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Veröffentlichungsversion / Published Version

Arbeitspapier / working paper

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:

Hessische Stiftung Friedens- und Konfliktforschung (HSFK)

Empfohlene Zitierung / Suggested Citation:

Deitelhoff, N., & Zimmermann, L. (2013). *Things we lost in the fire: how different types of contestation affect the validity of international norms*. (PRIF Working Papers, 18). Frankfurt am Main: Hessische Stiftung Friedens- und Konfliktforschung. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-455201>

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Things We Lost in the Fire: How Different Types of Contestation Affect the Validity of International Norms

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December 2013

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In current norm research in International Relations (IR), the contestation and the dynamics around norms have become the new focus of analysis. Contestation of norms and their application can either lead to a strengthening or weakening of norms as scholars argue. But under which conditions does contestation lead to either one? We argue that the type of contestation matters to explain if contestation has norm strengthening or norm weakening effects. While contestation around the application of norms usually results in a specification in which situation a norm applies and how it needs to be applied, contestation of the validity of a norm questions the norm as such and – over time – often leads to a weakening of the norm. The paper will, in a first step, discuss the different approaches to norm contestation that can be found in IR research. In a second step, it will present the argument and a typology of norm contestation that is based on a discourse theory of law and normativity. The argument will, in a third step, be empirically illustrated by analyzing the contestatory discourses around the responsibility to protect and the whaling ban.

1. Introduction

While in the 1990s, IR researchers focused on the emergence and the diffusion of international norms, especially in the area of human rights, rule of law and democracy, norm researchers today take a more skeptical view: Norms that have been described as stable and relatively uncontested are now being portrayed as eroding, such as the torture prohibition (McKeown 2009; Sikkink 2013), or as already dead, as the anti-mercenary norm (Panke/Petersohn 2012). At the same time even newly emerging norms, like the responsibility to protect, are portrayed as already fading again (Evans 2008). Recurring contestation and lack of compliance with international norms make norm erosion the topic of the day.

At the same time, critical norm research has shown unease with constructivist norm research from another direction. Scholars have criticized its linear and static depiction of norms and instead emphasized their ‘dual quality’ (Wiener 2007). Norms can be reinterpreted and changed; they can be weakened or strengthened by norm contestation (Badescu/Weiss 2010; Krook/True 2012; Sandholtz/Stiles 2009; Wiener 2008). Yet, when does contestation lead to either one? Under which conditions does contestation lead to norm decay or to norm strengthening? Both conventional and critical norm research have so far found no answer to this question. For conventional constructivist norm research, contestation is per se a sign of norm weakening, in critical norm research the threshold, when contestation turns to be a weakening instead of a strengthening force, remains unclear. Thus, both approaches fail to grasp the dynamic nature of the relationship between contestation and norm stability which is probably an effect of the enduring structuralism of norm research. A focus on such dynamics seems to belong to the things we lost in the fire of the battle to make norm research a respected field of IR.

In this paper, our aim is to bring this focus on dynamics back into play: We argue that the type of contestation matters to explain how it affects a norm’s stability. Contestatory discourses around the application of a norm are a normal practice (Chayes/Chayes 1993: 188; Sandholtz/Stiles 2009) since nobody can foresee every possible situation and context in which a norm might be applied in the future. Such contestation regularly provokes specifications with regard to the type of situation to which a norm applies and how it needs to be applied (what behavior it demands of its addressees). Justificatory discourses, in contrast, directly target the validity of a norm, i.e. the basis of its normative obligation (Günther 1988). If the validity of a norm is increasingly questioned, non-compliance becomes more widespread and will no longer be denounced by norm addressees leading – over time – to norm decay.

The paper will discuss the different approaches to norm contestation that can be found in IR research and their limits (section 2). We, then, distinguish two types of norm contestation, based on a discourse theory of law and normativity (section 3). The argument will, in a third step, be empirically illustrated by analyzing the contestatory discourses surrounding the responsibility to protect and the whaling ban (section 4). While the responsibility to protect highlights the typical strengthening effects of applicatory discourses on norms, contestation around the whaling ban shifted from applicatory to justificatory discourses, increasingly troubling the validity of the norm. In addition, we will explore which factors led to this radicalization of contestation (section 5).

2. Two approaches to contestation

There are two principal approaches to contestation in IR. Conventional norm research perceives of contestation as automatically weakening a norm's stability, while the critical approach depicts contestation as a potential step to its strengthening. Both approaches are limited, however, in their explanation why and how contestation might lead to either a weakening or a strengthening of norms.

Norm emergence and norm decay

Systematic research on norms and their effects is a latecomer to IR. It only began to gain ground in the discipline upon the advent of the social constructivist research program in the late 1980s (Kratochwil/Ruggie 1986; Nadelmann 1990; Wendt 1987). One of the most influential conceptualizations of international norms was based on a norm life cycle, which depicts a norm's development from its emergence, its diffusion in the international system to its internalization by actors (Finnemore/Sikkink 1998).

