Politics of the Environment: Actors, Interests, and Institutions* (Oxford: Clarendon Press, 1992) 313 at 314.
[70] Rich, *supra* note 32, see Chapter 5.
[71] David A. Wirth, 'Partnership Advocacy in World Bank Environmental Reform' in Fox & Brown, *supra* note 32.
[72] For detailed accounts of the environmental campaigns see Rich, *supra* note 32; Wade, *supra* note 32; Fox & Brown, *supra* note 32; Clark, Fox & Treakle, *supra* note 3232; Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (Ithaca, N.Y.: Cornell University Press, 2004) [Khagram]; Goldman, *supra* note 9.

infrastructure and the extractives industry.[73] International policy makers within UN fora, the OECD, and the Group of Seven (G7) positively encouraged the Bank's environmental activities, including its research on environmental economics. The World Bank's 'emphasis on export led growth, open markets and domestic liberalization' through its program lending and structural adjustment loans were further legitimized as appropriate for sustainable development by the WCED.[74]

The WCED report *Our Common Future* states that the Bank 'has taken a significant lead in reorienting its lending programmes to a much higher sensitivity to environmental concerns and to support for sustainable development'.[75] It highlights the Bank's efforts in articulating 'clear policies and project guidelines for incorporating environmental concerns and assessments into their planning and decision making', noting that only a few organizations like the World Bank 'have assigned staff and resources to implementing them'.[76] While making some specific environmental recommendations, including more attention to species conservation, in terms of energy utilization the report ultimately encourages development banks to press 'governments to require that the most energy-efficient technology be used when industries and energy utilities plan to build new or extend existing facilities'.[77] This again reinforces the ecological modernization approach. In turn, the World Bank endorsed the WCED report's definition of sustainable development based on 'careful macroeconomic analysis [that] will strengthen environmental protection and lead to rising and sustainable levels of welfare'.[78]

Our Common Future does state, however, that the Bank's changes 'will not be enough unless and until it is accompanied by a fundamental commitment to sustainable development by the World Bank and the transformation of its internal structure and processes so as to ensure its capacity to carry this out'.[79] This supports the change demanded by environmentalists at the World Bank. Indeed the WCED report explicitly argues that the World Bank 'should develop easily usable methodologies to augment their own appraisal techniques and to assist developing countries

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[73] Nielson & Tierney 2003, *supra* note 32 at 259.
[74] Bernstein 2001, *supra* note 16 at 77.
[75] WCED, *supra* note 2 at 337.
[76] *Ibid.* at 338.
[77] *Ibid.* at 178.
[78] World Bank, *World Development Report 1992: Development and the Environment* (Oxford: Oxford University Press, 1992) at 8 [World Bank 1992].
[79] WCED, *supra* note 2 at 337.

to improve their capacity for environmental assessment'.[80] The Bank did implement mandatory environmental impact assessments for all World Bank projects in 1989, after environmentalists pushed for such changes both directly and indirectly—persuading powerful member states to force the Bank to do so as well.[81]

Changes in the Bank were further triggered in 1992, the year of the Rio Summit. The impact of a major international campaign against the largest dam project in history—the Bank-funded Narmada Sadar Sarovar in India—reached its tipping point when an independent, Bank-authorized, investigation revealed major shortcomings in the Bank's environmental and social practices at Narmada.[82] On the back of this debacle, and with the release of an internal report detailing broader Bank project failures, the Bank responded to environmentalist demands and member state pressure (member states were also buoyed by the Rio Summit process) in several ways.[83] It elevated the Environment Department to the Vice-Presidential level within the Bank; it strengthened its environmental and social safeguard policies for all projects; it increased its transparency through establishing an information disclosure policy; and it created an Inspection Panel for project-affected peoples to seek redress. Further changes included establishing environmental monitoring and evaluation procedures to improve its environmental practices and the hiring of more environmental specialists. By 2001 the Bank had an institution-wide environmental strategy outlining how it could mainstream environmental concerns throughout its operations.[84]

The Bank therefore broadened its understanding of sustainable development to incorporate green issues and specific safeguard practices in the 1990s, while further embedding its ecological modernization approach. Compared to earlier commonly held views 'which saw the trade-offs between environment and economy as a zero-sum game,'[85] the Bank began to make the case for a 'win-win' approach to sustainable development such

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[80] *Ibid.* at 163.

[81] Park 2005, *supra* note 8; Nielson & Tierney 2003, *supra* note 32; Gutner 2002, *supra* note 32; Wade, *supra* note 32; Rich, *supra* note 32.

[82] Willi A. Wapenhans, *et al.*, *The Wapenhans Report, Portfolio Management Task Force* (Washington D.C.: World Bank, 1992); Bradford Morse & Thomas Berger, *The Independent Review of the Sardar Sarovar Projects* (Ottawa: Resource Futures International, 1992). For more see Susan Park, *The World Bank Group: Changing International Organization Identities* (Manchester: Manchester University Press, forthcoming) [Park forthcoming].

[83] Nielson & Tierney 2003, *supra* note 32 at 261.

[84] For a detailed account of the Bank's environmental changes as a result of environmentalist pressure, see Park forthcoming, *supra* note 82 at chapter three.

[85] Stewart, *supra* note 44 at 208.

that 'enhanced efficiency contributes to the emergence of environmental industries and technologies.' This was detailed in the World Bank's flagship publication the *World Development Report*, which in 1992 was devoted to the environment. It further stated that 'continued, and even accelerated, economic and human development *is* sustainable and can be consistent with *improving* environmental conditions.'[86] The World Bank went on to endorse the removal of market distortions *and* the regulation of development activity by conceding that institutions are an important requirement for fully effective markets. Nevertheless, the World Bank also aimed to further efficient environmental management and sustainable development by 'getting the prices right'.[87] In 1999 the World Bank devised new measurements for sustainable development such as the *Genuine Savings* indicator covering environmental depletion, investment in human capital, and traditional savings.[88] However, this model for measuring sustainable development was internally contested,[89] such that it was 'ignored' in the Bank's own country macroeconomic work.[90]

Overall, the World Bank began to accept that market forces do not operate in a social and political vacuum to produce environmental benefits.[91] The Bank now agrees that some environmental goods are not substitutable, and that environmental services are non-rival and non-excludable. Yet it continues to measure environmental factors using utility-based indicators rather than on throughput or within an eco-systemic approach.[92] This may go some way towards explaining why the World Bank created global partnerships for the global and regional environmental commons such as biodiversity hotspots on the one hand, while maintaining its adherence to engaging in environmentally and socially risky sectors such as dams on the

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[86] World Bank 1992, *supra* note 78 at iii (emphasis in original). See also Neumayer, *supra* note 46 at 76; Bernstein 2001, *supra* note 16 at 77; Stewart, *supra* note 44 at 208.

[87] World Bank, *Five Years After Rio: Innovations in Environmental Policy (Environmentally Sustainable Development Studies and Monograph Series No. 18)* (Washington D.C.: World Bank, 1997) at 34.

[88] Peter P. Rogers, Kazi F. Jalal & John A. Boyd, *An Introduction to Sustainable Development* (Cambridge, Mass.: Harvard University Press, 2006) at 336.

[89] Neumayer, *supra* note 46 at 144-55.

[90] Philip Lawn, *Sustainable Development Indicators in Ecological Economics* (Cheltenham: Edward Elgar, 2006) at 65.

[91] Phillip J. Cooper & Claudia Maria Vargas, *Implementing Sustainable Development: From Global Policy to Local Action* (Lanham, Md.: Rowman & Littlefield, 2004) at 156.

[92] World Bank, *World Development Report 2003 – Sustainable Development in a Dynamic World: Transforming Institutions, Growth, and Quality of Life* (Washington, D.C.: The World Bank, 2003); Herman Daly, 'The Illth of Nations: When Growth Becomes Uneconomic' in Liane Schalatek *et al.*, conts., *Managing Sustainability World Bank Style: An Evaluation of the World Development Report 2003*, Papers No. 19 (Washington., D.C.: Heinrich Böll Foundation, 2002) 19.

other.[93] Agenda 21—the 1992 UNCED programme of action on sustainable development,[94] the 1997 Plan of Further Implementation,[95] and the 2002 Plan of Implementation[96] continued to recommend that the Bank increase states' environmental capacity and promote economic growth through market mechanisms.

Both rationalist and constructivist approaches have been used to explain the World Bank's greening. The former explains the Bank's environmental shift through state-based material directives (the logic of consequences), as opposed to the latter's international norms, organizational identity and culture (the logic of appropriateness).[97] Rationalists, particularly through the Principal-Agent (P-A) model, analyze intergovernmental organizations as states' agents. According to this model, the Bank was forced to either meet the changes demanded of it by powerful member states such as the United States or have its funding cut. The logic of consequences therefore informs the agents' behaviour, and in the case of the World Bank, meant the introduction of environmental and social safeguard policies and the establishment of compliance mechanisms.[98] The constructivist argument goes beyond material pressure to argue that changes within the Bank came from environmentalist persuasion, social influence and coercion through lobbying of powerful member states using material pressure to change the organization's actions and therefore its identity.[99] In this regard, change within the World Bank resulted from the logic of appropriateness, where shared assumptions by powerful member states, environmentalists and the Bank itself coalesced on the appropriateness of implementing environmental practices including environmental safeguards and standardized procedures such as environmental monitoring and evaluation.

Both accounts agree that the World Bank introduced environmental reform at the organizational level. For example, Gutner compares the World

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[93] World Bank 2008, *supra* note 10 at 25.

[94] *Report of the United Nations Conference on Environment and Development (Rio de Janeiro)*, UNCED, Annex II 'Agenda 21', UN Doc. A/CONF/151/26/vol.1 (1992) [UNCED Agenda 21].

[95] *Programme for the Further Implementation of Agenda 21*, GA Res. S/19-2, UN GAOR, 19th Sess., Annex, Agenda Item 8, UN Doc. A/RES/S-19/2 (1997).

[96] *Report of the World Summit on Sustainable Development (Johannesburg)*, Annex 'Plan of Implementation of the World Summit on Sustainable Development', UN Doc. A/CONF.199/20, see Chapter X 'Means of Implementation', recommendations 116-124, also recommendation 159.

[97] Gutner 2005a, *supra* note 32; Gutner 2005b, *supra* note 32; Nielson & Tierney 2005, *supra* note 32; Nielson & Tierney 2003, *supra* note 32; Park 2005, *supra* note 8.

[98] Gutner 2005a, *supra* note 32; Gutner 2005b, *supra* note 32; Nielson & Tierney 2005, *supra* note 32; Nielson & Tierney 2003, *supra* note 32.

[99] Park 2005, *supra* note 8; Park forthcoming, *supra* note 82.

Bank's aims with its outcomes in terms of its environmental performance.[100] Evidence of the ability of the World Bank to change focused on its integration of environmental issues into its development aims as well as the creation of increased environmental loans and staff; environmental divisions, policies and processes; and environmental monitoring and evaluation procedures.[101] In terms of its operational practices the Bank established environmental projects and impact assessments, national environmental action plans and country environmental analysis. That the Bank would shift from ignoring, to rejecting, to responding to environmentalist claims provided evidence, constructivists argued, of a shift in the organization. Further, that these changes became the benchmark for all multilateral development banks and were seen to be appropriate by states, environmentalists and the World Bank indicated a logic of appropriateness at work.[102]

The World Bank's greening is an important component for examining how sustainable development is implemented and enacted.[103] Tracing the Bank's implementation of sustainable development, first from inter-state negotiations and then from environmentalist and member state opposition to the World Bank's operations, shows the importance of social recognition on how norms become appropriate for actors with given identities. This does not mean, however, that the meaning of sustainable development is now fixed across all aspects of international development. Rather, it is the specific operational practices of multilateral development banks and other lenders that become fixed. [104] Yet the greening literature on the Bank focuses on that institution's specific actions and does not go beyond its organizational changes to examine how the process of establishing a normative structure of sustainable development is understood amongst culturally divergent actors. This process is discussed next.

V. Furthering Social Recognition through the WCD: Reconstituting Sustainable Development's Meaning-in-Use?

[100] Gutner 2005a, *supra* note 32 at 15.
[101] Gutner 2002, *supra* note 32; Gutner 2005a, *supra* note 32; Nielson & Tierney 2003, *supra* note 32; Park, *supra* note 8; Wade, *supra* note 32.
[102] Park forthcoming, *supra* note 82.
[103] This is documented in the literature: Gutner 2002, *supra* note 32; Nielson & Tierney 2003, *supra* note 32; Park forthcoming, *supra* note 82.
[104] For example, that all lenders should have environmental and social policies, environmental loans and staff, and environmental monitoring and evaluation is now socially recognized.

Thus far, the Bank's ecological modernization approach to sustainable development has been detailed in relation to the norm of sustainable development as constructed by states. In the 1980s, the Bank was challenged by environmentalists and member states to incorporate green issues into its operations, which it integrated into its ecological modernist approach. The Bank's greening is important for demonstrating how international norms shape actors' behaviour, and how the Bank's meaning of sustainable development was both reconstituted and socially recognized through interactions with states, environmentalist and the Bank. Although shared understandings emerged between environmentalists, states, and the Bank over incorporating environmental practices, contestation remained over the Bank's role in funding energy generation projects such as large dams in developing countries. World Bank support for large dams corresponded with inter-state environmental agreements, where states recognized their right to develop and to use their environmental resources as they see fit.[105]

As a result, the normative structure of sustainable development implicitly accepts that large dams remain fundamental to states' energy requirements. Further, the ecological modernization approach focuses on more efficient technology to provide for states' energy needs, without ruling out large infrastructure energy projects.[106] Therefore, the normative structure of sustainable development's meaning-in-use was contested by those at the project site: between project-affected peoples, environmentalists, industry and international development lenders such as the World Bank. Protracted contestation led to stalemate amongst culturally divergent actors that eventually paved the way for the creation of the WCD. The commission made recommendations for achieving sustainable development in ways that were acceptable to all actors involved in dams and development.[107]

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[105] See *Declaration on the Right to Development*, GA Res. 41/128, UN GAOR, 41st Sess., Agenda Item 101, UN Doc. A/RES/41/128 (1986) at Art. 1; see also *Report of the United Nations Conference on Environment and Development (Rio de Janeiro)*, UNCED, Annex I 'Rio Declaration on Environment and Development', UN Doc. A/CONF/151/26/vol.1 (1992) at principle 2. While shared understandings about how to address dams may be considered independent norms (see Khagram, *supra* note 72) examining whether consensus can be reached regarding dams feeds into the fundamental norm of sustainable development and is the reason for examining it in terms of the meaning-in-use approach.

[106] UNCED Agenda 21, *supra* note 94.

[107] Cultural divergence here refers to actors that have different nationalities, different ideologies and operate at different levels of international politics—internationally and transnationally. They have different normative baggage that they bring to international negotiations owing to these entrenched differences. The WCD states that its 'work programme covered 5 continents irrespective of political milieu, sectoral interest, administrative arrangement and power relations'; World Commission on Dams, 'Outline of the WCD', online: WCD

At first, the World Bank increasingly came under fire for maintaining a high profile role in large dams while simultaneously arguing that it was enacting sustainable development with appropriate safeguards in place.[108] Environmentalists galvanized throughout the late 1980s and 1990s against Bank-funded large dams because of their high potential for environmental and social impacts. Large dams such as Narmada in India often involve the involuntary resettlement of people and may include substantial loss of biodiversity, natural habitats, forests, and cultural heritage. More generally, the dams and reservoirs are now known to contribute to global warming through the release of greenhouse gases.[109]

Dams were not were substantial components of the World Bank's portfolio in the 1980s and 1990s. However, the World Bank is a lynchpin in international development that can play a catalytic role in this industry; while the environmental impact of large dams made them the focus of high profile environmental World Bank campaigns.[110] Environmentalists claimed that the World Bank was 'the biggest funder of the international dam industry',[111] by lending over fifty billion dollars for approximately 527 dam projects throughout the world[112] (although the Bank argued that it lent only three per cent of the total funding of dams in developing countries, equalling about three per cent of the Bank's overall portfolio during this period[113]).

Dams erupted as a major point of contestation between industry, environmentalists and the Bank because there was an increasing disjuncture between national standards for large dams throughout the 1980s.[114]

<http://www.dams.org/commission/partners.htm>. Nonetheless these groups interact internationally to reach agreement amongst all actors engaged with dams. They therefore constitute a group attempting to establish sustainable development's a meaning in use for dam development.

[108] This may be considered a case of green versus greenwash, but that would ignore the range of environmental practices that the World Bank does undertake. See Gutner 2002, *supra* note 32; Nielson & Tierney 2003, *supra* note 32; Park forthcoming, *supra* note 82.

[109] Patrick McCully, *Silenced Rivers: The Ecology and Politics of Large Dams*, 2nd ed., (London: Zed Books, 2001) [McCully 2001].

[110] *Ibid.* at ix; Conca 2006, *supra* note 31 at 83, 179-80; Rich, *supra* note 32.

[111] McCully 2001, *supra* note 109 at xvii. See also Jennifer M. Brinkerhoff, 'Partnership as a Social Network Mediator for Resolving Global Conflict: The Case of the World Commission on Dams' (2002) 25 Int'l J. Public Admin. 1281 at 1287 [Brinkerhoff].

[112] Jeff Lawson, '2,000 NGOs Support Manibeli Declaration' (1995) 18 Cultural Survival Q.

[113] See World Bank Independent Evaluation Group (IEG), 'World Bank Lending for Large Dams: a Preliminary Review of Impacts' [IEG], online: The World Bank Group <http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/BB68E3AEED5D12A4852567F5005D8D95>.

[114] Richard E. Bissell, 'A Participatory Approach to Strategic Planning: *Dams and Development: A New Framework for Decision-Making*' (Review) (2001) 43 Environment 37 [Bissell].

Environmentalists were engaged in protracted high profile transnational campaigns against dams throughout developing countries—most famously against the World Bank over the Narmada dam in India—precisely when developed states were beginning to decommission dams for their environmental impact.[115] Meanwhile, the dam industry 'had always left dam discussions with dam opponents to governments and the World Bank, finding the terms of argument rather distasteful,' even while it witnessed a decline in the number of dams being commissioned during this period.[116] Sparked by Narmada, over 2,000 non-government organizations (NGOs) from 44 states signed the *Manibeli Declaration* in October 1994, calling for a moratorium on World Bank funding for large dams.[117] The declaration pushed the World Bank to commission and implement

> the recommendations of an independent comprehensive review of all Bank–funded large dam projects to establish the actual costs, including direct and indirect economic, environmental and social costs, and the actually realized benefits of each project… The review must be conducted by individuals completely independent of the Bank without any stake in the outcome of the review.[118]

In 1994 the World Bank's Operation Evaluation Department (OED) began a review of fifty Bank-funded large dams. Of the two-year desk review only a short précis is publicly available, stating that seventy-four per cent of the dams are 'acceptable or potentially acceptable' and that 'the Bank should continue supporting the development of large dams provided that they strictly comply with Bank guidelines and fully incorporate the lessons of experience.'[119]

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[115] Khagram, *supra* note 72; McCully 2001, *supra* note 109.

[116].Bissell, *supra* note 114 at 38. There has been a resurgence of dam building in developing countries as states grapple with meeting their energy requirements; see David Biello, 'The Dam Building Boom: Right Path to Clean Energy?' *Yale Environment 360* (23 February 2009), online: Yale Environment 360 <http://e360.yale.edu/content/feature.msp?id=2119>.

[117] Large dams have a height of fifteen metres or more from their foundation; World Commission on Dams, *Dams and Development: A New Framework for Decision-Making, Report of the World Commission on Dams* (London and Stirling: Earthscan, 2000) at 11 [WCD 2000].

[118] International Rivers, 'Manibeli Declaration: Calling for a Moratorium on World Bank Funding of Large Dams' (1 September 1994), online: IRN <http://www.internationalrivers.org/en/follow-money/manibeli-declaration>.

[119] IEG, *supra* note 113. While OED reviews often include forthright criticisms of the World Bank—Willi A. Wapenhans, 'Learning by Doing: Reflections on 35 Years with the World Bank' in J. Carlsson & L. Wolhgemuth, eds., *Learning in Development Cooperation* (Stockholm: Expert Group on Development Issues, 2000)—they can also elide over substantive criticism. For more see Catherine Weaver, *The Hypocrisy Trap: The World Bank and the Poverty of Reform* (Princeton: Princeton University Press, 2009).

In March 1997, the first international meeting of people affected by dams was held in Curitiba, Brazil, with activists from twenty states calling for an independent commission into the effects of dams.[120] Knowing the OED report findings would be controversial, the Bank intended to deliver them to a joint workshop with the hybrid environmental organization IUCN one month later.[121] On the basis of a leaked copy of the report, Patrick McCully from the International Rivers Network (IRN) issued a statement that the 'OED had wildly exaggerated the benefits of the dams under review, underplayed their impacts, and displayed a deep ignorance of the social and ecological effects of dams'.[122] Intensifying criticism meant that World Bank management realized 'that it needed to either get out of the dam-building business or find a new avenue for reconciliation with stakeholders'.[123] NGOs argued that the World Bank was in a weak position, forcing it to make concessions;[124] others argued that the World Bank lost 'control of the process of evaluation review and standard setting on large dams'.[125] The forthcoming workshop then became the basis for creating an independent review to examine dam building internationally.

In early April 1997 thirty-nine participants from the World Bank, the IUCN, the dam industry—including representatives from the largest industry organization, the International Commission on Large Dams (ICOLD)—and environmentalists and anti-dam proponents met to discuss whether they could negotiate a consensus to examine dam effectiveness and principles and guidelines for future dam building.[126] Despite distrust participants agreed to the Gland Initiative, which aimed to establish an independent committee that would produce a report within two years.[127] The Gland meeting was a watershed in the politics of dams, with all participants realizing the need to move beyond the ongoing, protracted and destructive

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120 Patrick McCully, 'A Critique of the "World Bank's Experience with Large Dams: A Preliminary Review of Impacts"' (Berkeley: IRN, 2008) [McCully 1997].

121 Conca 2006, *supra* note 31 at 181; Brinkerhoff, *supra* note 111 at 1287.

122 McCully 1997, *supra* note 120.

123 Bissell, *supra* 114 at 38.

124 Lori Pottinger, 'Dam Industry Faces Judgement Day' (1997) 12 World Rivers Review, online: International Rivers <http://www.internationalrivers.org/files/WRR.V12.N3.pdf>.

125 Conca 2006, *supra* note 31 at 181.

126 Critical NGOs that attended included the IRN, the Bank Information Centre, the Berne Declaration, Movement of People Affected by Dams, and the Narmada Bachao Andolan (NBA or Save the Narmada); McCully 2001, *supra* note 109 at lxiv.

127 Tony Dorcey *et al.*, eds., *Large Dams: Learning from the Past, Looking at the Future – Workshop Proceedings: Gland, Switzerland* (Gland & Washington, D.C.: IUCN and The World Bank Group, 1997).

contestation over dam-building throughout the world.[128] It would lead to the creation in 1998 of the World Commission on Dams to review the performance of large dams and to issue recommendations on its findings.

The commission was never sure of its ability to reach consensus or even to complete its work owing to the ongoing dam building and anti-dam controversies playing out around the world.[129] The WCD was comprised of twelve commissioners, including representatives from states, the dam industry and anti-dam advocates. It initially relied on thirty-nine organizations from across the spectrum for advice on its work, later expanding to sixty-eight.[130] Headed by South Africa's former water minister Kader Asmal, the commission operated for two and a half years at the cost of almost ten million dollars.[131] The WCD created the largest source of information on the dam industry ever. It analyzed 1,000 dams and took an inventory of 45,000. It examined 125 dams—including controversial ones—in detail, undertook three country level reviews, and conducted seventeen thematic reviews including environmental, economic and governance aspects.[132] The process was transparent, open to submission, and included outreach activities such as regional workshops and newsletters. It was also supported by a sophisticated online presence.[133]

As a member of the WCD forum states, 'rarely has a commission taken an intransigent international controversy further into politics rather than fulfilling the hopes of the initiators that the commission would find a non-political answer'.[134] Despite entrenched industry/environment divisions the WCD was able to operate on a consensus basis; releasing its finding in November 2000.[135] Noting that dams also have substantial overrun costs and have contributed to the displacement of between 40 and 80 million people,[136]

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[128] *Ibid.* at 9.
[129] *Ibid.*; McCully 2001, *supra* note 109.
[130] Bissell, *supra* 114 at 39.
[131] Navroz K. Dubash *et al.*, 'A Watershed in Global Governance? An Independent Assessment of the World Commission on Dams (Executive Summary)' (2002) 21 Pol. & Life Sciences 42 at 55 [Dubash *et al.*].
[132] Bissell, *supra* note 114; Ken Conca, 'Introducing the Harrison Symposium' (2002) 21 Pol. & Life Sciences 37 at 38.
[133] Brinkerhoff, *supra* note 111 at 1291.
[134] Bissell, *supra* 114 at 37.
[135] Only one commissioner resigned—Madame Shen Guoyi from China, purportedly for personal reasons—while Madha Patkar from NBA added a comment to the final draft of the report challenging the shortcomings of the normative structure of sustainable development; WCD 2000, *supra* note 117 at viii, 321-2.
[136] *Ibid*.

the WCD report also points to successful dams all having the same three characteristics:

> they reflected a comprehensive approach to integrating social, environmental, and economic dimensions of development; they created greater levels of transparency and certainty for all involved; and they have resulted in increased levels of confidence in the ability of nations and communities to meet their future energy and water needs.[137]

Encompassing key elements of sustainable development regarding development and the environment as well as human rights, the WCD recommended seven policy principles and twenty-six guidelines to policy makers. The principles were that dam building should 'gain public agreement; conduct comprehensive options assessment; address existing dams; sustain rivers and livelihoods; ensure compliance; recognise entitlements and share benefits; and share rivers for peace, development and security'.[138]

The WCD was advisory and its recommendations were voluntary. As the WCD Commissioner Asmal noted, the WCD uses '"moral authority" to secure acceptance of its guidelines'.[139] According to Brinkerhoff the 'WCD's success is not conclusive, though its experimental approach, groundbreaking cooperation and the relative optimism it created, do suggest it is an important model to analyze in the search for appropriate responses to global conflict'.[140] For some scholars, it exemplifies a process of deliberative democracy, increased accountability and legitimacy because of the participation of international organizations, global networks of environmentalists, and business.[141] The WCD is part of a broader trend towards creating private sector or hybrid standards among a range of industries[142] that supplement agreements between states.[143] More

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[137] Bissell, *supra* 114 at 39.

[138] *Ibid*. See also WCD 2000, *supra* note 117 at xxxiv-v.

[139] Quoted in Brinkerhoff, *supra* note 111 at 1290.

[140] *Ibid*. at 1282.

[141] *Ibid*.; Klaus Dingwerth, 'The Democratic Legitimacy of Public-Private Rulemaking: what Can We Learn from the World Commission on Dams?' (2005) 11 Global Governance 65; Steven Bernstein 'Legitimacy in Global Environmental Governance' (2005) 1-2 J. Int'l L. & Int'l Rel. 139.

[142] Sander Chan & Philipp Pattberg, 'Private Rule-Making and the Politics of Accountability: Analyzing Global Forest Governance' (2008) 8 Global Env. Pol. 103; David Vogel, 'Private Global Business Regulation' (2008) 11 Ann. R. Pol. Science 261; Ronnie D. Lipschutz & Cathleen Fogel, '"Regulation for the Rest of Us?" Global Civil Society and the Privatisation of Transnational Regulation' in Rodney Bruce Hall & Thomas J. Biersteker, eds., *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002) 115.

importantly, the WCD located itself within the international framework of treaties and agreements. For example the WCD couched

> its recommendations within the context of the United Nations covenants and declarations of human rights, development and environment. By doing so it firmly located itself as within, rather than external to the frameworks of intergovernmental organization deliberations.[144]

The WCD therefore saw its recommendations as enacting the normative structure of sustainable development by upholding the Rio Declaration and specifying its meaning-in-use. While industry, environmentalists and international policy makers such as the World Bank largely viewed the process of deliberation and negotiation within the Commission as legitimate,[145] did they accept its recommendations? As stated in the introduction, the meaning of sustainable development is attributed via interaction amongst relevant members of a group or community. The WCD created guidelines for sustainable development's meaning-in-use for disparate actors involved with dams internationally. These guidelines do therefore entail recognizable and enforceable prescriptions for behaviour.

In this regard, the relevant members of the group or community include both state and non-state actors including environmental NGOs, project affected peoples, industry associations and individual firms. Indeed, the majority of respondents were non-state actors. Patrick McCully from the IRN for example, argued that the report is 'surprisingly strong worded and coherent' and 'as a whole [it] vindicates many of their arguments and proposes a progressive decision-making framework for future water and energy planning'.[146] Environmentalists like the IRN and the Berne Declaration, as well as project-affected groups including many from Africa and Asia, were in favour. Only the NBA and the Ethiopian IUCN issued critical letters; the former questioning the WCD's support of dam

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[143] Georgina Ayre & Rosalie Callway, eds., *Governance for Sustainable Development: A Foundation for the Future* (London: Earthscan, 2005); Elizabeth R. DeSombre, *Global Environmental Institutions* (London: Routledge, 2006); Norichika Kanie & Peter M. Haas, *Emerging Forces in Environmental Governance* (Tokyo: United Nations University Press, 2004).

[144] Dubash *et al.*, *supra* note 131 at 60; WCD 2000, *supra* note 117 at 201-2.

[145] Only some actors challenged the legitimacy of the WCD outright, including one academic, the state of India and the Russian National Committee of Large Dams. See the World Commission on Dams, '*Dams and Development: A New Framework for Decision-Making, The Report of the World Commission on Dams* – Reactions to the Final Report', online: WCD <http://www.dams.org/report/reaction/>.

[146] McCully 2001, *supra* note 109 at xxv.

construction, the latter questioning the preference of environmental concerns over development objectives.[147]

While all stakeholders examined the WCD's report closely,[148] dam critics responded more positively to the report than dam proponents.[149] Some firms such as the construction company Skanska AB immediately agreed to adopt the recommendations.[150] This was however inconsistent with the overall negative view held by the dam industry. ICOLD's President stated that the WCD's recommendations 'are not universally applicable and should not be considered as such by anyone, including funding institutions.'[151] Only a handful of the national chapters of ICOLD supported the recommendations; the majority were overwhelmingly critical, as was the Russian National Committee of Large Dams. In comparison the United States National Hydropower Association (NHA) was an outlier, in stating that it was 'further along on creating opportunities to optimize benefits from existing dams and strengthen environmental mitigation and restoration measures' as called for by the WCD.[152]

In terms of international organizations, UN agencies such as UNEP and the World Health Organization were in favour of the report. Both the African and Asian Development Banks initially responded positively, although they were non-committal. In comparison, the World Bank 'was the most cautious' stakeholder to the report, using 'client government reservations as a

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[147] Narmada Bachao Andolan, 'World Commission on Dams Report vindicates unjustifiability of large dams' (20 September 2000), online: WCD <http://www.dams.org/report/reaction/reaction_nba.htm>; Gedian Asfaw, 'Criticises the report from an Ethiopian perspective', online: WCD <http://www.dams.org/report/reaction/reaction_asfaw.htm>.

[148] Dubash *et al.*, *supra* note 131 at 56.

[149] Conca 2006, *supra* note 31.

[150] Skanska AB, 'Skanska Supports the World Commission on Dams' Recommendations' (16 November 2000), online: WCD <http://www.dams.org/report/reaction/reaction_skanska.htm>.

[151] C.V.J. Varma, 'Response to the Final Report: ICOLD – Open Letter to WCD Chair' (30 November 2000), online: World Commission on Dams <http://www.dams.org/report/reaction/reaction_icold2.htm>

[152] Initial statements were made from twenty-five national chapters of ICOLD. Only five national groups responded favourably, and only two—Australia and the Netherlands—were strongly positive. National Hydropower Association USA, 'NHA comment on world dam report' (20 November 2000), online: WCD <http://www.dams.org/report/reaction/reaction_nha.htm>. The main criticisms of the WCD report detailed by states, industry representatives and professional associations are that the report was biased in overlooking the positive aspects of dam development; that it was methodologically flawed in its choice of the dams analyzed in depth; that it did not take into account current efforts by the dam industry to rectify environmental and social issues; that the costs of implementing its recommendations will be too high; and that the principles and guidelines recommended do not translate into national context and take local variation into account.

rationale for its unenthusiastic response.'[153] The Bank 'experienced a major internal debate over the implications of the report', because 'the Bank's board of executive directors [comprised of member states] is visibly concerned about the "costs of compliance" with the WCD approach' to the point where it 'is quite doubtful that the World Bank can afford the possible increase in design and compliance charges for dam projects'.[154]

As a result, the World Bank offered only 'a modest suite of follow-up activities such as gathering information on good practice and further exploration of how the WCD guidelines might inform the World Bank's own guiding strategies'.[155] An internal Bank report stating that the WCD recommendations were too weak to implement was endorsed by the Bank's Board.[156] The Bank did argue however, that much of the WCD's recommendations already fit within its the environmental and social policies. Dubash *et al*. argue that had the World Bank been on the WCD or better represented it would have 'placed greater pressure on the institution to acknowledge ownership of the findings and recommendations', but at the price of the commission's independence.[157]

Despite the Bank's lacklustre response, since the Commission completed its work there has been engagement with the report's recommendations. Although states with big dam projects like India and China have not endorsed the WCD, numerous other international actors, including states grappling with dam controversies, have.[158] In other words, while the recommendations have not been universally accepted, the WCD process has been—and continues to be—taken up. This was demonstrated by the engagement in the WCD process by states, international organizations, industry associations, environmentalists and project-affected people. Yet it is also evident now that the WCD has completed its work. Under the auspices of UNEP's 'dams and development project', which was established to further the work of the commission, annual global multi-stakeholder dialogues were held between 2002 and 2006, emulating the WCD template. These dialogues drew attention to those aspects of dam building that remained unaddressed by the WCD report. Furthermore, twelve developing and five developed states have enacted multi-stakeholder meetings at the national level to

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[153] Dubash *et al*., *supra* note 131 at 57

[154] Bissell, *supra* 114 at 40.

[155] *Ibid*. at 57.

[156] Conca 2006, *supra* note 31 at 204; McCully 2001, *supra* note 109.

[157] Dubash *et al*., *supra* note 131 at 50. The World Bank was on the WCD forum, contributing to only six per cent of WCD financing; *ibid.* at 51.

[158] *Ibid*.

discuss the implications of the WCD recommendations.[159] Perhaps even more importantly, five states—Nepal, South Africa, Thailand, Uganda and Vietnam–have undertaken more extensive ongoing dialogues to assess how to understand the WCD report recommendations within their national context.[160]

Can we then speak of a single meaning of sustainable development in use for dams in international development? One can argue that the WCD recommendations are being diffused around the world and that international actors like the World Bank, the dam industry and states can be assessed against the recommendations (and found wanting thus far). In other words, there are now legitimate principles and guidelines for international development in the dam industry with which actors must contend. That states with dam controversies are engaging with them supports the argument that an ongoing process of interaction between disparate actors over these principles and guidelines is reconstituting the meaning of sustainable development in use. While the initial focus that led to the creation of the WCD was World Bank funding of large dams, the establishment of the WCD has contributed to a much larger process of interaction and contestation amongst culturally divergent actors. Further research into the how the meaning of sustainable development in use is playing out at the national level through multi-stakeholder dialogues will reveal whether culturally divergent actors understand the WCD's meaning of sustainable development in use the same way. Fortunately, we have the theoretical means to undertake this research.[161]

VI. Conclusion

This article traces how the fundamental norm of sustainable development became stable enough to be taken as given through inter-state conferences and negotiations. Yet norms also evolve over time and may have different meanings within specific contexts. The article traced the evolution of sustainable development from its inter-state context to its influence on the World Bank. The Bank interpreted sustainable development as ecological modernization, enacting market based efficiency solutions to solve the

[159] Developing states include Argentina, Indonesia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Namibia, Pakistan, Sri Lanka, Togo, and Zambia. Developed states include Germany, Netherlands, Norway, Sweden and the United Kingdom. See UNEP Dams and Development Project, 'Dialogue Activities', online: UNEP <http://www.unep.org/dams/Promoting_Dialogue/National_Dialogue/>.

[160] *Ibid*.

[161] Wiener 2008, *supra* note 7.

environmental impacts of its development activities. This upheld the normative structure of sustainable development as constructed by states. It was subsequently challenged by environmentalists and member states, who engaged in a process of greening the institution to created shared understandings of the appropriate behaviour for multilateral development lenders. Both processes, of formal validity and of social recognition, are therefore examples of norm implementation.

However, norms may also remain contested where actors are culturally divergent within a specific group or community. This is particularly significant in the realm of international dams development, where industry, states, the World Bank, environmentalists, and project-affected people continue to contest the meaning of sustainable development in use. The creation of the WCD aimed to overcome such normative contestation. While the WCD provided concrete principles and guidelines that could reconstitute the normative structure of sustainable development, these were not automatically accepted by states, industry or the World Bank. However, the process for overcoming stalemate has created new means of interactions for disparate actors to culturally validate sustainable development's meaning-in-use at the national level.

The Domestic Contestation of International Norms
An Argumentation Analysis of the Polish Debate Regarding a Minority Law

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I. Introduction

Minority protection has emerged as one of the most prominent areas of international norm-setting activity in the post-Cold War era, as indicated by the adoption of several international documents addressing the issue, including the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE),[1] the United Nations *Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*,[2] the Council of Europe's *Charter for Regional and Minority Languages*,[3] Recommendation 1201 adopted by its Parliamentary Assembly,[4] and the *Framework Convention for the Protection of National Minorities* (FCNM).[5] In addition, the European Union has included the requirement to guarantee the protection of minorities into its political accession criteria.[6]

Despite international attempts to codify and promote minority rights, they remain contested. This contestation pertains not only to the definition and recognition of minorities and the question of whether they should be granted special rights, but also to different concepts of minority protection ranging from non-discrimination to collective minority rights. In addition, the legitimacy of demands to adopt minority protection has been curtailed by accusations of applying double standards. This problem arises specifically for the EU, because the external use of minority protection as a membership condition did not follow the establishment of an internal minority standard based on group-specific rights for national minorities. The EU has neither developed such rights within the *acquis communautaire*, nor do the member states subscribe to a single European standard.[7] Other international organizations such as the Organization for Security and Co-operation in Europe (OSCE) have been accused of applying inconsistent standards when

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[1] Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (held on 5 June to 29 July 1990).
[2] *Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res. 47/135, UN GAOR, UN Doc. A/RES/47/135 (1992).
[3] Council of Europe, *Charter for Regional and Minority Languages*, CETS No. 148 (1992).
[4] Council of Europe, P.A., 1 February 1993 (22nd Sitting), Doc. 6742 (1993).
[5] Council of Europe, *Convention for the Protection of National Minorities*, CETS No. 157 (1995).
[6] European Council, *Presidency Conclusions: Copenhagen European Council* (held on 21 to 22 June 1993).
[7] Bruno De Witte, 'Politics Versus Law in the EU's Approach to Ethnic Minorities' (2000) EUI Working Paper No. RSC 2000/4.

addressing minority protection as well.[8] Accordingly, the successful implementation of minority protection in Central and Eastern European countries (CEECs) in the context of EU enlargement has so far predominantly been used as an argument against constructivist or norm-based accounts, which generally assume consensual meaning and stability as a precondition for international norms to be considered legitimate and thus to have an impact on the domestic level. If minority rights are contested and lack legitimacy, they are not likely to be followed on the basis of constructivist processes such as persuasion and internalization. Instead, compliance (if it happens at all) should be caused by rationalist factors such as external incentives or sanction threats.