Studies on the phase of norm emergence depicted it as a conflictual process in which norm entrepreneurs would attempt to win support for their norm vis-à-vis alternative norms (Finnemore/Sikkink 1998; Nadelmann 1990; Price 1998).¹ This element of conflict vanished in the proposed models once the norm had reached a tipping point. If a norm was established, it was often depicted as stable in its meaning and legitimacy (critically Wiener 2007), diffusion followed rather conflict-free socialization processes. Conflict surrounding norms was only considered to have taken place in the diffusion phase, when single resistant states would reject well-established norms (see Checkel 1999; Risse et al. 1999). In the final stage of a norm's life cycle, norms were not even thought of as a part of the public debate anymore. Instead, it was the norm's unquestioned presence, its habitualization and internalization, that marked its validity (Finnemore 1996; Finnemore/Sikkink 1998: 895-896; Risse/Sikkink 1999: 17).

The focus on the stability of norms was owed to the particular context of emergence of social constructivism in IR. In a discipline that denied ideational factors any independent effects on state behavior, social constructivists were eager to demonstrate that "norms mattered" (Finnemore/Sikkink 2001: 396). In this general context, a contestation of norms was perceived as a weakening of norms and as a weakening of an argument for the influence of ideational factors.

This linear model of norm diffusion and this focus on norm stability has been subject to much criticism lately (Deitelhoff/Zimmermann 2013; Engelkamp et al. 2012; Epstein 2012; Ulbert 2012). Latest research has taken up the question, if international norms can erode once they had been internalized. Studies in this area describe norm decay (alternatively regression or erosion) at a domestic (McKeown 2009; Rosert/Schirmbeck 2007) and an international level (Deibert/Crete-Nishihata 2012; Panke/Petersohn 2012). The aim is to further the norm life cycle by the inclusion of norm erosion cascades.

Nonetheless, those few studies on norm erosion rather mirror the stability bias of early norm research. Although they argue that norm contestation does not necessarily lead to full norm decay,

1 On norm emergence, see also later studies by Deitelhoff (2006, 2009) and Payne (2001).

it is perceived of as a necessary weakening of norms: “even if defenders are quite successful in rolling back some of the revisionists’ gains, the norms will always lose some salience just in virtue of being publicly challenged” (McKeown 2009: 11; similar Panke/Petersohn 2012: 721; Rosert/Schirmbeck 2007: 256). Every step away from un-questioned internalization is equated with a potential weakening of a norm.

Regarding the explanation of such erosion cascades research is still in its infancy. Two different perspectives exist: For Panke and Petersohn, it is active non-compliance with norms, which is not sanctioned, that triggers norm erosion (2012: 726).² Rosert and Schirmbeck, in contrast, focus on norm erosion in public discourse, where “norm challengers” can trigger domino effects (Rosert/Schirmbeck 2007: 280-281). Similarly, McKeown expects norm revisionists to trigger a norm legitimacy crisis (2009: 9-11). Yet, insights are missing why revisionists might be more or less successful. In addition, the relation of contestation in public discourse and non-compliance remains under-specified. The enduring structuralism of norm research results in a narrow understanding of norms that equates their validity with their uncontestedness.

Critical norm research

Critical approaches to norms have gone to great lengths to escape this focus on stability by focusing on norm contestation (Wiener 2004, 2008), norm localization processes (Acharya 2004, 2009), and norm change (Krook/True 2012; Sandholtz/Stiles 2009). This research has consistently highlighted that norms remain dynamic and contested even after their emergence (Krook/True 2009). Their meaning can change in different contexts and in response to new developments: Norms have a ‘dual’ quality, as Antje Wiener (2007) dubbed it – they are stable as well as dynamic.

Localization research investigates norm reinterpretation and resistance in different, regional and domestic contexts (Acharya 2004; Merry 2006; Zimmermann 2012; Zwingel 2012). Yet, this research does neither analyze the limits of such contestation nor how localization influences a norm’s stability at a global level. Research on norm change, in contrast, studies the dynamics of norms and their interpretation at an international level (Badescu/Weiss 2010; Krook/True 2012; Sandholtz/Stiles 2009). These works point to contestation and interpretation processes that result in either norm strengthening or norm weakening. Yet, they do not explain, when we should expect either one. While Sandholtz and Stiles (2009), for example, point to factors that positively influence norm change in form and content, such as the discursive power of contesting actors, a link to shared meta norms and precedence, they do not explain how these factors relate to the validity of norms.