Contrary to such assumptions, this article proposes an argumentation-analytical approach to studying norms as intersubjective reasons instead of structural causes or subjective motives in order to account for the impact of contested norms in processes of domestic norm construction. This approach is based on an analysis of the conceptual frameworks, types of arguments, and coherence of the argumentation used to justify the adoption of minority rights in the domestic decision-making process.[9] As a case study, this article analyzes the parliamentary debates leading to the adoption of a Polish law on national minorities.

The article is structured as follows: Part II discusses the shortcomings of existing research on the role of norms in International Relations (IR), which fails to adequately address the intersubjective (instead of objective or subjective) ontology of norms and their role as reasons rather than causes of action, and makes the case for an argumentation-analytical approach to studying norms. Part III presents three analytical lenses for argumentation analysis: first, the contested conceptual frameworks underpinning the proposals; second the different types of arguments (utility-, value- or rights-based) utilized to justify the claims; and third, the coherence of the overall argumentation. Part IV applies the approach to the Polish parliamentary debate regarding the adoption of a minority law. Part V evaluates the use and coherence of arguments in the Polish debate, arguing that rights-based

[8] Will Kymlicka, 'Reply and Conclusion' in Will Kymlicka & Magda Opalski, ed., *Can Liberal Pluraism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press, 2001) 347 at 381.

[9] For an overview on the historical background and different strands of argumentation analysis see Frans H. van Eemeren *et al*., *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary Developments* (Mahwah, N.J.: Lawrence Erlbaum Books, 1996).

arguments referring to Council of Europe standards were the most important resource to coherently justify the adoption of the law and the individual minority rights concept that it employs.

II. Theorizing Norms as Intersubjective Reasons: Making the Case for an Argumentation-Analytical Approach

Constructivist research on norms in IR has mainly focused on 'robust',[10] i.e. strong and stable norms in order to account for the diffusion of and compliance with international norms. Even approaches that claim to 'bring agency back in'[11] against overly structural accounts, e.g. from sociological institutionalism, normally focus on agency in reaction to established norms.[12] If the evolution of norms (as opposed to the impact of a given norm) is addressed, the analysis usually seeks to establish an independent measure for norm strength,[13] while ignoring contestation and changes in the meaning of norms. Only well-defined and consensually shared norms are counted as being sufficiently strong to be effective, whereas contested norms are not expected to have any impact.

In order to overcome these limitations, two problematic features of norms have to be addressed. The first concerns the ontological status of norms as intersubjective phenomena, instead of as either objective structural constraints or subjective motivations of actors. The second is that norms cannot easily be operationalized as direct causes of action and thus treated as an independent or intervening variable in a positivist research design, but serve as public reasons for action that call for an interpretative reconstruction of reasoning processes.

Norms are consensually defined as 'collective expectations for the proper behaviour of actors within a given identity'.[14] In accordance with this

[10] Jeff W. Legro, 'Which norms matter? Revisiting the "failure" of internationalism' (1997) 51 Int'l Org. at 31 [Legro].
[11] Jeffrey T. Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 World Politics at 324.
[12] See, e.g., Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights* (Cambridge: Cambridge University Press, 1999) [Risse *et al*.].
[13] Legro, *supra* note 10 at 39; Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. at 905.
[14] Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, 'Norms, Identity, and Culture in National Security' in Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996) 33 at 54.

definition, it is now common to distinguish norms from mere behavioural regularities,[15] as well as to acknowledge that '[u]nlike ideas, which may be held privately, norms are shared and social; they are not just subjective but intersubjective.'[16] This means that they can neither be treated as objective factors that are exogenously given and independent of actor perceptions and interpretations, nor can they be reduced to subjective ideas, beliefs or intentions held by individual actors. It follows that norms should be studied not so much on the level of cognition or behaviour, but on the level of communication, justification and argumentation.

The intersubjective ontology of norms is not easily reconciled with a positivist epistemology, which considers norms as causes of action.[17] In such a framework, only two pathways are considered to establish a sufficient causal influence of norms on behaviour: either they work as structural constraints, which are sufficiently strong to overcome even contravening ideas and interests and thereby directly determine behaviour irrespective of subjective convictions, or they work indirectly through processes of socialization and internalization, so that they influence the identities and preferences of actors and cause behaviour as subjective motives for action. As a result, norms are either 'ontologized'[18] as exogenously given social facts with a fixed and commonly known meaning and thereby assimilated to objective facts, or they are assumed to work through processes on the subjective level and hence reduced to individual motives and intentions.

Constructivists opposed to a positivist reading of the effects of norms have stressed that norms cannot be a sufficient cause of action because they are counterfactually valid[19] and 'cannot provide closure for the purposes of carrying on because rules are not the sufficient agency whereby intentions

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[15] See e.g. Neta C. Crawford, *Argument and Change in World Politics* (Cambridge: Cambridge University Press 2002) at 86 [Crawford].

[16] Martha Finnemore, *National Interests in International Society* (Ithaca/London: Cornell University Press, 1996) at 22 [emphasis omitted].

[17] John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 Int'l Org. 855 [Ruggie].

[18] Antje Wiener, 'Constructivism: The Limits of Bridging Gaps' (2003) 6 J. Int'l Rel. & Dev. 253 at 266.

[19] 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) [Kratochwil]; Ruggie, *supra* note 17.

become equivalent to causes.'[20] Instead, norms 'fall into the category of reasons for actions, which are not the same as causes of actions.'[21] Treating norms as reasons asks for a communicative perspective focusing on the intersubjective validity of norms in processes of argumentation and justification. The reasons provided by actors establishing or following norms give important insights into how norms work, so that if 'norms influence decisions through the reasoning process, the processes of deliberation and interpretation deserve further attention.'[22]

Among the IR scholars studying argumentative processes, three different approaches can be distinguished. As a first strand, constructivists have sought to utilize Habermas' theory of communicative action.[23] A major aim for scholars working from this angle is to identify the role and conditions of sincere arguing processes in international relations, and to trace the consequences for processes of persuasion, socialization and normative change.[24] Arguing in this perspective is not only a distinct mode of interaction (as opposed to bargaining), but is also based on a specific logic of action in which actors are oriented towards reaching a reasoned consensus and prepared to be persuaded by the better argument. Against this view, the concept of rhetorical action, which can be defined as the 'instrumental use of arguments to persuade others of one's selfish claims,'[25] has been developed as an alternative theoretical approach to study argumentation processes. While supporting the constructivist claim that norms and justifications are not merely post-hoc rationalizations or epiphenomena to material factors, the rhetorical action approach retains a consequentialist logic of action, which means that actors engaged in arguing are not necessarily genuine and also do not internalize norms, even when they have to admit argumentative defeat.

It follows that both approaches, despite their antagonistic positions on the subject of individual persuasion and norm internalization, share a

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[20] Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989) at 51.
[21] Ruggie, *supra* note 17 at 869 [emphasis omitted].
[22] Kratochwil, *supra* note 19 at 11 [emphasis omitted].
[23] Jürgen Habermas, *Theorie des kommunikativen Handelns* (Frankfurt/Main: Suhrkamp, 1981) [Habermas 1981].
[24] Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org. 1.
[25] Frank Schimmelfennig, 'International Socialization in the New Europe: Rational Action in an Institutional Environment' (2000) 6 Eur. J. Int'l Rel. 109 at 129 [Schimmelfennig].

commitment to establish the action-theoretical foundations of argumentative behaviour, i.e. try to account for argumentation as a *process* by which either argumentative success or genuine persuasion is accomplished, and the *procedural* framework conditions under which argumentation is most likely to take place and be effective. This article proposes a third perspective, which concentrates on argumentation as a *product*, i.e. the contents and types of arguments on the intersubjective level.[26]

III. Three Analytical Lenses of Argumentation Analysis: Conceptual Frames, Argument Types, and Coherence

This article focuses on the content of arguments by analyzing three central elements of contestation with regard to minority rights: first, the issue-specific conceptual framework within which a specific claim is situated–in our case, different minority protection concepts; second, the different types of arguments that are put forward to back a claim; and third, the way in which different arguments to support a position add up to a coherent argumentation.

1. The contested meanings of the minority protection norm: a conceptual framework

Far from being a stable, consensual human rights norm, minority protection remains a contested issue. This contestation pertains not only to the general validity of the minority rights norm, i.e. the question of whether minorities should be protected at all, but also to the meaning of the norm and—most fundamentally—to the concept of a minority itself. The following section elaborates on central conceptual questions connected with the protection of minorities.

The approach of a state towards its minorities can be analyzed along two dimensions: first, whether a negative or a positive attitude to protecting minorities via group-specific rights and supporting measures is taken; and second, whether the approach rests on individualist or collective assumptions about the nature of the nation, minorities, and their respective rights. In terms of the major debates regarding ethnic relations in political theory, these two dimensions can roughly be described as the distinction between nationalist and multiculturalist positions on the one hand,

[26] For the distinction between argumentation as procedure, process or product see Habermas 1981, *supra* note 23 at 47ff.

depending on whether national unity or diversity between sub-national groups is emphasized, and liberal versus communitarian positions on the other, which differ on the question of whether individual autonomy or group-membership is given priority. '[L]iberal individualists argue that the individual is morally prior to the community ... Communitarians dispute this conception of the "autonomous individual". They view people as "embedded" in particular social roles and relationships.'[27] Among the positions stressing national unity, the main theoretical distinction is between ethnic or cultural and civic forms of nationalism,[28] while on the multiculturalist side the current debate is between communitarian and liberal approaches to multiculturalism.[29]

Ethnic or cultural concepts of a nation lead to a communitarian perspective with negative implications for the protection of minorities.[30] Since the nation is conceptualized as a collective built on the ethnic or cultural traits of the majority that claims 'ownership' of the state, the identity of minorities is not a quality to be protected or even promoted, but rather a potential threat to the unity of the nation and the state. Diversity therefore has to be eliminated, not preserved. The resulting minority-related policies are different for ethnic and cultural nationalisms.[31]

An ethnic concept of the nation makes minorities permanent outsiders without any chance of integration. In this case, the only solution to minority problems is the actual removal of the minority, either by moving borders to create homogenous nation states, or by moving the minority populations to achieve this goal. A cultural concept, on the other hand, would allow minorities to stay, but only under the condition that they fully assimilate to the majority culture, be it voluntarily or by force, and thereby cease to exist as a minority in the cultural sense. Although some of these policies have been considered to be legitimate at some point in time,[32] all of them are

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[27] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001) at 18ff [Kymlicka 2001a].

[28] Cf. e.g. Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in Europe* (Cambridge: Cambridge University Press, 1996).

[29] For a discussion cf. Kymlicka 2001a, *supra* note 27.

[30] Cf. Brian Barry, *Culture and Equality* (Cambridge: Polity Press, 2001) at 137 [Barry].

[31] See Stephen Shulman, 'Challenging the Civic/Ethnic and West/East Dichotomies in the Study of Nationalism' (2002) 35 Comp. Pol. Stud. 554 [Shulman].

[32] Jennifer Jackson-Preece, 'Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms' (1998) 20 Hum. Rts. Q. 824.

rendered illegitimate by international norms today. The norm of territorial integrity is upheld against claims to change borders along ethnic lines.[33] Ethnic cleansing, i.e. '[f]orced population transfers intended or with the effect to move persons belonging to minorities away from the territory on which they live would constitute serious breaches of contemporary international standards.'[34] Furthermore, '[c]oercive assimilation is now internationally outlawed, while voluntary assimilation has become less respectable.'[35]

By contrast, liberal or civic nationalism rests on a concept of the nation as a 'community of equal, rights-bearing citizens',[36] based on the 'model of a unitary republican citizenship, in which all citizens share the identical set of common citizenship rights.'[37] In addition, all persons in the territory of a state—citizens and non-citizens alike—enjoy universally valid and equal human rights.[38] Within such an approach, the main norm to be applied to ethnic groups, be they immigrants or traditionally resident national minorities, is non-discrimination.

Applied in a strictly formal way, this framework of general human and citizenship rights precludes any group-differentiated rights aimed at specifically supporting minority groups or the persons belonging to them. Unlike ethnic or cultural nationalism, however, civic nationalism does not openly pursue the exclusion or assimilation of minorities, but aims to fully integrate them without discrimination into the national community and to tolerate and accommodate diversity within this general framework of rights. 'The liberal notion of equality before the law, so far from resting on the assumption that differences do not exist, is proposed as the fairest way of

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[33] Samuel J. Barkin & Bruce Cronin, 'The state and the nation: changing norms and the rules of sovereignty in international relations' (1994) 48 Int'l Org. 123.

[34] Asbjørn Eide, 'Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (2000) UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1 at 5.

[35] Giuliano Amato & Judy Batt, 'Minority Rights and EU Enlargement to the East. Report of the First Meeting of the Reflection Group on the Long-Term Implications of EU Enlargement: The Nature of the New Border' (1998) RSC Policy Paper No. 98/5 at 6.

[36] Michael Ignatieff, *Blood and belonging: Journeys into the new nationalism* (London: BBC Books, 1993) at 6.

[37] Kymlicka 2001a, *supra* note 27 at 43.

[38] Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca and London: Cornell University Press, 2003).

accommodating them.'[39] The resulting policy towards minorities is a 'laissez-faire approach in which the state is as culturally neutral as possible and promotes individual, not collective rights.'[40]

Both assumptions have been criticized by adherents of a communitarian concept of multiculturalism. First, the position was challenged that a state could in fact take a neutral position in terms of culture and language. Instead, minorities are in a permanently inferior position to the majority, so that putting members of minority groups on an equal footing requires more than simply preventing discrimination on the basis of their belonging to a minority, which would always mean equality on the terms of the majority. Real equality requires permanent positive state action in support of the minority group, in order to preserve or even promote its identity and prevent assimilatory tendencies, which are not intended but could be the outcome of liberal anti-discrimination and integration policies.

Second, proponents of communitarian multiculturalism reject the 'atomism' of liberal approaches[41] and claim minority rights to be 'inconsistent with liberalism's commitment to moral individualism and individual autonomy.'[42] Instead, it is suggested that group membership needs to be recognized as a foundational value in itself, from which individual conceptions of the 'good life' are derived. It follows that, in order to achieve ethno-cultural justice, minority rights have to be conceptualized not as individual rights but as collective rights granted to the group as such,[43] so that the existence and identity of minorities can be preserved and promoted independent of the willingness and ability of the group members to do so voluntarily in each individual case.

Against this tendency to equate the necessity to protect minorities via group-specific rights with the communitarian rejection of liberal

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[39] Barry, *supra* note 30 at 68.
[40] Shulman, *supra* note 31 at 560.
[41] Cf. Shlomo Avineri & Avner de-Shalit, eds., *Communitarianism and Individualism* (Oxford: Oxford University Press, 1992).
[42] Will Kymlicka, *Contemporary Political Philosophy: an Introduction*, 2nd ed. (Oxford: Oxford University Press, 2002) at 337 [Kymlicka 2002].
[43] For theoretical discussions on the concept of group rights cf. Ian Shapiro & Will Kymlicka, eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997); Christine Sistare, Larry May & Leslie Francis, eds., *Groups and Group Rights* (Lawrence, Ka.: University Press of Kansas, 2001).

individualism and its preoccupation with preserving group identities via collective rights, a liberal theory of multiculturalism[44] agrees with the critique of the classical liberal hypothesis of the 'culture-blind' state, whose minority-related policies are limited to the prevention of discrimination on the basis of general human and citizenship rights. It dismisses the communitarian claim that minority protection has to be based on a rejection of liberal individualism, arguing instead that 'there are compelling interests related to culture and identity which are fully consistent with liberal principles, and which justify granting special rights to minorities.'[45] As a solution, group-specific minority rights are granted to individuals.

In conclusion, whereas ethnic or cultural nationalism does not offer any legitimate answers to the protection of minorities (although it may still play an important role in the political debates over minority rights), the three alternative philosophical positions offered in this section are linked with three different legal ways of protecting minorities: non-discrimination, individual and collective minority rights.

Table 1: Philosophical Approaches Regarding Minorities

	Individual	*Collective*
Multiculturalist	liberal multiculturalism: individual minority rights	communitarian multiculturalism: collective minority rights
Nationalist	civic nationalism: integration/ non-discrimination	ethnic/cultural nationalism: exclusion or assimilation

[44] Will Kymlicka, *Multinational Citizenship. A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).
[45] Kymlicka 2002, *supra* note 42 at 339.

2. Three types of arguments: utility-, value-, and rights-based

In addition to the conceptual reference frames into which specific proposals are embedded and to which arguments have to refer explicitly or implicitly, we can distinguish three types of arguments as an analytical framework to evaluate the different argumentative references that are used to back a policy: utility-, value- and rights-based arguments.[46] The distinction is drawn from Habermas, who distinguishes pragmatic, ethical and moral employments of practical reason.[47] For the application to a debate regarding the role of international norms on the national level, an additional distinction between references to internal or external reasons within each type of argument is necessary, namely whether references are made to international (external) or domestic (internal) factors as backings for a claim.

First, arguments can refer to the expected utility of an action in relation to a given purpose. Within this type of argument, a policy decision is presented as legitimate on the basis of its efficiency in reaching a goal, or by referring to interests served by the policy, such as economic gains or increased security and stability. By contrast, utility-based counter-arguments refer to the costs or negative effects of a policy. Internal utility-based arguments invoke domestically relevant factors such as the perceived problem-solving capacity of minority protection in the given case, internal pressures or demands, e.g. from sizable and powerful interest groups or the minorities themselves, and assessments of the costs of adopting a minority bill. External utility-based arguments either refer to external incentives and pressures that have an outside-in impact, such as EU conditionality or demands made by powerful kin-states of certain minorities, or conversely to the inside-out effects of the bill, e.g. with regard to external minorities.

Second, arguments may refer to the particular values defining a community. A policy decision is considered legitimate because it is appropriate in the given cultural context and in relation to the identity of the members of a given community. Internal value-based arguments refer to an identity based on national values, norms and historical legacies, whereas external value-based arguments invoke a 'European' or 'Western' identity

[46] Helene Sjursen, 'Why Expand? The Question of Legitimacy and Justification in the EU's Enlargment Policy' (2002) 40 J. Common Market Stud. 491.
[47] Jürgen Habermas, *Justification and Application. Remarks on Discourse Ethics* (Cambridge: Polity Press, 1993).

founded on assumptions that minority rights are (or are not) shared by the aspired community of values.

Third, a policy can be justified by rights-based arguments, i.e. with reference to universal rights or overarching principles of justice which are deemed to be universally valid and could be accepted by all parties concerned. In the sphere of rights-based arguments, support for (or opposition against) the adoption of internal arguments is based on an assessment of whether the argument necessarily follows from a legal obligation, e.g. enshrined in the constitution (internal) or in international minority rights instruments (external).

Table 2: Utility-, Value- and Rights-based Arguments Regarding Minority Rights

	Internal	*External*
Utility-based	problem-solving capacity internal pressures, costs, benefits	*outside in:* external incentives conditionality or kin-state demands *inside out:* reciprocity
Value-based	national identity and history	'European' identity, 'Western' values
Rights-based	constitutional obligations	international obligations

3. The role of coherence in complex argumentations

In complex situations, policy choices often have to be backed by multiple arguments to be persuasive and, to that end, different types of arguments might be deployed simultaneously.[48] There often is not one single convincing

[48] Crawford, *supra* note 15 at 23.

argument. Argumentation is therefore fundamentally different from logical proof or demonstration, because it 'is concerned with the problem of praxis, i.e., with gaining adherence to an alternative in a situation in which no logically compelling solution is possible.'[49] Additionally, multiple arguments can be the result of the need to win support in a diverse audience, or be directed towards different audiences.[50] Although it might be preferable both in normative terms and with regard to the success of the argumentation to find universally valid 'reasons that convince all the parties in the same way,'[51] this is often unachievable.

In argumentation theory, mutually supporting arguments are termed convergent. If several arguments independently lead to the same conclusion, this can enhance the persuasiveness of the overall argument.[52] This does not mean, however, that the persuasiveness of a convergent argumentation increases automatically with the number of arguments put forward. First, the fact that a proponent feels forced to provide several different reasons for her claim can raise the suspicion that the arguments themselves are weak.[53] Second, it can be assumed that the higher the number of arguments introduced, the greater the importance as well as the difficulty to achieve coherence of the overall argumentation. The concept of coherence has found its way into IR scholarship with Thomas Franck's claim that '[t]he degree of a rule's legitimacy depends in part on its coherence, which is to say its connectedness, both internally (among the several parts and purposes of the rule) and externally (between one rule and other rules, through shared principles).'[54] With regard to application of norms, coherence has to be distinguished from mere consistency. Coherence does not simply demand that a norm is applied equally to everyone, but that any distinction or exception can be justified in principled terms, so that 'a rule's inconsistent application does not necessarily undermine its legitimacy as long as the inconsistencies can be explained to the satisfaction of the community by a

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[49] Kratochwil, *supra* note 19 at 21.

[50] Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation* (Notre Dame: University of Notre Dame Press, 1969) [Perelman & Olbrechts-Tyteca].

[51] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Oxford: Blackwell, 1996) at 166 [emphasis omitted].

[52] Perelman & Olbrechts-Tyteca, *supra* note 50 at 471.

[53] Chaim Perelman, *The Realm of Rhetoric* (Notre Dame: University of Notre Dame Press, 1982) at 139.

[54] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990) at 180.

justifiable (i.e. principled) distinction.'[55] Still, double standards constitute a major incoherence and therefore a severe challenge to the policy's legitimacy if they are based on arbitrary distinctions that cannot be justified in any reasonable way.

Although Franck takes a predominantly structural view, in which legitimacy (and therefore also coherence) figures as 'a property of a rule or rule-making institution which itself exerts a pull to compliance,'[56] this was not how the concept was originally conceived of in Ronald Dworkin's writings on the 'integrity' of legal norms and decisions, from which Franck's notion of coherence is derived.[57] Coherence (or integrity) in this perspective is not so much a structural feature of the norms themselves, but a political ideal or guiding principle at work both in the construction of norms and in their interpretation and application.[58] Hence, it can be used not only for a structural analysis of norms, but can also be applied to the analysis of complex argumentations. The most obvious form of argumentative incoherence is, of course, if arguments are not in fact convergent but controversial, i.e. support divergent or even mutually exclusive policies. But even if all arguments seemingly push in the same direction, '[t]he convergence between arguments may cease to carry weight if the result arrived at by the reasoning shows up elsewhere some incompatibility which makes it unacceptable.'[59]

IV. Case Study: Arguments in the Polish Parliamentary Debate Regarding the Law on National and Ethnic Minorities and on Regional Languages

Unlike many case studies on EU conditionality in the field of minority protection,[60] or on the impact of international human rights norms more generally,[61] Poland is not a case of strong external pressure against norm-breaching governments. International pressure and conditionality on Poland to implement minority protection beyond the level established in the initial

[55] *Ibid.* at 163.
[56] *Ibid.* at 16 [emphasis omitted].
[57] *Ibid.* at 143.
[58] Ronald Dworkin, *Laws's Empire* (Cambridge, Ma.: Harvard University Press, 1986) at 176.
[59] Perelman & Olbrechts-Tyteca, *supra* note 50 at 472.
[60] See e.g. Judith Kelley, 'International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions' (2004) 58 Int'l Org. 425.
[61] See e.g., Risse *et al.*, *supra* note 12.

phase of democratization (1989-91) was low. However, it is also not a case of automatic and uncontested 'self-socialization' on the basis of a strong and stable domestic equilibrium in favour of minority rights.[62] Progress towards a comprehensive protection of minorities through constitutional provisions, international conventions (specifically by ratifying the FCNM), and simple legislation in form of a law on national and ethnic minorities as well as regional languages[63] has been slow and contested.[64]

This was not only due to considerable resistance from nationalist parties and a general lack of public interest. Even the supporters of minority protection were initially divided between liberals favouring a universal human rights agenda with a strong emphasis on individualism and non-discrimination, and protagonists of special minority rights formulated in collective terms, which were found both on the post-communist left and the post-Solidarity moderate right. Only gradually did these contradicting views converge on individual minority rights under the strong influence of legal advisors promoting this solution as the 'European standard'.

The development of Polish minority rights legislation is therefore an interesting case study of the role of international norms in a situation of domestic contestation. As proposed in the theoretical section, this article utilizes an argumentation-analytical approach to account for the role of norms as intersubjective reasons for deciding on a specific minority protection concept. While a full argumentation-analytical account would include all three dimensions of argumentation (product, process, and procedure) and hence also cover the process dimension (e.g. by studying the development and change of positions over time), as well as the procedural dimension (e.g. by comparing argumentation in publicly-held plenum debates with closed and small-group committee sessions, which should differ systematically according to the assumptions of theories of persuasion and deliberation), this article self-consciously restricts itself to the product dimension by taking a 'snap-shot' of the content of arguments put forward in the three readings leading to the final adoption of the Polish law on national

[62] Schimmelfennig, *supra* note 25 at 133.

[63] Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych I etnicznych oraz o języku regionalnym (Law of 6 January 2005 on national and ethnic minorities and on regional languages), Dz.U. 2005 nr 17 poz. 141.

[64] Peter Vermeersch, 'Minority Policy in Central Europe: Exploring the Impact of the EU's Enlargement Strategy' (2004) 3 Global Rev. of Ethnopol.

minorities.[65] The analysis focuses both on the conceptual distinction between non-discrimination, individual and collective minority rights and the argumentation-analytical distinction of utility-, value- and rights-based argument types. Finally, it evaluates the coherence of the overall argumentations supporting or rejecting the adoption of the bill.

1. Conceptual Issues: Individual Minority Rights and Substantive Equality vs. Formal Non-Discrimination and Ethnic Nationalism

In conceptual terms, the debate between individual and collective minority rights, which had featured prominently in earlier debates, no longer played an important role. If collective rights were invoked, it was only in the negative. The bill was presented as granting only individual rights to persons belonging to minorities, explicitly stressing several times that 'the bill does not establish any group rights.'[66] '[W]e are not speaking about minority rights as group rights. The character of this bill is founded on the point that we speak about individual rights, about citizen's rights, because this is the only way it can be formulated.'[67] It can therefore be concluded that the interpretation of minority rights as individual rights, which was a hotly contested issue among supporters of minority protection in Poland in the early 1990s, had been firmly consolidated in the discourse and conceptual thinking of Polish elites. Non-discrimination focused arguments, which in earlier debates were mainly directed against special minority rights, were added to the individual minority rights frame in support of the bill. In this line of argument, permanent group-specific measures to support minorities are presented as not only compatible with the norm of non-discrimination, but in fact necessary to achieve *de facto* equality by way of granting 'so-called positive discrimination, which aims at providing equal opportunities to preserve the mother tongue, culture, and religion.'[68]

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[65] The first reading took place in the 13th session of the 4th cadence on 15 February 2002 [Sejm IV/13]; the second reading in the 84th session of the same cadence on 23 September 2004 [Sejm IV/84]; the third and final reading in the 88th session on 4 November 2004 [Sejm IV/88]. The contributions to these three debates constitute the text corpus for the analysis. All contributions have been researched and are available under <http://www.sejm.gov.pl>.

[66] Poland, Sejm IV, *Debates*, No. 13, (Genofewa Wiśniowska) [Debate 13 (Wiśniowska)] [All translations by author].

[67] Poland, Sejm IV, *Debates*, No. 13, (Eugeniusz Czywkin) [Debate 13 (Czywkin)].

[68] *Ibid*.

The opposition against the bill built its rejection on a combination of arguments drawn from civic as well as ethnic versions of nationalism. On the one hand, the negative assessment of the bill was framed in terms of non-discrimination. Two non-discrimination based arguments were made. First, the adoption of a special minority law was deemed unnecessary, since large-scale discriminations of persons belonging to minorities were claimed to be absent in the current Polish situation.[69] Second, the draft itself was presented as establishing 'group privileges'[70] that go beyond non-discrimination and therefore constitute a 'discrimination of the Polish majority'.[71]

Against this it was stressed that 'the rights of national minorities are best realized in a country where the general democratic rights that apply to all citizens are obligatory and upheld'[72] and that the 'constitution guarantees equal rights to everyone, therefore also to minorities, who are citizens of the Republic.'[73] Some opponents of the bill, in line with a more restrictive and formal reading of non-discrimination, questioned even the existing Polish minority protection system. For example, it was asked whether 'the privileges the organizations of minorities have in the elections to the Sejm and the Senate (the two chambers of the Polish parliament) are compatible with the constitution; do they not breach the principle of equal elections?'[74]

Although the negation of special minority protection was never explicitly framed in terms of the intention to either assimilate or exclude minorities from the national community, stressing that '[w]e do not want to take anything away from national minorities,'[75] the individualist and supposedly civic non-discrimination argument was—although in most cases only implicitly—supplanted by arguments grounded in a more ethnic understanding of the relationship between the nation, the state, and minorities, as can be seen in allegations that one of the shortcomings of the

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[69] Cf. Poland, Sejm IV, *Debates*, No. 13, (Jerzy Czerwiński) [Debate 13 (Czerwiński)]; Poland, Sejm IV, *Debates*, No. 88, (Zbigniew Sosnowski) [Debate 88 (Sosnowski)]; and Poland, Sejm IV, *Debates*, No. 88, (Antoni Stanisław Stzyjewski).

[70] Poland, Sejm IV, *Debates*, No. 84, (Sosnowski) [Debate 84 (Sosnowski)].

[71] Poland, Sejm IV, *Debates*, No. 84, (Halina Szustak) [Debate 84 (Szustak)].

[72] Poland, Sejm IV, *Debates*, No. 13, (Tadeusz Samborski) [Debate 13 (Samborski)].

[73] Poland, Sejm IV, *Debates*, No. 84, (Tadeusz Gajda) [Debate 84 (Gajda)]; cf. Debate 13 (Samborski), *ibid*.

[74] Poland, Sejm IV, *Debates*, No. 88, (Jerzy Czerwiński) [Debate 88 (Czerwiński)].

[75] Debate 13 (Czerwiński), *supra* note 69.

draft was the lack of specific minority-related duties,[76] e.g. in form of a loyalty clause.[77]

These demands do not fit in easily with the invoked notion of equality of all citizens, which would necessarily lead to the conclusion that all members of the civic nation, i.e. all citizens independent of their ethnic origin, have not only equal rights—as argued—but also equal duties. Instead, minorities are represented as an ethnic 'out-group', which is obliged to prove its loyalty to the Polish state (as opposed to their ethnic kin-state) to a higher degree than the 'natural' members of the national community. Although only implicitly, the argument still rests on a version of ethnic nationalism, which defines the nation and the state in ethnic terms and considers minorities to be at least potentially outside the national community. Hence, claims to balance minority rights with special duties could be rejected by the proponents of the bill on the basis of the same non-discrimination arguments the opponents themselves had invoked. Since minorities were citizens, and 'from citizens you do not demand a weekly, yearly or even daily declaration of loyalty,'[78] it was argued that 'putting this group under any special duties [would] violate the constitutional clause ruling out discrimination.'[79]

2. Rights-based Arguments: Constitutional and International Obligations

One main line of argument for the adoption of the bill was the legal reasoning that it is 'a necessity following from constitutional and international obligations.'[80] In this rights-based type of argument, the proposed minority law was not only justified as being in line with national and international legal norms, but as being a necessary means of specifying and implementing existing legal obligations, which are not self-executing and therefore need to be transposed into simple legislation. At the domestic level, the constitution (in particular the minority rights clause) was the prime source of legitimacy[81] and it was argued that 'while the Constitution of the

[76] *Ibid*.
[77] Poland, Sejm IV, *Debates*, No. 84, (Zdisław Jankowski) [Debate 84 (Jankowski)].
[78] Poland, Sejm IV, *Debates*, No. 13, (Henryk Kroll) [Debate 13 (Kroll)].
[79] Poland, Sejm IV, *Debates*, No. 84, (Genofewa Wiśniowska) [Debate 84 (Wiśniowska)]; cf. Poland, Sejm IV, *Debates*, No 84, (Eugeniusz Czywkin) [Debate 84 (Czywkin)].
[80] Debate 84 (Wiśniowska), *ibid*.
[81] Cf. Debate 13 (Wiśniowska), *supra* note 66; Debate 84 (Czywkin), *supra* note 79.

Republic … introduced provisions regarding national and ethnic minorities, these provisions need to be specified at the level of simple legislation.'[82]

In analogy and mostly in direct combination with internal rights-based arguments, a prominent line of argument in favour of adopting the bill was stressing the external sources of legal obligation. In this case, the bill was again presented as a necessary implementation of existing higher-order legal obligations which had to be specified at the level of simple legislation, this time not the Polish constitution but ratified (or at least signed) international documents such as the FCNM, or the obligations following from EU membership such as implementing the Race Equality Directive.[83]

The validity of these internal as well as external rights-based arguments was put into question by the opponents of the bill in denying the claim of legal obligation. Against constitutional arguments, they either—as has been already cited in the conceptual part above—invoked the constitutional provisions regarding equality and non-discrimination against special minority rights, thereby effectively ignoring Article 35 which clearly has a group-specific content, or maintained that '[t]he Constitution of the Republic of Poland in Article 35 ensures national minorities an appropriate legal status.'[84] This means that the constitutional provisions are presented as self-executing, so that further specification and implementation via special legislation is not necessary.

The claim that the adoption of a minority bill followed directly from international legal obligations was also opposed on the basis of two arguments that denied the existence of any such obligation. Either implementation as such was unnecessary because international law emanating from ratified treaties has a direct effect on documents under the Polish constitution and documents such as the FCNM were in fact self-executing, or the implementation by way of a special law on minorities was rejected because 'Poland has not undertaken the obligation to adopt a special law on national minorities.'[85]

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[82] Poland, Sejm IV, *Debates*, No. 88, (Tadeusz Matusiak) [Debate 88 (Matusiak)].
[83] Cf. Poland, Sejm IV, *Debates*, Nos. 13, 84, 88, (Jerzy Mazurek); Debate 84 (Czywkin), *supra* note 79; Debate 84 (Wiśniowska), *supra* note 79.
[84] Debate 84 (Jankowski), *supra* note 77.
[85] Poland, Sejm IV, *Debates*, No. 84, (Czerwiński) [Debate 84 (Czerwiński)].

3. Value-based Arguments: Polish Tolerance and European Norms

Internal value-based arguments, i.e. references to Polish identity and history, were frequently made by both sides of the debate. What is most interesting is that, unlike most of the other types of arguments, the disagreement between supporters and opponents of the bill was not in the grounds presented as justification, i.e. the values and legacies invoked, but in the conclusions drawn from largely convergent assessments. Polish tolerance as a character trait and historical fact was almost routinely invoked in the majority of presentations, both in favour of and against the adoption of the bill. The proponents, on the one hand, presented 'traditional Polish tolerance' as an aspiration to live up to. Adopting the bill was therefore argued to 'adhere to the honourable tradition of Poland as a tolerant country.'[86]

Negative 'lessons of the past' were also presented in support of minority protection. While the negative example of the communist period was invoked as a reminder that even in a country with a long tradition of tolerance the protection of minorities cannot be taken for granted, the inter-war period was utilized as support for the rights-based argument that a constitutional provision had to be specified and implemented to guarantee effective protection.[87]

On the other hand, the very same imagery of Poland as a traditionally tolerant country was invoked by the opposition to the bill as an argument against the necessity of any legal regulation, stressing that 'Poland always was, is and will be an example of tolerance for Europe, and for that we do not need any special law, empty rights, provisions on paper.'[88] If Poland is 'by nature' a tolerant country, minorities do not need special protection in order to be treated appropriately.

Since international obligations based on European standards formed an important part of the argument in favour of adopting the bill, external value-based arguments, especially regarding the status of minority protection as a shared European or Western norm, were also part of the argumentation for or against adoption. Although on the supporting side the claim that

[86] Debate 13 (Wiśniowska), *supra* note 66; cf. Debate 88 (Matusiak), *supra* note 82; Poland, Sejm IV, *Debates*, No. 84, (Jan Byra) [Debates 84 (Byra)].

[87] Cf. Debate 13 (Kroll), *supra* note 78; Debate 84 (Czywkin), *supra* note 79.

[88] Debate 13 (Czerwiński), *supra* note 69; cf. Poland, Sejm IV, *Debates*, No. 84, (Marek Kuchciński).

protecting minorities was part of Poland's 'return to Europe' was often implicit in the rights-based arguments about international obligation, some proponents nonetheless explicitly held that 'the principle regarding the protection of minorities is almost generally applied in Europe.'[89] However, it was granted that 'there is not a single model of policy for national minorities among the countries of the European Union, also with regard to legal regulations.'[90] Value-based arguments were utilized to represent minority protection as a Western European norm in the abstract, rather than to derive the specific content of the norm. But even this was heavily contested by the opposition to the bill. Especially the absence of minority protection in general and special minority laws in particular in several EU member states and the issue of setting double standards as conditions to become members of the Western community of values was used as a mobilizing argument against the bill.

First, examples of EU countries without minority protection were cited in order to shatter the image of minority protection as a European standard and expose the hypocrisy of Western promotion of minority rights in the CEECs. The argument that European standards should serve as a model for Poland was even reversed: it was argued that instead of invoking the 'European standard' to justify the introduction of a special minority rights bill, the existing 'Polish standard'—*nota bene* without a minority law—'can stand as a model for other countries in Europe to copy.'[91]

Second, 'because there are special laws for the protection of minorities in Lithuania, Belarus and the Ukraine, but there are no such laws in Germany, Spain or France,'[92] the bill was presented as belonging to an Eastern rather than Western identity. Hence, while the aspiration to belong to the Western community of values was uncontested, implementing minority rights via special legislation was rejected as not being part of the value system of this in-group, but rather as a characteristic of the out-group, i.e. the context of Eastern Europe that Poland wants to escape.

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[89] Debate 88 (Matusiak), *supra* note 82.
[90] *Ibid*.
[91] Debate 84 (Szustak), *supra* note 71; cf. Poland, Sejm IV, *Debates*, No. 84, (Stanisław Gudzowski); Debate 13 (Czerwiński), *supra* note 69; Debate 88 (Sosnowski), *supra* note 69.
[92] Debate 88 (Czerwiński), *supra* note 74.