Conflict around the interpretation and reconstruction of norms is also part of research on norm contestation (see Van Kersbergen/Verbeek 2007; Wiener 2004, 2007: 58, 2008, 2010: 203). Contestation refers to conflicts around the meanings (meanings-in-use) of norms (Wiener 2004), which emerge when norms gain validity in different cultural contexts:

“It is through this transfer between contexts, that the meaning of norms becomes contested, as differently socialized actors such as politicians, civil servants, parliamentarians or lawyers trained in different legal traditions seek to interpret them.” (Wiener 2008: 33)

For Wiener, contestation is a positive phenomenon as it is the condition for a deliberation over meanings of norms which is necessary to produce norm legitimacy:

“Legitimacy of international law may actually depend on sorting out the normative baggage brought to bear in international encounters.” (Wiener 2010: 203)³

Thus, contestation can be a strengthening, not a destabilizing force if the right framework for such deliberation exists (Wiener 2007: 56, 2008: 204-208). This is possible

² They argue that, finally, norms disappear “if the emerging new practice is no longer framed as non-compliance” (Panke/Petersohn 2012: 3), yet do not investigate this in their empirical case studies.

³ See also Wiener (2007: 48) and Wiener/Püttner (2009: 10).

“only under certain conditions such as social interaction in shared context over a prolonged period of time” (Wiener 2010: 203).

While this research emphasizes, that there might be danger of “too much” contestation (Wiener 2010: 203), empirical research on the limits of contestation is still missing. It remains an open question where the threshold is between integrative and destabilizing contestation.

In critical norm research, norm contestation becomes a normal practice which shapes the interpretation of norms. These approaches of norm contestation and norm transformation, however, usually say little about their limits: How much contestation can a norm invoke before its addressees no longer consider it to be a shared normative expectation? When does controversy begin to weaken instead of strengthen a norm’s stability? In the following, we argue that contestation can strengthen a norm only as long as it remains limited to the application of a norm.

3. Two types of contestation

Before we detail out this distinction, the character of a norm’s stability needs exploring. According to Habermas, norms are temporally, socially, and materially generalized behavioral expectations (Habermas 1992: 138). In IR, they are mostly defined as inter-subjective standards of appropriate behavior on the basis of given identities (Finnemore/Sikkink 1998: 891). Norms regulate interpersonal relationships by solving problems of collective action and also constitute the very kind of interpersonal relationships that exist.

Basically, social norms reflect routines of behavior and allow expectations to emerge as to which behavior is appropriate in a specific situation. At the same time, however, norms also reflect normatively desirable behavior: “it is precisely the prescriptive (or *evaluative*) quality of ‘oughtness’ that sets norms apart from other kinds of rules” (Finnemore/Sikkink 1998: 891).⁴ The source of obligation can vary: it can either refer to a sedimented ensemble of cultural values (that is, an ethos of a community), to common institutions, such as a constitution, or to the reasoned consensus of addressees in an open and public discourse (Habermas 1999: 305; Kratochwil 1989: 125-126).⁵ It is this shared basis of normative expectations, i.e. the source of the normative obligation that constitutes a norm’s validity, and saves the norm from being automatically weakened by norm-violating behavior (Finnemore/Sikkink 1998: 892; Kratochwil 1989: 63-64). Norms are deontological entities that primarily derive their validity from the shared inter-subjective acceptance of their obligatory claims by their addressees and only secondarily from their factual enforcement.

Thus, norms often only become visible to us when they are violated or contested. Violations provoke justifications because they imply neglecting an inter-subjective obligation, but they do not necessarily weaken a norm. If for example the U.S. are breaking the international torture ban, it might even strengthen the norm if they justify this break as a valid exemption and/or if other states condemn this behavior (see also Sandholtz/Stiles 2009: 14-15). At the same time, however, constant non-compliance will destroy the validity of norms over time, since addressees would lose their trust in the inter-subjective obligation at the core of the norms (see also Price 2006: 257). Thus, both a focus on only non-compliance or on only discursive claims cannot give a full picture of a norm’s stability. A norm’s stability is high as long as non-compliance is described as non-compliance by its addressees and as long as a comparatively high level of compliance exists.⁶ Norm

4 Similarly Chayes/Chayes (1995).

5 These different sources give rise to specific norm types: ethical norms (in German: *Sittlichkeit*) reflect shared understandings on the ‘good life’ within a community, conventions rather reflect a generalized insight into the rational benefit of a certain behavior (e.g. to drive on the right side of a street to avoid collisions), moral norms reflect those expectations that are at least potentially universally valid (i.e. to which nobody can disagree with good reasons). Clearly, these types can only be neatly distinguished analytically while they typically intermingle in social reality. This becomes most apparent with legal norms that embody all other kinds of norms.