4. Utility-based Arguments: Costs, Consequences, Conditionality and Reciprocity

The first set of utility-based arguments relate to the costs of adopting the bill in a narrow, monetary sense. The financial burdens of implementing minority protection, which had not been a major point of contestation in earlier debates on the constitution and the ratification of the FCNM—largely because they concerned the commitment to minority protection in general and did not imply any direct implementation measures—were now addressed by the opponents of the bill, although they were hardly a central point in their argumentation. Criticizing the fact that the draft was presented without any detailed estimates of the expected financial effects,[93] they argued that 'the bill causes considerable costs,'[94] which would be excessive for a country that is 'poor and in crisis.'[95] The advocates of adopting the bill, although in the defensive on this issue and unable to provide detailed estimates, claimed to the contrary that the costs would be moderate at best.[96]

The second set of arguments forwarded under the auspices of utility-based reasoning concerns the expected consequences and the assumed efficiency and problem-solving capacity of adopting minority rights legislation. Although this issue was not very prominent and mostly implicit in the arguments put forward in favour of the bill, the underlying image was that the adoption of minority protection norms would contribute to solve remaining—albeit not hugely problematic—ethnic tensions. It would therefore be a positive and effective tool to improve the relations between ethnic groups in Poland and would 'favour the integration of persons belonging to national and ethnic minorities as citizens.'[97]

On the opposing side it was argued that the bill is unnecessary, because 'in practice, nationality problems constitute no real conflictive element in public life.'[98] This argument is grounded in the assumption that minority protection is not a right to be granted regardless of the current situation of minorities, but rather a problem-solving device that is only necessary when ethnic tensions are considered to be problematic. Moreover, this line of reasoning was even reversed to project possible negative consequences of

[93] Poland, Sejm IV, *Debates*, No. 84, (Leszek Samborski).
[94] Poland, Sejm IV, *Debates*, No. 13, (Marek Kuchciński) [Debate 13 (Kuchciński)].
[95] Debate 13 (Czerwiński), *supra* note 69.
[96] Debate 13 (Czywkin), *supra* note 67.
[97] Debate 88 (Matusiak), *supra* note 82.
[98] Debate 13 (Samborski), *supra* note 72.

adopting the bill. It was argued that instead of contributing to the solution of (non-existent) ethnic problems, extensive minority protection 'creates the field for potential conflicts.'[99] Minority rights were therefore not presented as an effective problem-solving device at all, but as disruptive and problem-creating.[100] In the most extreme statements, it was predicted that minority protection would further the 'balkanization of Central Europe,'[101] create the 'preconditions for separatist aspirations,'[102] and lead to the 'disintegration of the state'[103] or, on a specifically anti-German note, to a 're-Germanization'[104] of certain parts of Poland such as Silesia.

The third set of utility-based arguments concerns the question of whether the development and adoption of the bill was a reaction to domestic or external incentives or demands. As for the internal argument, neither proponents nor opponents claimed that the bill was the result of pressure or bargaining power of the minorities themselves. Although the pro-side did mention that the bill was 'elaborated together with the minority leaders'[105] and addressed their wishes,[106] minority mobilization was not presented as the main cause of the efforts. Rather, it was stressed that the bill was necessary in spite of the small size and bargaining power of the minorities.[107]

Much more contested was the question of external influences. In addition to the rights-based arguments about international legal obligations (which included the norms of the EU anti-discrimination *acquis*) and the value-based arguments about minority protection as a shared European norm, the supporting side also included utility-based arguments about EU conditionality.[108] However, it was stressed that the adoption of the bill– although in line with the international obligations Poland has undertaken, EU conditions and the non-discrimination *acquis*—would be adopted 'without pressure from international relations, out of the free will of the

[99] Poland, Sejm IV, *Debates*, No. 84, (Adam Lipiński) [Debate 84 (Lipiński)].
[100] Cf. Debate 13 (Czerwiński), *supra* note 69; Debate 13 (Kuchciński), *supra* note 94; Debate 84 (Sosnowski), *supra* note 70; Debate 84 (Szustak), *supra* note 71.
[101] Poland, Sejm IV, *Debates*, No. 13, (Janusz Dobrosz) [Debate 13 (Dobrosz)].
[102] Debate 13 (Kuchciński), *supra* note 94.
[103] Debate 13 (Czerwiński), *supra* note 69.
[104] Debate 13(Dobrosz), *supra* note 101.
[105] Debate 13 (Czywkin), *supra* note 67.
[106] Poland, Sejm IV, *Debates*, No. 13, (Jerzy Szteliga).
[107] Debate 13 (Wiśniowska), *supra* note 66.
[108] Cf. Debate 13 (Wiśniowska), *supra* note 66; Debate 88 (Matusiak), *supra* note 82.

legislature.'[109] On the other side of the argument, one of the most outspoken representatives of the opposition to the bill claimed that adopting the bill would be bowing to external demands that are not in the Polish interest. While in the first reading EU conditionality was still invoked, it was dropped in the second and third readings, which were held after Polish accession to the EU on 1 May 2004. Instead, the bill was denounced as a reaction to German demands, citing a resolution of the German Bundestag of 1998.[110]

One of the main lines of argumentation against the adoption of the bill concerned the issue of reciprocity, i.e. the link between granting rights to minorities in Poland and the legal situation of Poles living in neighbouring countries. Thus, it was argued that if 'we introduce special rights for minorities … we expect similar solutions in other countries with a considerable amount of people of Polish descent'.[111] Conversely, 'this project with its unilateral creation of privileges for minorities in Poland leads to the final legalization of the existing asymmetry in this matter to the disadvantage of Poles in neighbouring countries.'[112]

Although the reciprocity argument is represented as a utility-based argument—because its central points are the external effects of domestic minority rights legislation and the question of whether adopting far-reaching minority rights would be in the Polish interest or, conversely, weaken its bargaining position on the international stage—it is important to stress that the reciprocity argument in itself is a complex argument that also includes value- and rights-based elements. First, the idea that the situation of Poles abroad should be considered when discussing domestic legislation again reveals an ethnic conception of the nation—from a civic perspective, foreign citizens simply have no bearing upon decisions regarding rights for Polish citizens, regardless of their ethnicity—and implicitly rests on a value-based assumption, namely that a national community has a special kinship-based duty towards foreign citizens of the same ethnicity. Second, the argument

[109] Poland, Sejm IV, *Debates*, No. 13, (Helmut Paździor); cf. Debate 13 (Czywkin), *supra* note 67.
[110] Debate 13 (Czerwiński), *supra* note 69; Debate 84 (Czerwiński), *supra* note 85.
[111] Debate 84 (Lipiński), *supra* note 99; cf. Debate 84 (Jankowski), *supra* note 77; Debate 84 (Gajda), *supra* note 73.
[112] Debate 13 (Czerwiński), *supra* note 69; cf. Debate 13 (Kuchciński), *supra* note 94.

was also explicitly framed in rights-based terms by presenting reciprocity as 'a generally applied principle in international relations.'[113]

The supporters of the bill responded to the demand of reciprocity in two ways. First, they rejected reciprocity as a relevant issue to be addressed in the consideration of minority rights in Poland by rejecting both the rights-based and utility-based arguments brought forward in support of the application of negative reciprocity. On the one hand, it was argued that 'the principle of reciprocity in Europe, above all, does not apply to national minorities.'[114] Invoking reciprocity as a norm in international relations was therefore presented as 'inappropriate and even disgraceful.'[115] On the other hand, the utility-based logic behind the idea of using internal minority rights as a 'bargaining chip' against states with Polish minorities was exposed and rejected, claiming that '[c]itizenship rights are not a good, which can be exchanged "tit-for-tat". Either the state wants to put into practice the constitutional principles it undertook, or it does not want to do so.'[116] As a second counter-argument, one proponent of the bill replaced the negative logic of reciprocity as presented by the opposition to the bill with a positive link between granting minority rights internally and supporting Polish minorities in other states, because 'with the adoption of a law on minorities, as Hungary shows us, we mobilize other countries to a better treatment of Polish minorities.'[117]

V. Evaluating the Use and Coherence of Utility-, Value- And Rights-Based Arguments

What conclusions can be drawn from analyzing the arguments put forward in the debate? Recall that argumentation analysis cannot explicate the subjective motivations of actors, but nevertheless reveals intersubjective reasons for action presented as mobilizing arguments to justify a policy decision. Keeping this in mind we can assess the role played by international norms for the adoption and content of the minority rights law. Such an assessment rests on three observations: first, whether we can see a dominant

[113] Poland, Sejm IV, *Debates*, No. 13, (Antoni Stanisław Stzyjewski); cf. Debate 13 (Czerwiński), *supra* note 69; Debate 84 (Czerwiński), *supra* note 85.
[114] Debate 88 (Matusiak), *supra* note 82.
[115] Debates 84 (Byra), *supra* note 86.
[116] Debate 13 (Czywkin), *supra* note 67.
[117] Debate 13 (Kroll), *supra* note 78.

pattern of general justifications as opposed to singular and isolated references; second, whether and to what extent an argument accounts for the adoption of the minority bill and justifies the decision along three dimensions: the general validity of minority rights, the content of the bill, and the specific applicability to the Polish situation; and third, whether each argument rests on plausible grounds and whether the overall argumentation of either side is coherent, i.e. whether arguments that are plausible in themselves are devalued by incompatibilities with other arguments put forward.

Utility-based arguments did not play a prominent role in justifying the adoption of the bill. This analysis confirms the assumption that the size, mobilization and bargaining power of the minorities were not decisive factors. Neither side alleged that the bill was a reaction to minority demands. Supporters mentioned that it was in line with the requests and expectations of the minorities, but stressed that it was necessary because of the weakness and small size, not the power of the minorities. This claim was not contested by the opposition, which would have certainly capitalized on any plausible argument that the bill was forced by minority pressure. From this follows, moreover, that the problem-solving capacity of minority rights was also not an important point: neither supporters nor opponents considered the situation of minorities in Poland to be problematic; the opponents even questioned the problem-solving character of minority protection in principle. Arguments concerning costs were presented mainly against the bill. It has to be noted, however, that the debate reveals very divergent interpretations of the benefits and costs of norm-adoption. At the very least this shows that adoption costs are not easily transformed into an objective measure of the likelihood of norm-adoption, although it has to be granted that the perception of non-prohibitive costs among a majority of members of parliament was probably a factor that enabled adoption of the bill.

The situation is less clear with regard to external incentives and pressures. EU conditionality was—albeit rarely—mentioned by supporters as a reason for adopting the bill, and it was invoked by one opponent as an argument to undermine the 'ownership' of the decision.[118] While considerations about EU conditionality may have therefore played a secondary role in the decision, two reasons speak against external incentives

[118] Cf. Jeffrey T. Checkel, 'Compliance and Conditionality' (2000) ARENA Working Paper WP 00/18.

as the main driving force. First, the advocates of adopting the bill conceded that EU conditions did not prescribe any specific minority protection system. Second, although EU monitoring was mentioned, adopting the bill was not presented as necessary to gain accession. Also, the opponents' use of the argument that the bill was externally coerced by EU conditionality declined in the second and third reading (i.e. after Poland had acceded to the EU) and it was not replaced by the plausible point that adoption was no longer necessary after accession.

An external influence invoked by one of the nationalist opponents was that the bill responded to kin-state demands from Germany. However, the argument was backed by questionable data. The temporal proximity between the first introduction of the bill to the Sejm and a resolution of the German Bundestag is not a convincing point, since the bill was prepared long before. Furthermore, the resolution did not make any concrete demands, was never followed up, and, if anything, sparked a strong negative reaction in Poland. Germany certainly did not block Polish accession to the EU, although the adoption of the bill was uncertain until the end. The argument therefore seems to be a purely rhetorical tool to utilize anti-German sentiment among Polish politicians.

The issue of reciprocity and the linkage between internal and external minorities does play a very important role in the debate, but it is disconfirmed as an alternative explanation for the adoption of minority rights because in the Polish context it was one of the most frequently and forcefully presented arguments against adopting the bill. Although the 'positive reciprocity' argument was made as well, this remained a singular point put forward by only one speaker and was not generally applied as a supporting argument. In sum, it has to be concluded that considerations of reciprocity and support for external minorities hindered rather than promoted the domestic adoption of minority rights legislation in Poland.

Value-based arguments referring to Polish values and traditions were routinely invoked, showing that these arguments in principle were regarded as important. However, two aspects strongly suggest that national norms or legacies played no decisive role in determining the Polish minority protection system. First, the invoked values were shared and stable, but indeterminate in their conclusions. Therefore, although there was a 'robust' perception of Poland as a traditionally tolerant country, this could be equally

used as an argument for and against minority protection. Second, the values and traditions were much too broad and general to give any guidance as to how minority protection should be achieved. Particular historical solutions, e.g. the constitutional provisions of the inter-war period, were seldom directly cited, and even then never used as a guide or example for the current system under consideration. In other words, domestic values and traditions did not give any clear behavioural prescription with regard to the adoption of minority protection legislation.

A similar conclusion applies to arguments referring to external, i.e. Western or European values. Again, two factors speak against a direct guiding influence of this factor. First, as even the proponents invoking minority protection as a shared European value had to admit, the European practice of instituting minority-related policies is much too diverse to derive specific prescriptions from the 'fuzzy' concept of minority protection as a shared European norm. Second, the opponents were not even forced to resort to openly anti-European arguments to justify their rejection on value-based grounds, but could exploit the existence of double standards to argue that minority protection was not part of a Western or European identity. Therefore, although the aspiration to belong to the Western community of values remained uncontested even by representatives of the nationalist right, indicating that the Polish 'return to Europe' was indeed an 'unobjectionable'[119] point of reference and potentially a powerful legitimizing argument, the behavioural prescription derived from it was hotly contested.

Rights-based arguments stressing domestic/constitutional and international obligations were the dominant line of reasoning presented by the proponents of norm-adoption, both as a guide towards the content of the provisions and as a justification of the necessity of its adoption. Taking into consideration that the minority rights clause in the Polish constitution was already inspired and guided by Council of Europe standards this indicates a significant role of European norms in the process of domestic norm-construction. In fact, international obligations derived from Council of Europe and EU documents are the only factor that accounts for all three elements that are important with regard to the justification of norms: their general validity, their content, and their applicability in the specific case.

[119] Ole Elgstrøm, 'Consolidating "Unobjectionable" Norms: Negotiating Norm Spread in the EU' (Paper presented at the ECPR 4th Pan-European IR-conference, Canterbury, 8-10 September 2001) [unpublished].

The opponents, on the other hand, were hard-pressed to deny the claim to international obligation. They did so by contesting the applicability, but not the general validity or content of these norms. Moreover, they felt the need to present reciprocity as an alternative international legal principle to justify their opposition. However, this attempt to find a rights-based argument to support reasoning grounded in value-based (ethnic community) and utility-based (instrumental use of domestic legislation) considerations runs into problems with the coherence of the overall argumentation: Although reciprocity is indeed a general principle of international law, it is expressly non-applicable to human rights issues. Also, while the reference to the possibility of bilateral agreements as additional measures to implement minority protection is indeed made in the FCNM, this in no way discourages, let alone precludes the implementation via domestic legislation. Most importantly, however, the idea of reciprocity is irreconcilable with general considerations of rights and equality because it would make the treatment of each minority group dependent on the policies of their kin-state (which can differ considerably) and by definition exclude minorities without kin-states. It follows that the rights-based part, although repeatedly and forcefully put forward, was a weak point of the opponents' argumentation.

The problem of coherence in the argumentation of the opponents also concerns the conceptual underpinnings of the arguments. On the one hand, the opponents explicitly framed their rejection in terms derived from a civic perspective on the nation, i.e. on individual non-discrimination and the equality of all citizens. On the other hand, their propositions were implicitly based in part on assumptions derived from ethnic nationalism, e.g. the call for special duties and proofs of loyalty for minorities or the idea of reciprocal treatment of minorities according to their kin-state's policy towards citizens of Polish descent. It can be assumed that an openly ethnic nationalist discourse was not possible or at least not deemed to be beneficial by the opponents, so that the civic discourse was chosen as the more legitimate point of reference. However, although both propositions are convergent—i.e. they can both lead to a negative conclusion with regard to the adoption of special minority rights—they are also incoherent, because claims that are derived from one set of assumptions (ethnic nationalism: differential treatment of citizens according to ethnicity) are incompatible with the core axioms of the other (civic nationalism: equality of citizens regardless of ethnicity).

By contrast, the advocates of adopting the bill were able to present their claim coherently in terms of constitutional and international obligations by relying on the framework of individual minority rights as established by Council of Europe norms, which had already been transposed into the Polish constitution. Additionally, they utilized the partial overlap and 'translatability' between individual minority rights and substantial non-discrimination. This combination was used for mainly two reasons: first, a non-discrimination based argumentation was needed in order to counter the opponents' position that the bill violated the principle of equality; and second, it supplied the supporters with yet another basis for their claim that the bill responded to international obligations, namely that it was also implementing the EU anti-discrimination *acquis*.

VI. Conclusion

This article developed an argumentation-analytical approach to studying the role of contested international norms in domestic settings and applied it to the parliamentary debate leading to the adoption of a Polish minority law. It proposed to study the content of arguments supporting or opposing minority protection along three lines: first, the minority rights concepts upon which the proposed position are built, i.e. non-discrimination, individual or collective minority rights; second, the type of arguments used to back the claims, i.e. utility-based, value-based and rights-based arguments; third, the coherence between the different types of arguments put forward to support a position, i.e. whether single arguments add up to a coherent overall argumentation.

The analysis of the debate on adopting the Polish minority law showed that while both sides used all types of arguments in complex argumentations, only the supporting side was able to capitalize on rights-based claims referring to international norms and constitutional provisions to construct a coherent case for adoption of the law, whereas the opponents tried but failed to reframe rights-based claims to support their rejection in such a way that it was coherent with their other arguments. Value- and utility-based arguments taken alone were not able to decide the argumentation in either direction. It can therefore be concluded that rights-based arguments in general and arguments referring to international norms in particular played a crucial role in determining which side of the argument was able to justify its position in a coherent way.

While the analysis of arguments as intersubjective reasons cannot (and does not aim to) provide an explanation of the outcome in terms of the objective causes or subjective motives that led to the decision—in fact the positions in the Polish debate were already mostly fixed—it still gives important insights into how international norms inform and justify positions in domestic debates, even in cases where external pressure is weak and the norms in question contested.

Legal Contestation about 'Enemy Combatants'
On the Exercise of Power in Legal Interpretation

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I. Introduction

Among the many battlegrounds in the 'war on terror' is one of semantics. In legal discourse, immediate consequences attach to the use of specific expressions, including those employed in relation to individuals captured and detained under the auspices of war. In the context of the laws of international armed conflict the understanding prevails that those persons in the category of 'combatants' can be detained for the duration of hostilities on the simple basis of being 'combatants' and that 'civilians' can be interned if they take part in hostilities and/or pose an individual threat justifying their internment. The default position on 'civilians' is that they must be spared from the consequences of hostilities and that internment is an exception requiring justification. Who is a 'civilian' and which legal arguments can justify his detention is of course the subject of entrenched controversy. Many individuals, like Ali Saleh Kahlah al-Marri, have petitioned for a writ of *habeas corpus* to have the lawfulness of their detention reviewed. The individuals' classification is decisive. The US 4th Circuit of Appeals held in 2007:

> If the Government accurately describes al-Marri's conduct, he has committed grave crimes. But we have found no authority for holding that the evidence offered by the Government affords a basis for treating al-Marri as an enemy combatant, or as anything other than a civilian.[1]

The legal qualification of al-Marri and other individuals taken into custody in the 'war on terror' takes place in a semantic fight that lies at the core of legal argument.[2] It shows the concrete contestedness of one of the foundational norms of the laws of war, namely the distinction between combatants and civilians. The laws of war pertaining to the treatment of al-Marri have become increasingly contested for multiple reasons. One reason is precisely the process of 'cultural validation' of the norms under scrutiny

[1] *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) at 165 [*al-Marri*]. Legal contestation with regard to al-Marri has of course continued to occupy US courts.

[2] For the concept of 'semantic fights' in legal contestation see Ralph Christensen & Michael Sokolowski, 'Recht Als Einsatz Im Semantischen Kampf' in Ekkehard Felder, ed., *Semantische Kämpfe. Macht und Sprache in den Wissenschaften* (Berlin and New York: de Gruyter, 2006) at 353. Also note that the Oxford English Dictionary finds one meaning of contestation to be the '[d]isputation or controversy, as between parties at law', *The Oxford English Dictionary*, 2d ed., s.v. 'contestation', online: OED <http://www.oed.com>.

that accounts for divergences in interpretation.[3] Different experiences and different concerns dominate distinct local discourses that shape actors' divergent interpretations of international norms.[4] Also, by vesting their actions in terms of legality, actors seek to tap law's symbolic power.[5] Interpretations are claims to lawfulness;[6] as such, they are expressions of power exercised by implementing meanings that are aligned with a particular actor's preferences.[7]

This article expands on an understanding of interpretation in law as an exercise of power. Remnants and variants of the bygone idea that the correct interpretation could be found in an exegetic or hermeneutic approach to legal texts have impeded efforts to find legal expressions' meaning in their use and of understanding contestation of meanings as manifestations in the exercise of power. Sure enough, legal reasoning, methods, and positive rules of interpretation serve a normative function. This is not the decisive issue here. The aim is to spell out and apply an alternative perspective and to provide a firm grasp on practice. Nonetheless, normative repercussions flare up.

Since it is legal practice that is under scrutiny a look at legal theory puts the understanding of interpretation as exercise of power into context. This informs research on norms in international relations in a number of ways. It

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[3] Antje Wiener and Uwe Puetter, 'The Quality of Norms is What Actors Make of It' (2009) 5 J. Int'l L. & Int'l Rel. 1. [Wiener & Puetter 2009]; Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 Eur. J. Int'l Rel. 189.

[4] Andrea Liese, 'Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment when Countering Terrorism' (2009) 5 J. Int'l L. & Int'l Rel. 17.

[5] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings L.J. 814 at 838 [Bourdieu]: 'Law is the quintessential form of the symbolic power of naming that creates the things named … It confers upon the reality which arises from its classificatory operations the maximum permanence.'

[6] See the conception of law by Rudolf von Jhering, *Der Kampf ums Recht*, 18th ed. (Wien: Manzsche, 1913) [Jhering] and compare Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum. L. Rev. 809.

[7] Ekkehard Felder, 'Semantische Kämpfe in Wissensdomänen. Eine Einführung in Benennungs-, Bedeutungs- und Sachverhaltsfixierungs-Konkurrenzen' in Ekkehard Felder, ed., *Semantische Kämpfe. Macht und Sprache in den Wissenschaften* (Berlin and New York: de Gruyter, 2006) 13; Jacques Derrida, quoted in Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago, Ill.: Univ. of Chicago Press, 2003) at 105: 'Semantic instability, irreducible trouble spots on the borders between concepts, indecision in the very concept of the border: all this must not only be analysed as a speculative disorder, a conceptual chaos or zone of passing turbulence in public or political language. We must also recognize here strategies and relations of force. The dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation.'

is argued that legal discourse takes a particular legal argumentative form that preconditions acceptance of claims to legality and that, within this form, interpretations can be understood as expressions of power (Part II). This argument in a theoretical perspective is then illustrated in legal practice that relates to the expression 'enemy combatants' and to the treatment of al-Marri. The application of the theoretical perspective buttresses the argument that norms pertaining to his treatment have become increasingly contested because powerful actors stretch prevalent meanings in order to portray their actions as lawful. It is argued that the constraints of legal argument are such that the US administration has sought to implement the expression of 'enemy combatants' into the discourse and to thereby create a greater distance from treaty law (Part III). This paves the way for discussing the possible merits of applying critical constructivist research on norms.[8] Here the article ends on a normative note. It suggests that the contestability of legal norms does not necessarily shatter law's aspiration to justice. To the contrary, contestability may prevent the reification of justice and shift the focus to the responsibility of individual interpreters. Elucidating the contestedness of norms draws attention to the exercise of power in legal contestation and casts the spotlight on the individual actor and her interpretative choice (Part IV).

II. Legal Contestation: Contestability, Legal Argument and the Exercise of Power

This section develops a theoretical perspective of legal contestation. It thereby takes up central tenets of critical constructivist research on norms and combines them with conceptions of law that build on semantic pragmatism and structural indeterminacy. It seeks to inform international relations research on norms by first expanding on the particularities of *legal* contestation. While contestability is always a possibility the legal argumentative form constrains actors in the ways in which they can contest meanings of legal expressions. Finally, it develops an understanding of legal interpretations as expressions of power.

1. Contestability in Legal Scholarship

Approaches that build on semantic pragmatism suggest that a norm is not immediately palpable but hinges on its interpretation as a constitutive act in its creation. This interpretation is never fixed; it can be relatively stable but is oftentimes subject to challenges. In particular two prominent and related

[8] For the notion of critical constructivism see Wiener & Puetter 2009, *supra* note 3.

arguments have been offered in legal scholarship to explain continuous contestability.

The first argument rests on the understanding that norms do not come with a true meaning just as words do not have a meaning other than that attributed to them by their use.[9] Suggesting a different interpretation to a legal expression can continuously challenge a legal norm. H.L.A. Hart acknowledges that meanings of norms stem from the practical use of the norm.[10] Furthermore, he suggests distinguishing a core of settled meanings from disputed meanings.[11] The fact that some norms might be uncontested is not, however, ontologically anchored. It is rather the simple result of the absence of dispute. Contestation is always a possibility. Such possibility is practically limited because not every interpretation has a chance of being accepted by other participants in the relevant community. Limitations set by interpretative communities take the ground between the pitfalls of objectivity, the plain meaning of the text, and pure subjectivity, the unconstrained reading of the text.[12]

The second explanation for contestability rests on the structure of international legal discourse. The contestability of legal expressions is not only about their semantic ambiguity. Arguably it is stronger due to the underlying reasons to which interpreters can resort. Martti Koskenniemi suggests that international law is by common agreement premised on the will of sovereign states and that this basis brings with it the problem of binding sovereigns. How can sovereigns be the source of all law and at the same time be bound by it?[13] Interpretations either rely on the consent of the

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[9] This approach is embroiled in a complex philosophical debate. I suggest, however, that a semantic pragmatism in the wake of Wittgenstein can find considerable common ground. See, *e.g*. Dennis M. Patterson, 'Dworkin on the Semantics of Legal and Political Concepts' (2006) 26 Oxford J. L. Stud. 545; Ludwig Wittgenstein, *Tractatus Logico-Philosophicus, Tagebücher 1914-1916, Philosophische Untersuchungen* (Frankfurt: Suhrkamp, 1984) at 262; Ludwig Wittgenstein, *Das Blaue Buch*, 9th ed. (Frankfurt: Suhrkamp, 2000) at 49. On the prospects of semantic pragmatism in legal interpretation also see Damiano Canale & Giovanni Tuzet, 'On Legal Inferentialism. Toward a Pragmatics of Semantic Content in Legal Interpretation?' (2007) 20 Ratio Juris 32.

[10] See also Herbert L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997 [1961]) at 138 [Hart].

[11] *Ibid.* at 120-8.

[12] Stanley Fish, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literature and Legal Studies* (Durham: Duke University Press, 1989) at 141-160 [Fish].

[13] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) at 224-240 [Koskenniemi]. This question has dominated legal scholarship ever since a liberal conception of international law has come to see the individual sovereign's consent as the basis of all law binding upon him. For the German

sovereign state or they rely on an idea of substantive justice that is not premised on their consent. In the first case, they are apologetic: the direction of argument is ascending or inductive. In the latter case they are utopian: the direction of argument is descending or deductive. International legal argument inescapably oscillates between these two poles rarely coming to rest.[14]

> The problem is that in case somebody disagrees with our interpretation, we are left with very little means to convince him and, unless we are both ready to enter into open-minded discussion about the justice of adopting particular interpretations (in which case, of course, there is no certainty that we shall agree in the end), the danger of endless conceptual referral can hardly be avoided.[15]

2. The Form of Legal Argument

Contestability is always a possibility on the basis of semantic pragmatism and structural indeterminacy. However, acceptance is always a constraint in interpretation. This constraint need not be based on grounds of rationality or reasonableness. It can be understood as factual acceptance that can be the result of a combination of various motives. Acceptance here is a sociological concept different from acceptability or reasonableness in logic and moral philosophy. Certainly moral appeal and the perception of rational deduction are factors in inducing acceptance, but so are other mechanisms of persuasion.[16] Contestability implies that there is no internal or external yardstick that could decide the dispute.[17] *Legal* contestation also implies that interpretative claims take a particular argumentative form.

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context see Jochen von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Baden-Baden: Nomos, 2001) at 28-38.

[14] David Kennedy, 'Theses About International Law Discourse' (1980) 23 German Y.B. Int'l L. 353 at 378-9. This is shown at length in Koskenniemi, *ibid*.

[15] Koskenniemi, *supra* note 13 at 531.

[16] Lyndel V. Prott, 'Argumentation in International Law' (1991) Argumentation 299, finds that the rhetoric used by international lawyers 'depend[s] greatly on the techniques of reasoned persuasion, and that the forms of strict logic play a minor part in their justifications of decisions', at 309; Fish, *supra* note 12 at 471-502. See *infra* section II.3.

[17] *Cf*. Walter Bryce Gallie, 'Essentially Contested Concepts' (1956) 56 Proceedings of the Aristotelian Society 167. This leaves issues of moral realism aside; the claim is less far reaching and can be solely based on the absence of 'uncontroversial and well-developed methods for thinking about morality', Thomas Nagel, *The Last Word* (Oxford: Oxford University Press, 1997) at 102.

The possibility of acceptance of interpretative claims in legal discourse is premised on an argument's qualification as a legal interpretative claim. Rules of interpretation[18] and standards upheld by the legal profession prescribe how a legal argument has to be crafted.[19] More particularly, they prescribe how claims have to be argumentatively tied to legal expressions.[20] The legal argumentative form finds loose contours in a 'culture of formalism', which emphasizes the need for formal contestability.[21] The rules for legal reasoning render arguments criticizable in their distinct elements. This is a prerequisite for communicative action. But it is just a prerequisite. In order to amount to a sound Habermasian basis for international law other ingredients would have to be added.[22] Certainly, the rules of interpretation are themselves nothing but rules and subject to the same fate of interpretation.[23] Yet, legal

[18] In particular those laid down in the *Vienna Convention on the Law of Treaties*, 1155 UNTS 331; 8 ILM 679 (1969). Case law and scholarly contributions abound on the issue of interpretation.

[19] Jochen von Bernstorff, 'Sisyphus was an International Lawyer. On Martti Koskenniemi's "From Apology to Utopia" and the Place of Law in International Politics' (2006) 7 German L.J. 1015 at 1029, arguing that the necessity to tie argumentative claims in a formal way to general legal expressions conveys law's intrinsic aspiration to formal equality. *Cf.* Friedrich V. Kratochwil, 'How Do Norms Matter?' in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 35 at 47.

[20] See Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Y.B. Int'l L. 48: 'as a rule they [the rules of interpretation] are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means. It is elegant – and it inspires confidence – to give the garb of an established rule of interpretation to a conclusion reached as to the meaning … of a treaty', at 53. *Cf* Hersch Lauterpacht, 'De l'interpretation des Traités: Rapport' (1950) 43 Ann. inst. dr. int. 366.

[21] Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001) at 494.

[22] For the argument that the legal argumentative form provides prerequisites for Habermasian discourse, see Robert Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, 2nd ed. (Frankfurt am Main: Suhrkamp, 1991) at 37-9 and Jürgen Habermas, *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992) at 272 *et seq.*: 'Die *in der Profession bewährten Standards* sollen die intersubjektive Nachprüfbarkeit und Objektivität des Urteils garantieren', at 275. For international law in particular, see Jürgen Habermas, 'Hat Die Konstitutionalisierung des Völkerrechts noch eine Chance?' in Jürgen Habermas ed., *Der gespaltene Westen* (Frankfurt: Suhrkamp, 2004) 113 at 184. Hans-Joachim Cremer, 'Völkerrecht - Alles Nur Rhetorik?' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 267 at 288, picks up this idea. Andrew Hurrell makes out three preconditions for a normative discourse theory to work: moral accessibility, institutional authority, and effective political agency; Andrew Hurrell, *On Global Order. Power, Values and the Constitution of International Society* (Oxford: Oxford University Press, 2007) at 298-319 [Hurrell 2007].

[23] *Cf.* Hart, *supra* note 10 at 126.

contestation is a distinct enterprise. Its particularity is upheld by a combination of moral choice, beliefs, ethos, and habit.[24]

In sum, contestation is always a possibility. This is a theoretically reasoned contention on the basis of semantic pragmatism and structural indeterminacy and not a normative proposition. Nor is it by itself a threat to law's normativity or its merits. It does not deny that law can and does shape social action and expectations. Awareness of the possibility of contestation neither creates, increases, nor reduces such possibility. Nor does it change the constraints of interpretations that lie in the need for acceptance by other participants in legal discourse. Furthermore, such acceptance is premised on an argument's qualification as a legal interpretative claim.

3. Power and Rhetoric

When a norm is contested, actors have a choice between alternatives. The motives for an actor's choice can be manifold. This section expands on this article's interest in highlighting the exercise of power in interpretations. Exposing the contestability of norms and the particular legal argumentative form draws attention to actors' attempts to vest actions in the mantle of legality. Statements about what the law says are also interpretations that seek acceptance of meanings that are aligned with preferences and interests. Power can be understood as 'the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate.'[25] Successful interpretations, that is, interpretations that find acceptance, can thus be conceived as expressions of power.[26]

Analyzing interpretations as acts of naming and as implementations of particular meanings has a long tradition. John Austin encapsulated what is at stake in legal interpretation: 'there can hardly be any longer a possibility of not seeing that stating is performing an act.'[27] Precursors to the study of

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[24] *Cf.* Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard Univ. Press, 1964); Bourdieu, *supra* note 5; Ernest J. Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale L.J. 949; Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 Theor. Inq. L. 9.

[25] Michael Barnett & Raymond Duvall, 'Power in Global Governance' in Michael Barnett & Raymond Duvall, eds., *Power in Global Governance* (Cambridge: Cambridge University Press, 2005) 1 at 3, slightly amending John Scott, *Power* (Cambridge: Polity Press, 2001), 1-2.

[26] *See* Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 Cambridge Rev. Int'l Affairs 197 at 199; Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14 at 40.

[27] John Langshaw Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1979 [1962]) at 139 [Austin].

performative speech are equally insightful. The Roman rhetorician Quintilianus acknowledges his debt to Cicero and Aristotle's *Art of Rhetoric* and develops a technique of description that aligns the image arising from the description with the interest of the speaker or writer.[28] This thought has gained renewed appreciation in international relations scholarship that stresses the power of persuasion[29] and a strategic element in constructions of social reality.[30] The metaphor of semantic fights denotes the practice by which actors try to implement the use of a particular expression and conception in relation to specific facts to suit their interests or normative convictions. Legal contestation makes this point overtly clear: the qualification of an individual as 'combatant' establishes a framework for the argument that the individual has to rely upon in order to contest the legality of his detention. New expressions are particularly influential.[31] Legal interpretative claims form the weapon in legal contestation; the recognition of the legality or illegality of certain behaviour is what actors strive for. Law can then be understood as a battleground.[32] This conception of law offers greater depth in understanding how power is exercised in semantic fights with reference to legal expressions.

III. The Contested Meaning of 'Enemy Combatants'

The qualification of al-Marri and the contested meanings of the terms 'combatant', 'civilian', and 'enemy combatant' serve to show the increasingly contested distinction between combatants and civilians – a distinction foundational to the laws of war. Critical analysis of this discourse elucidates the particularities of *legal* contestation and illustrates the way power is exercised in interpretation. This section demonstrates the theoretical perspective's view on legal practice. It provides a contextual overview and analyzes distinct actors' interpretative claims. It then reconsiders the

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[28] Quentin Skinner, 'Rhetoric and Conceptual Change' (1999) 3 Finnish Y.B. Pol. Thought 60. On the so-called New Rhetoric see Chaïm Perelman, *Logique Juridique. Nouvelle Rhétorique*, 2nd ed. (Paris: Dalloz, 2001); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (New York: Palgrave Macmillan, 1987) at ch. 5.

[29] Rodger A. Payne, 'Persuasion, Frames and Norm Construction' (2001) 7 Eur. J. Int'l Rel. 37; Ronald R. Krebs & Patrick Thaddeus Jackson, 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric' (2007) 13 Eur. J. Int'l Rel. 35.

[30] Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887, speak of 'coercive constructivism'.

[31] Richard Koebner, 'Semantics and Historiography' (1953) 7 The Cambridge Journal 131 [Koebner]; 'situations and actions sometimes lead to the creation of new expressions, which in turn not only instigate a particular course of action but may also exert an enduring influence upon social attitudes', at 131.

[32] *Cf.* Jhering, *supra* note 6.

argumentative interchange under the theoretical perspective developed in the previous section.

1. Context and Problem

The so-called 'war on terror' has challenged established interpretations of legal expressions of the law of war.[33] This includes the categorization of people who fight or aid the fight against, in particular, the United States. Before President Bush declared a 'war on terror', there had been an almost unanimously shared understanding that 'combatants' are immunized for their lawful military actions under the laws of war and that, in contrast, 'civilians' must not take direct part in hostilities; should they nevertheless do so, they lose their protection as civilians and could be tried for their action.[34] The question of whether the means and methods civilians use when engaging in hostilities are lawful does not even arise in deciding their criminal culpability because they are, as a category of persons, in principle not authorized to use force.[35] The laws of international armed conflict divide the subjects of the use of force into those whose combatancy may be lawful ('combatants') and those whose fighting would be illegal in any event ('civilians'). This understanding might still be prevalent but has been severely contested. Further attempts to specify those two categories of persons already go to the heart of legal contestation about 'enemy combatants'. In brief, the legal framework and context are as follows.

In his address on terrorism before a joint meeting of Congress on 20 September 2001, President Bush announced that 'Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.'[36] The US has

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[33] See generally Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 Eur. J. Int'l L. 993.

[34] See Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 Colum. J. Transnat'l L. 1 [Berman]; Kenneth Watkin, 'Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy,' (2005) 2 HPCR Occasional Paper Series. Yoram Dinstein, however, has consistently argued that there exists a third category of 'unlawful combatants' that encompasses anyone who fights unlawfully; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 29-50 [Dinstein].

[35] One exception might apply but appears to have fallen outside the centre of attention in legal discourse and will not be considered; namely, the concept of *levée en masse. Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 at art.4(A) [GC III].

[36] 'A Nation Challenged; President Bush's Address on Terrorism Before a Joint Meeting of Congress' *New York Times* (21 September 2001), online: New York Times

been engaged in what it calls the 'war on terror' ever since and has taken military action on a global scale. Its first target was Afghanistan less than one month after 11 September. The day after initial attacks, Bush declared that 'on my orders the United States military has begun strikes against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. … This military action is a part of our campaign against terrorism.'[37] The military action against Iraq was also conducted under the auspices of the 'war on terror', although the stated reasons for intervention in that country have been diverse.[38] The day after President Bush declared major combat operations to have ended in Iraq he framed the 'success' as 'one victory in a war on terror that began on 11 September 2001, and still goes on.'[39]

It is important to note the range of contexts subsumed under the expression 'war on terror'. The problem legal interpretation faces is how to apply legal expressions to such a broad variety of contexts. Legal expressions such as 'combatant' and 'civilian', but also 'war', stem from treaties that build to a large extent on the distinction between international and non-international armed conflicts. In legal contestation, the *Geneva Conventions* of 1949 figure prominently. Following their common Art. 2, they

> shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[40]

<http://www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html>.

[37] 'A Nation Challenged; Bush's Remarks on U.S. Military Strikes in Afghanistan' *New York Times* (8 October 2001), online: New York Times <http://www.nytimes.com/2001/10/08/us/a-nation-challenged-bush-s-remarks-on-us-military-strikes-in-afghanistan.html>.

[38] 'Threats and Responses; Transcript: Confronting Iraq Threat "Is Crucial to Winning War on Terror"' *New York Times* (8 October 2002), online: New York Times <http://www.nytimes.com/2002/10/08/us/threats-responses-transcript-confronting-iraq-threat-crucial-winning-war-terror.html?n=Top/News/World/Countries%20and%20Territories/Iraq&pagewanted=1>. As is well known, the link between Saddam Hussein and Al Qaeda did not exist, see *e.g.* 'The Terrorism Link That Wasn't' *New York Times* (19 September 2003), online: <http://www.nytimes.com/2003/09/19/opinion/19FRI1.html?th>. It is a different question to ask who believed that it did exist.

[39] David E. Sanger, 'Aftereffects: The President; Bush Declares "One Victory in a War on Terror"' *New York Times* (2 May 2003), online: New York Times <http://www.nytimes.com/2003/05/02/world/aftereffects-the-president-bush-declares-one-victory-in-a-war-on-terror.html?n=Top/Reference/Times%20Topics/Subjects/U/United%20States%20Armament%20and%20Defense>.

[40] GC III, *supra* note 35 at art. 2.

Art. 3 common to the *Geneva Conventions* in contrast applies 'in the case of armed conflict not of an international character.'[41] Thus a controversial issue of interpretation is how to qualify the 'war on terror' – is it an international or non-international armed conflict?

The expression the US has used in this context and which this article scrutinizes is that of 'enemy combatant'. The laws of armed conflict distinguish 'combatants' and 'civilians'. The *Geneva Conventions* of 1949 do not explicitly define either category but rather specify the category of prisoners of war[42] and the category of 'protected persons'.[43] The categories are expressly defined in the First Additional Protocol of 1977 ('AP I'),[44] which the US has not ratified and whose customary law status it disputes. Art. 43(2) AP I reads: 'Members of the armed forces of a Party to a conflict … are combatants, that is to say, they have the right to participate directly in hostilities.'

And Art. 50(1) AP I provides:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Further, note Art. 51(3) AP I: 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.'

Apart from the qualification of the 'war on terror' as either international or non-international armed conflict, a second point of controversy in legal contestation about 'enemy combatants' is whether this expression can be applied generally to individuals fighting against the US in the 'war on terror' without regard to the individuals' membership in armed forces. Furthermore, the consequences arising from the categorization as 'enemy combatants' are disputed. They extend to questions of rights of the individuals, their protection, treatment, and to the justification for their detention under the laws of armed conflict. The focus of this article centres on the justification for detention. Art. 118 GC III states that 'Prisoners of war

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[41] *Ibid.* at art. 3.

[42] *Ibid.* at art. 4

[43] *Geneva Convention Relative to Protection of Civilian Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 at art.4 [GC IV].

[44] *Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3.

shall be released and repatriated without delay after the cessation of active hostilities.' The controversy over the justification and duration of detention ties the following questions together: Are 'enemy combatants' generally combatants? If so, is their detention legally sanctioned until the cessation of the 'war on terror'?

2. Competing Interpretations of 'Enemy Combatants'

The expression 'enemy combatant' has been introduced into present legal discourse by the US administration.[45] It conveys conceptions which the administration intends to implement, but has been received in US case law with varying results. The use of the term is under international scrutiny because if it should come to be accepted it would have universal effect and consequences that many would reject. Scholars and the International Committee of the Red Cross (ICRC) have used the expression in divergent ways. Every actor has been able to successfully tie its claims to legal expressions.

a. The Interpretation by the US Administration

The Combatant Status Review Tribunals (CSRTs) set up under the *Detainee Treatment Act* (DTA) of 2005[46] serve the declared purpose of determining 'whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant.'[47] The closest resemblance to a legal definition of the expression 'enemy combatant' that the US has offered was given in an order from the Deputy Secretary of Defense on 7 July 2004, which states:

> An 'enemy combatant' … shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the Unites States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[48]

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[45] The expression as such is not entirely new. However, it is new to the present discursive context and it is employed with a new meaning. *Cf.* Joanna Woolman, 'The Legal Origins of the Term "Enemy Combatants" Do Not Support Its Present Day Use' (2005) 7 J.L. & Soc. Challenges 145 [Woolman].

[46] 10 U.S.C. § 10005(e)(2)(A).

[47] Deputy Secretary of Defense, 'Memorandum for Secretaries of the Military Departments' (14 July 2006) at Enclosure 1, online: U.S. Department of Defense <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

[48] *Ibid.*

This corresponds with the government's submission in *Hamdi v. Rumsfeld*,[49] where it argued that Yaser Esam Hamdi was properly detained as an 'enemy combatant' because he was 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'[50] Who qualifies as a combatant? Following Legal Advisor to the US Department of State, John B. Bellinger,

> [I]t's very clear, and an accepted [sic] in international law, that individuals who take up arms illegally … are combatants because they are fighting, but they are 'unlawful combatants' because they are doing it in an illegal way.[51]

The US administration pushes the claim that combatants are, apart from members of armed forces and irregular groups fulfilling certain criteria, also simply those individuals who fight. Further clarification can be gained by looking at the individuals to whom the government applies the expression 'enemy combatant'. In the aforementioned case the government rests its claim that Hamdi is an 'enemy combatant' on the assertions that he has been 'affiliated with a Taliban military unit and received weapons training,' that he 'remained with his Taliban unit following the attacks of September 11,' and that, during the time when Northern Alliance forces were 'engaged in battle with the Taliban, … Hamdi's Taliban unit surrendered' to those forces, after which he 'surrender[ed] his Kalishnikov assault rifle' to them.[52] The government further bases its claim on the fact that al Qaeda and the Taliban 'were and are hostile forces engaged in armed conflict with the armed forces of the United States,' and that 'individuals associated with [those groups] were and continue to be enemy combatants.'[53]

It also applies this term to persons like Ali Saleh Kahlah al-Marri, who, upon the account of the government, was 'closely associated with al Qaeda, an international terrorist organization with which the United States is at

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[49] 542 U.S. 507 (2004) [*Hamdi*].

[50] *Ibid*. at 526, citing the Brief for Respondents, at 3.

[51] 'Digital Video Press Conference with John B. Bellinger III, Legal Adviser to the Secretary of State: Opening Statement' (13 March 2006), online: United States Diplomatic Mission to Germany <http://www.usembassy.de/germany/bellinger_dvc.html>; also see John B. Bellinger, 'Legal Issues in the War on Terrorism – a Reply to Silja N. U. Vöneky' (2007) 8 German L.J. 871.

[52] *Hamdi, supra* note 49, brief of the Applicants, at 148-149.

[53] *Ibid*.

war.'[54] Notably, and as the court dealing with al-Marri's appeal in a *habeas corpus* petition points out, the government did

> not assert that (1) al-Marri is a citizen, or affiliate of the armed forces, of any nation at war with the United States; (2) was seized on or near a battlefield on which the armed forces of the United States or its allies were engaged in combat; (3) was ever in Afghanistan during the armed conflict between the United States and the Taliban there; or (4) directly participated in any hostilities against United States or allied armed forces.[55]

This use of the expression corroborates the statement by John Bellinger[56] that the US takes a combatant to be anyone who fights.

Apart from the personal scope to which the government applies the term 'enemy combatant' it makes claims about the consequences attached to this categorization. These also extend to the justification for holding individuals in custody without formal charges or proceedings 'until the Government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of 11 September 2001.'[57] The justification for detention rests on a combination of the claim to the personal scope of 'combatant' and to the qualification of the 'war on terror'. First, combatants can be held until the cessation of hostilities.[58] The US maintains that this holds true for all persons it qualifies as 'enemy combatants'. Second, it ties the 'cessation of hostilities' to the end of the 'war on terror'. It maintains that it is at war with al Qaeda in a legal sense. This is manifest in the *Authorization to Use Military Force* (AUMF), which is directed not only at the Taliban but generally at '"nations, organizations, or persons" associated with the 11 September 2001, terrorist attacks.'[59]

The conception conveyed by the US in its use of the term 'enemy combatant' can be summed up as a claim to qualify as 'enemy combatant' every person who fights, with the consequences that such individual can be

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[54] *al-Marri, supra* note 1 at 166, citing the Declaration of Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism offered by the government in support of its claim.

[55] *Ibid*.

[56] See *supra* note 51.

[57] *Hamdi, supra* note 49 at 540.

[58] GC III, *supra* note 35 at art. 118.

[59] Pub.L. No. 107-40, § 2(a), 115 Stat. 224 (2001) [AUMF].

detained until the cessation of hostilities. The legally relevant hostilities are those of the 'war on terror'.[60]

b. Reception and Treatment in Case Law

The US government's claims have received varied responses by the courts. The focus of this subsection shall be on two cases the government relies on in support of its claim (*Hamdi v. Rumsfeld*[61] and *Padilla v. Hanft*[62]) as well as on the rejection of its interpretative claim in *al-Marri v. Wright*.[63]

The court in *Hamdi* did not explicitly address the question of the personal scope of the category of 'enemy combatants'. The court posits its argument within the context of the 'war on terror' but ties its reasoning to Art. 118 GC III applicable in *international* armed conflict. It finds that '[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.'[64] Yet, '[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.'[65] But the court was dealing with Hamdi, who was fighting on behalf of the Taliban, an unrecognized *de facto* regime, and who was caught during the international armed between Afghanistan and the US. It could therefore make the narrow but sufficient statement that '[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States."'[66]

The Supreme Court claimed to only answer the narrow question of the detention and due process of Hamdi, who was a Taliban combatant for the duration of the international armed conflict with the Taliban. This is how the majority reads the case in *al-Marri*.[67] The court explicitly neither endorsed

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[60] All three claims are included in the joint 'Statement of Daniel J. Dell'Orto, Principal Deputy General Counsel Department of Defense; Major General Thomas J. Romig, Judge Advocate General of the Army; Major General Jack L. Rives, Acting Judge Advocate General of the Air Force; Rear Admiral James E. McPherson, Judge Advocate General of the Navy; Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the United States Marine Corps: Before the Senate Armed Services Committee, Subcommittee on Personnel Military Justice and Detention Policy, 14 July 2005', online: United States Senate Armed Services Committee <http://armed-services.senate.gov/testimony.cfm?wit_id=3387&id=1559>.

[61] *Supra*, note 49.

[62] 423 F.3d 386 (4th Cir. 2005) [*Padilla*].

[63] *Supra* note 1.

[64] *Hamdi, supra* note 49 at 520.

[65] *Ibid.* at 521.

[66] *Ibid.*

[67] See *infra* note 75-79 and accompanying text.

nor rejected the label of 'enemy combatants' but noted generally: 'The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.'[68]

Yet, the context the court dealt with in *Hamdi* is broader than the international armed conflict between the US and the Taliban. It concerns the 'war on terror' and the AUMF, which is directed not at the Taliban but at '"nations, organizations, or persons" associated with the 11 September 2001, terrorist attacks.'[69] This gives some credit to the government's claim that the 'war on terror' is the relevant conflict for assessing combatancy and legality of detention. Certainly, the interpretation of the Court's judgment is itself again up for contestation.

That *Hamdi* lends itself to a reading supportive of the government's claim becomes apparent in *Padilla*. Here the court decided on the petition of Jose Padilla, who was taken to be a close associate of al Qaeda.[70] It was found that Padilla was also 'armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.'[71] The Court held that Padilla

> unquestionably qualifies as an 'enemy combatant' as that term was defined for purposes of the controlling opinion in Hamdi. Indeed, under the definition of 'enemy combatant' employed in Hamdi, we can discern no difference in principle between Hamdi and Padilla. Like Hamdi, Padilla associated with forces hostile to the United States in Afghanistan.[72]

Thus, the distinction between civilians and combatants that *Hamdi* did not make explicit and which the government glosses over in its interpretative claim finds resonance in *Padilla* where the label 'enemy combatant' is found to be fitting for a person who was associated with al Qaeda and not the Taliban. Notably, this decision is tied explicitly to the law of war:

> We understand the plurality's reasoning in Hamdi to be that the AUMF authorizes the President to detain all those who qualify as 'enemy combatants' within the meaning of the laws of war, such power being universally accepted under the laws of war as

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[68] *Hamdi, supra* note 49 at 522.
[69] AUMF, *supra* note 59.
[70] *Padilla, supra* note 62 at 389-90.
[71] *Ibid.* at 391.
[72] *Ibid.*

> necessary in order to prevent the return of combatants to the battlefield during conflict.[73]

In a footnote the court added more tellingly on the length of detention:

> Under Hamdi, the power to detain that is authorized under the AUMF is not a power to detain indefinitely. Detention is limited to the duration of the hostilities as to which the detention is authorized. 124 S.Ct. at 2641-42. Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF.[74]

In sum, *Padilla* follows the government's interpretative claim regarding the personal scope of the category of 'enemy combatants' and its justification of detention.

Pieces of this holding were put together by the same Court, yet in a different constellation of judges, in *al-Marri*. Here the court rejected the government's categorization of al-Marri as 'enemy combatant' despite the fact that it did not question the facts concerning the person of al-Marri and also despite the fact that al-Marri's actions are quite similar to those of Padilla with the sole difference, as the court itself highlights, that al-Marri was never proven to be armed and present in a combat zone during the conflict between the Taliban and the United States.[75] The court rejected the classification of al-Marri as 'enemy combatant', even assuming the government's accusations to be correct. It resorts to the laws of war and finds that

> clear rules for determining an individual's status during an international armed conflict, distinguishing between 'combatants' (members of a nation's military, militia, or other armed forces, and those who fight alongside them) and 'civilians' (all other persons).[76]

> If the Government accurately describes al-Marri's conduct, he has committed grave crimes. But we have found no authority for holding that the evidence offered by the Government affords a basis for treating al-Marri as an enemy combatant, or as anything other than a civilian.[77]

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[73] *Ibid.* at 393.
[74] *Ibid.*
[75] *Supra* note 1.
[76] *Ibid.* at 179, citing GC III, *supra* note 35 at arts. 2,4, and 5; and GC IV, *supra* note 43 at art.4.
[77] *Ibid.* at 165.

The Court also distinguishes between international and non-international armed conflicts and holds that the conflict with al Qaeda is not one between nations and therefore not of an international character–'the legal status of "enemy combatant" does not exist in non-international conflicts.'[78] Moreover, it addresses the government's claim that a civilian loses his civilian status and becomes an 'enemy combatant' if he engages in criminal conduct on behalf of an organization seeking to harm the United States and finds that 'merely engaging in unlawful behavior does not make one an enemy combatant.'[79]

In sum, the conception the government seeks to convey with the expression 'enemy combatant' has received an ambiguous reception in case law which is itself subject to divergent interpretations. It is used in support or rejection of opposing contentions. *Padilla* appears to uphold the government's use of the term just as clearly as *al-Marri* rejects it. The weight of authority of the Supreme Court in *Hamdi* could not contribute to clarification, rather, as the court said, '[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.'[80] It should be clear by now that the law defining this category provides the stage for controversy and is certainly not the end point in contestation.

c. Scholarly Contributions and the ICRC

The relationship between case law and scholarly contributions is reciprocal. The courts (including the Supreme Court) have cited, plausibly or not, scholarly contributions and scholars engage in a discussion of case law. The number of such studies is tremendous. The following depicts examples of scholarly contributions on a scale leading from acceptance to rejection of the government's interpretative claim. It cannot reflect the whole diversity of international legal scholarship.

The position of John C. Yoo is closely linked to that of the government and vice versa.[81] Yoo worked in the United States Justice Department's Office of Legal Counsel from 2001 to 2003 and can be seen as one of the architects of

[78] *Ibid.* at 187.
[79] *Ibid.*
[80] *Hamdi*, *supra* note 49 at 522.
[81] See Jeffrey Rosen, 'The Yoo Presidency' *New York Times* (11 December 2005), online: New York Times <http://www.nytimes.com/2005/12/11/magazine/11ideas_section4-19.html>.

the administration's policy upon the attacks of 11 September.[82] In his contributions, Yoo gives vigorous support to the executive by endorsing the idea of the unitary executive in foreign affairs. He explains: 'What the idea had lacked was an intellectual justification and defense.'[83] This is what he purports to provide.[84] In support of the government's interpretative claims, he resorts to the Supreme Court's decision in *Hamdi* and maintains that it recognizes the fact that the US is at war with al Qaeda and other supporting organizations in the 'war on terror', that Hamdi is an 'enemy combatant' and that his detention is justified until the cessation of hostilities – that is the end of the 'war on terror'.[85] Following the warning that 'the Court has unwisely injected itself into military matters,'[86] Yoo reiterates that it is for the executive to decide about the existence of a state of war.[87]

This is a concern shared by Curtis A. Bradley and Jack L. Goldsmith: 'there is no basis for the courts to second-guess that determination based on some metaphysical conception of the true meaning of war.'[88] Yet, they take concerns about detention until the cessation of hostilities in the context of the 'war on terror' more seriously and suggest an individualized approach which determines for each detained individual whether a balance between security and liberty justifies continuous detention.[89] However, they neither distinguish between civilians and combatants nor between international and non-international armed conflicts in this respect. Implicitly, therefore, a civilian can turn himself into a combatant. This view is explicitly endorsed by Yoram Dinstein. He argues that combatants are members of the armed forces and anyone who fights.[90] Detention of combatants can last as long as the conflict is ongoing – with regard to the detention of fighters of al Qaeda this is precisely the conflict with al Qaeda.[91]

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[82] On his role in the administration, see Tim Golden, 'A Junior Aide Had a Big Role In Terror Policy' *New York Times* (23 December 2005), online: New York Times <http://www.nytimes.com/2005/12/23/politics/23yoo.html>.

[83] *Ibid.*

[84] See John C. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006); John C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2006).

[85] John Yoo, 'Courts at War' (2006) 91 Cornell L. Rev. 573 [Yoo 2006a]; see also John C. Yoo & James C. Ho, 'The Status of Terrorists' (2003) 44 Virginia J. Int'l L. 207.

[86] Yoo 2006a, *ibid.* at 574.

[87] *Ibid.* at 584.

[88] Curtis A. Bradley & Jack L. Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 Harv. L. Rev. 2047 at 2070.

[89] *Ibid.* at 2123-7.

[90] Dinstein, *supra* note 34 at 27.

[91] *Ibid.* at 50.

Jordan J. Paust rigorously examines the government's claims on the basis of these distinctions and highlights its 'fallacies'.[92] In a first step in his line of reasoning he rejects the claim that the 'war on terror' constitutes a war in the legal sense. The US is not at war with al Qaeda. Al Qaeda does not qualify as a state, nation, belligerent or insurgent group. The attacks of 9/11 could trigger the right to self-defence, but not the application of the laws of war.[93] Secondly, outside the context to which the laws of war apply, namely the international armed conflicts against the regimes in Afghanistan and Iraq, there cannot be combatants. Combatant status is closely linked to the right to engage in armed conflict. Members of al Qaeda do not enjoy this status, nor should they.[94] The latter point, that combatancy is linked to the possibility of legitimately participating in hostilities and based on a link to a legitimate party to the conflict, is also stressed by Kenneth Watkin and Nathanial Berman.[95] In sum, Paust argues that the category of combatants only exists in international armed conflicts and that the conflict with al Qaeda is not an international war. Members of al Qaeda could therefore not be 'enemy combatants'.

A further group of scholars and participants in legal discourse also dismantles the expression of 'war of terror' and breaks it down into international and non-international armed conflicts and into the categories of combatants and civilians. Marco Sassòli and Knut Dörmann, for instance, largely follow the interpretation of the ICRC, which traditionally enjoys an authoritative say in the interpretation of the laws of war. Both scholars have worked for the ICRC's legal division. In its exhaustive study on Customary International Humanitarian Law the ICRC finds that civilians and combatants must be distinguished and that 'civilians are persons who are not members of the armed forces.'[96] In its official statement, entitled 'The relevance of IHL in the context of terrorism', the ICRC states:

> In its generic sense, an 'enemy combatant' is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict. The term is currently used – by those who view the 'global war against terror' as an armed conflict

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[92] Jordan J. Paust, 'Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions' (2004) 79 Notre Dame L. Rev. 1335.

[93] *Ibid.* at 1341-2.

[94] *Ibid.* at 1342-3. On 'combatant immunity', see Jordan J. Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War' (2003) 28 Yale J. Int'l L. 325 at 330-2.

[95] Watkin, *supra* note 34, Berman, *supra* note 34.

[96] Jean-Marie Henckaerts & Louise Doswald-Beck, eds., *Customary International Humanitarian Law. Volume I: Rules* (Cambridge: Cambridge University Press, 2005) at 19-24.

> in the legal sense – to denote persons believed to belong to, or believed to be associated with terrorist groups, regardless of the circumstances of their capture.[97]

In its interpretation, such use of the term is unfounded. Rather, combatants are members of a party to an international armed conflict. This corresponds with Dörmann's clarification on 'terminology'. He maintains with reference to Art. 43 (1) AP I that 'the term "combatants" denotes the right to participate directly in hostilities.'[98] A civilian is anyone who is not a combatant. Should civilians directly participate in hostilities, 'they remain civilians but become lawful targets of attacks for as long as they do so.'[99] They can be called 'unlawful/unprivileged combatant/belligerent.'[100] This is also the view of Sassòli, who highlights with regard to the US government's claim to the justification of detention that it only holds true for 'combatants' and that this category of persons only exists in international armed conflict.[101]

d. Summary of Competing Conceptions

The US administration claims that it is engaged in a 'war on terror' which includes the wars against Afghanistan, Iraq, and al Qaeda as well as other sponsors or supporters of terrorism. Individuals captured in this 'war on terror' are 'enemy combatants' regardless of whether they had been fighting on behalf of a state, a terrorist organization, or whether they have fought at all. Planning to fight or supporting hostilities would be sufficient. 'Enemy combatants' can be detained until the end of the 'war on terror'. US courts have taken ambiguous positions on these claims. *Hamdi* has in fact successfully lent itself to diametrically opposed claims–*Padilla* coming closest to a full endorsement of the government's claims and *al-Marri* closest to a rejection. A similar picture arises from an illustrative depiction of scholarly contributions and of the ICRC's position. Each participant in the discourse resorts to the laws of war and authoritative opinions, such as the decisions by the courts, to form and support its argumentative claims.

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[97] International Committee of the Red Cross, 'Official Statement: The relevance of IHL in the context of terrorism' (21 July 2005) [ICRC], online: ICRC <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

[98] Knut Dörmann, 'The Legal Situation Of "Unlawful/Unprivileged Combatants"' (2003) 85 Int'l Rev. Red Cross 45 at 45.

[99] *Ibid.* at 46.

[100] *Ibid.*

[101] Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) J. Int'l Crim. Just. 96 at 102-3.

Some commentators see the law to be next to unworkable under such pressure and argue for change in the laws of war to adapt to new circumstances.[102] This might be more honest. It should be clear, however, that the law in fact changes when interpretations of legal expressions change.

3. Legal Contestation about 'Enemy Combatants'

The perspective of legal contestation grasps that interpretations are contestable, that they follow a certain legal argumentative form, and that the act of interpretation can well be understood as an exercise of power because it cloaks a particular conception in a statement about what the law actually says.[103]

The possibility of contestation is uncontroversial in theory and practice. Actors can and do make divergent claims with reference to legal texts. Even bodies institutionally authorized to decide on divergent interpretations, US federal courts in this case, have not been able to settle the issue. Not only have legal scholars scrutinized their decisions but their judgments have covered the full range from outright approval of the government's claim to its utter rejection. Scholars as well as courts have succeeded in tying their divergent interpretations to legal expressions and jurisprudence.

Actors have conveyed their interpretations according to the rules and standards of legal argument. Yet, not all actors have employed the same rigour in connecting their argumentative claims to legal expressions. The US administration bases its argument on interpretations conveyed by its conception of 'enemy combatants'. Notably, this is an expression that cannot be found in any treaty–only in very few Court precedents, and then only in a usage distinct from the one the US administration now attempts to employ.[104] This suggests that the US cannot convincingly fit its interests in the framework of prevailing interpretations of legal texts. At least two observations may be made.

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[102] See Michael Reisman, 'Assessing Claims to Revise the Laws of War' (2003) 97 Am. J. Int'l L. 82; Barbara J. Falk, 'The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III' (2007) 3 J. Int'l L. & Int'l Rel. 31; Eric Talbot Jensen, 'Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance' (2005) 46 Virginia J. Int'l L. 209.

[103] Note that Austin lets the distinction between performative and constative utterance ultimately collapse to suggest instead that all constative acts are also performative, Austin, *supra* note 27. This is easily understandable on the basis that it is impossible not to interpret.

[104] *Cf.* Woolman, *supra* note 45.

First, the demand inherent in legal interpretation, that arguments be tied to legal texts and that this connection follows a distinct argumentative form, appears to have some constraining impact on the success of cloaking actions in the mantle of legality. Legal texts are open for interpretation. However, some meanings are prevalent and whoever wants to endorse a different meaning has to fight an uphill battle. Contestability in law carries a potential for change but also compels justification for such change or, at least, such change is limited by the acceptance by other participants in the discourse. The qualification of such arguments for change as legal argument is always a necessary precondition. Marco Sassòli points out:

> As with all laws, the laws of war can and must adapt to new developments. However, no law can be adapted in every new case of application to fit with the results desired by those (or some of those) involved. As part of international law, and pending a Copernican revolution of the Westphalian system, the law must, in addition, be the same for all States. To see it only as a means, to be immediately adapted to new claims, or to apply it selectively undermines the predictability and therefore the normative force that defines legal rules.[105]

A second observation is that, where meanings of certain expressions are rather well-established, it might be more promising for an actor pushing for change to endorse a different expression altogether. The US seeks to circumvent prevalent interpretations of legal texts by suggesting the expression 'enemy combatants' and thereby attempts to construct a new discourse which is more aloof from legal texts. Interpretations are certainly not static; should they shift to accommodate the US conception conveyed by the expression 'enemy combatants', the US will succeed in legalizing its actions. In this sense, fighting the war extends to 'communicating the war'[106] in the form of law. 'Defining the battlefield is not only a matter of deployed force, or privileging killing; it is also a rhetorical claim.'[107] Thus changes in definitions, changes in the law by way of interpretation, can well be understood as expressions of power.

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[105] Marco Sassòli, 'Use and Abuse of the Laws of War in The "War on Terrorism"' (2004) Law & Inequality 195 at 221 (internal footnotes omitted).

[106] David Kennedy, *Of War and Law*, (Princeton: Princeton University Press, 2006), 122 [Kennedy 2006a].

[107] *Ibid.*

The ICRC maintains that

> [t]o the extent that persons designated 'enemy combatants' have been captured in international or non-international armed conflict, the provisions and protections of international humanitarian law remain applicable regardless of how such persons are called.[108]

Following the ICRC's interpretation of the laws of war, 'combatants' only exist in international armed conflict. The term would be misapplied in non-international armed conflict and different consequences attach to each qualification. The expression 'enemy combatant' conveys a conception that the US has consistently connected to it, at least over the past five years. It is not fixed. It should be noted, however, that the prevalence of one expression over another shifts the balance in contestation. Were the term 'enemy combatant' to become the prevalent point of reference in legal discourse, rather than 'combatant' and 'civilian' as expressed in the treaties on the law of war, those critical of the US claims would have suffered a severe loss. They would then themselves have to seek to again replace this expression with different ones. Or they would have to seek to implement an interpretation of 'enemy combatant' which is unlike the US interpretation. It should be abundantly clear that semantics are at the heart of legal contestation, that they have consequences, and that seeking to find acceptance for meanings aligned with an actor's interest is an exercise of power. This paves the way for revisiting the possible merits of critical constructivist research on norms.

IV. Potential Merits of Critical Constructivist Research on Norms

It has been argued in theory and shown in practice that legal expressions find their meaning in their use, that contestation with reference to legal norms takes a particular legal argumentative form, and that acts of interpretation can well be understood as exercises of power. This section contends in conclusion that the understanding of legal practice developed in this article in line with central tenets of critical constructivism in international relations does not necessarily shatter international law's aspiration towards justice but rather helps to discard and counter its instrumentalization for a particular project. Contestability prevents the reification of justice. The contestability of international law then highlights the responsibility of individual interpreters fighting for individual substantive convictions in the same form of legal argument.

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[108] ICRC, *supra* note 97.

1. Contestability

The suggestion of contestability based on semantic pragmatism raises challenges to the concept of law. H.L.A. Hart observed that '[l]egal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules.'[109] On a note that is directed against an exaggeration of such indeterminacy, it might be argued that chaos and uncertainty are its consequences. Such reproach would be mistaken for two reasons. First, it is wrong because it usually resorts to an ideal conception which would then dictate what the practice in fact looks like. When the above account of legal practice is plausible, then an argument about how it should be does not yet change the facts.

Second, contestability does not mean that anything goes. The constraint lies in the necessary qualification of arguments as legal interpretations and their acceptance by other participants in legal contestation. The fact that such requirements ensure that interpretations are contestable in their distinct elements supports the thought that actors are locked in a 'communicative entrapment' of continuous contestation from which they can only exit with some costs and missed gains.[110] Contestation at the international level frequently has particular features which are cause for some reluctance to project Habermasian discourse theory from a democratic institutional context to contestation in international law.[111] Deliberation that might increase the normative value of argumentative outcomes would have to take place in a setting that displays at least minimal institutional prerequisites.[112] The normative quality of legal contestation ultimately rests on the quality of acceptance.

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[109] Hart, *supra* note 10 at 130.

[110] Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org. 1 at 3-16.

[111] For an overview of empirical studies that have focused on the settings of diplomatic negotiations see Cornelia Ulbert & Thomas Risse, 'Deliberately Changing the Discourse: What Does Make Arguing Effective?' (2005) 40 Acta Politica 351-67. Note, however, the cautionary outlook by Jürgen Habermas, 'Concluding Comments on Empirical Approaches to Deliberative Politics' (2005) 40 Acta Politica 384-92; Jürgen Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: Eine Replik' in Peter Niesen & B. Herborth eds., *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der Internationalen Politik* (Frankfurt am Main: Suhrkamp, 2007) 406. For a historical contextualization of this line of thinking, its use for international law and its prospect see also Armin von Bogdandy & Sergio Dellavalle, 'Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms' (2009) 10 German L.J. 5.

[112] Wiener & Puetter 2009, *supra* note 3 at 8; Hurrell 2007, *supra* note 22.

Relying on merely factual acceptance of course raises problems of normativity because factual acceptance can result from a variety of reasons that may not add anything to the interpretations' likeliness to be normatively legitimate. In particular the impact of power is often decisive and conspicuously absent in theoretical inquiry and normative propositions.[113] Distinct ways in which power influences the argumentative interchange inside its outward form of legal contestation are discernable. Most straightforwardly, actors would simply not make an argument because of the repercussions they might have to suffer. In relation to at least some actors, the US government possesses tremendous leverage that makes strong opposition less likely. Even if the law is itself semantically and structurally open for interpretation, prevalent meanings tilt the balance of argument. Concepts have histories that constrain powerful and weak alike. Power is likely to be embedded in prevalent interpretations of a legal expression which then makes it harder to find acceptance for contravening interpretative claims. Furthermore, acceptance can be induced by moralization and appealing juxtapositions of good and evil which in turn shape the identities of actors trying to do the 'right thing'. The US government's claim finds more acceptance because of the demonization of the enemy.[114] This is a common technique of justification through the shaping of identities.[115] It amounts to a threat to formal argumentative practice because it undermines precisely its formal attributes. It drives at exclusion and unequal application to the detriment of the 'outlaw'.[116] In other words, substantive convictions undermine the formal argumentative practice.

The illustration of contestation offers a critical distance and thrusts the individual participant into the spotlight:

> [T]he abandonment of aspiration to 'absolute' knowledge has exhilarating effects: on the one hand, human beings can recognize

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[113] Andrew Hurrell, 'International Law and the Changing Constitution of International Society' in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, New York: Oxford University Press, 2000) 327 at 330.

[114] Vincent-Joël Proulx, 'If the Hat Fits, Wear It, If the Turban Fits, Run for Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists' (2005) 65 Hastings L.J. 801 at 864.

[115] Teun A. van Dijk, 'Discourse and Manipulation' (2006) 17 Discourse & Society 359. For the rhetoric on the 'war on terror' see Phil Graham, *et al.*, 'A Call to Arms at the End of History: A Discourse-Historical Analysis of George W. Bush's Declaration of War on Terror' (2004) 15 Discourse & Society 199.

[116] See Gerry Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

> themselves as the true creators and no longer as the passive recipients of a predetermined structure; on the other hand, as all social agents have to recognize their concrete finitude, nobody can aspire to be the true consciousness of the world. This opens the way to an endless interaction between various perspectives and makes ever more distant the possibility of any totalitarian dream.[117]

The possible merits of understanding interpretative exchanges in light of critical constructivism and from the perspective of legal contestation might lie in supporting the effective use of contestation against the fixation of meanings.[118] Law would be understood as the battleground for semantic fights. It is not itself a cure that eases concerns about unwarranted exercises of power but rather a potential to be used.

2. Responsibility

Contestability leads to responsibility. The US conception of 'enemy combatants' is novel in the present discourse and, if successfully implemented, would have consequences that many would not welcome. If a contestant is convinced that a certain interpretative claim ought to be rejected, then she should do so—fighting in the same form for subjective convictions. This would reflect the normative program of a 'culture of formalism'.[119] The legal argumentative form sets the stage on which actors pursue different interests, normative convictions and possibly distinct philosophical commitments. The contestability of the law leaves room for a political choice.[120] In fact, Martti Koskenniemi suggests that it is 'a precondition for there to be something like a realm of politics in which issues of right, good and just can be meaningfully debated and reproached. There is no closure.'[121]

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[117] Ernesto Laclau, *Emancipation(S)* (New York: Verso, 1996) at 16-17.

[118] On the symbol of the 'empty' legal form as a counter-hegemonic assumption with recourse to Hans Kelsen's international law theory, Jochen von Bernstorff, *Hans Kelsen's International Law Theory: Believing in Universal Law* (Cambridge: Cambridge University Press forthcoming, 2009). From a perspective of systems theory a very similar argument has been made by Andreas Fischer-Lescano & Ralph Christensen, 'Auctoritatis Interpositio. Die Dekonstruktion des Dezisionismus durch die Systemtheorie' (2005) 44 Der Staat 213, exposing the paradox of decisions in legal interpretation as never quite grasping what the law is and concluding on a positive note that the process of decision-making in law can be seen as an attempt to prevent the reification of justice by every trick in the book, at 231.

[119] Koskenniemi, *supra* note 13 at 616.

[120] Hart, *supra* note 10 at 128.

[121] Martti Koskenniemi, 'Book Review: Giovanna Borradori (Ed.), *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago and London: University of Chicago Press, 2003)' (2003) 4 German L.J. 1087 at 1089; compare Armin von Bogdandy,

This adds to the understanding of the relationship between law, politics and ideas of justice in international relations.[122] A political decision is at the heart of legal contestation and it can be subjected to continuous challenges. Politics within the legal form is of a particular kind. It is shaped by the rules of interpretation and standards of legal argument. Law is itself neither utopian nor apologetic. Rather it oscillates between apology and utopia barely coming to rest.[123] An interpretation might be called apologetic or hegemonic. When it does not find any acceptance it is without effect or benefit – an empty claim whose pretence to legality can be easily refuted. It might well be argued that the argumentative form disguises what is at issue; namely, responsible political decisions. Claims to legality might preclude awareness of responsibility.[124] In other words, actors might hide behind the mask of legality. If they can do so successfully, then this might also well be legitimate. If not, then, again, the response would have to be to tear down this mask, to reveal the mistaken decision and to qualify it as *legally* impermissible.[125]

The perspective of legal contestation on legal practice elucidates the political decisions and the expressions of power inside the outward show of legal argument. It pursues an outright project of modernity; that is an improved understanding of practice that expands the basis for individual judgment and critique. A sociological analysis of law might have, in this sense, 'liberating force'.[126] When powerful actors cannot plausibly convey

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'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 Harv. J. Int'l L. 223 at 227. Also see the conception of law by Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958): 'Before men began to act, a definite space had to be secured and a structure built where all subsequent actions could take place, the space being the public realm of the *polis* and its structure the law; legislator and architect belonged in the same category', at 194-5.

[122] See Jochen von Bernstorff & Ingo Venzke, 'Ethos, Ethics and Morality in International Relations' in Rüdiger Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press forthcoming, 2009).

[123] Also see Nico Krisch, 'International Law in Times of Hegemony Unequal Power and the Shaping of the International Legal Order' (2005) 16 Eur. J Int'l Law 369.

[124] See Jason A. Beckett, 'Rebel without a Cause? Koskenniemi and the Critical Legal Project' (2006) 7 German L.J. 1045 at 1078 and David Kennedy, 'The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's "from Apology to Utopia")' (2006) 7 German L.J. 982 at 990. This is also the central thesis in Kennedy 2006a, *supra* note 106.

[125] *Cf.* Shirley V. Scott, 'The Political Life of Public International Lawyers: Granting the Imprimatur' (2007) 21 Int'l Rel. 411.

[126] Such an aim of sociology can be found, for instance, in the work of Pierre Bourdieu; Pierre Bourdieu & Loïc J. D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992); *cf.* Markus Schwingel, *Pierre Bourdieu* (Hamburg: Junius, 1995) at 147-163; David Nelken, 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 J. L. & Soc'y 407.

their interest in prevalent legal concepts, they push for change. This translates into a push for new expressions like 'enemy combatants' or different uses of established expressions. It translates into semantic fights. A grand potential for critique then lies in exploring the histories of concepts and legal expressions and in pointing out that change.[127] Few have put this more to the point than Milan Kundera: 'The struggle of man against power is the struggle of memory against forgetting.'

[127] Reinhart Koselleck, *Begriffsgeschichten* (Frankfurt am Main: Suhrkamp, 2006); for a collection of treatises in English, Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford: Stanford University Press, 2002); *cf* the early argument by Richard Koebner, *supra* note 31.