6 How high the level of compliance with a specific norm can be depends on many factors and differs from norm to norm, see also (Chayes/Chayes 1993; Nadelmann 1990).

stability is eroding if non-compliance is no longer described as non-compliance and becomes widespread. Both is most likely to happen the more contestation of a norm begins to target its validity, i.e. the inter-subjectiveness of its normative obligation instead of its application.

Justificatory and applicatory contestation

In general, contestatory discourses on norms take two different forms that follow different logics: discourses concerning the application of norms and discourses questioning the validity of norms. Norm applicatory discourses have to clarify whether (1) a norm is appropriate for a given situation and (2) which actions it requires in the specific situation.

“Treaty drafters do not foresee every of the possible applications, let alone their contextual settings.” (Chayes/Chayes 1993: 188-189; also Günther 1988)

This leads to constant contestation about the right interpretation and application of a norm (see also Sandholtz/Stiles 2009: 4). Over time, such applicatory discourses often lead to changing interpretations of a norm following new technological inventions or general normative change in societies. Gender equality was certainly interpreted very differently forty years ago than it is today.

In applicatory discourses, the context of the concrete situation always reigns supreme. In such discourses, the appropriateness principle is decisive. It measures the degree of coherence between the norm and all relevant characteristics of the respective situation at hand (Günther 1988: 96). If contestation questions the application of a norm, not a norm’s validity, we speak of *applicatory contestation*.

Norm *justificatory* discourses, in contrast, tackle the question of which norms a group of actors wants to uphold. Here, the issue at stake is what actors can expect of each other independent of a given situation. This means that only those normative claims to which all can agree in principle can be valid (Günther 1988: 16). Hence *justificatory contestation* questions the validity of a norm as such.⁷

Although all norms are dependent on applicatory discourses, not all are dependent to the same degree. The more precise a norm is, i.e. the more unequivocal its obligatory claims are, the less it provokes applicatory discourses (although even very precise norms are accompanied by applicatory discourses). Similarly, the more norms formulate positive duties (which demand a proactive behavior of actors), the more applicatory discourses are to be expected, while negative duties (which demand that actors refrain from a certain behavior) should correspond to fewer applicatory discourses. In sum, applicatory discourses should be much more intensive and tedious when abstract norms are under consideration, which formulate positive duties.

Given this understanding of applicatory and justificatory contestation of norms, contestation as such does not suggest a weakening of a norm. In contrast, contestation can even generate normative power of its own: It may serve as a discursive anchor in political debates that shapes political alternatives and which revitalizes the validity of norms for its addressees. Still, there are limits to this power, as norm validity is not completely independent of norm facticity. If a norm is constantly and across actors met with non-compliance, its stability will erode over time since the inter-subjective acceptance of its obligatory claims has broken down. Such erosion is most likely to set in when contestation radicalizes by (1) turning from application to validity itself (questioning the “righteousness” of the obligatory claims as such) and by (2) becoming constant (allowing no more temporal stabilizations of the norm). If it becomes unclear to actors what a norm consists of and if its content is at all legitimate, then norm violations would hardly be recognizable and therefore liable to criticism as true “violations.”

⁷ Thus, justificatory discourses principally involve a radicalization dynamic since they always question why a certain normative obligation should be upheld and thereby tend to transcend given communities and their shared understandings. This is why they are often portrayed a discourses based on the universalization principle.

4. Norm application and norm justification in practice

These differences between applicatory and justificatory contestation and their effects are illustrated by the development of the responsibility to protect (4.1) and the ban of commercial whaling (4.2). Both norms have been described as at the brink of norm decay because of ongoing contestation (Bailey 2008; Evans 2008; Hurd 2012). However, as we show, taking the different types of contestation into account, we can delineate very different dynamics for the two norms.

R2P: Application instead of justification

The introduction of a new responsibility for states to protect their peoples against massive human rights violations and for the international community to step in if states fail in this responsibility has been heralded as a milestone in the development of humanitarian security (Brunnée/Toope 2005/2006: 123; Evans 2006: 714). The consensual adoption of the R2P at the Millennium Summit of the United Nations in 2005 seemed to signal that the international community had finally managed to resolve the tension between the principle of national sovereignty and the protection of human rights by making sovereignty dependent on the protection of human rights (Evans 2008: 284; Feinsein/De Bruin 2009: 188).

At the core of the R2P lies an understanding of sovereignty as responsibility that Francis Deng (Deng et al. 1996) had already formulated in the mid-1990s. It was taken up by the International Commission on Intervention and State Sovereignty (ICISS), which spelled out a *responsibility to protect* in 2001. Sovereignty as responsibility highlights a significant change from the traditional understanding in which sovereignty was dependent on the ability to effectively control a specific territory.⁸ Instead, sovereignty is now dependent on the responsibility to assure the well-being of a population in a given territory. As adopted by the UN General Assembly in 2005, the R2P contains three responsibilities: First, it holds that the state has the prime responsibility to protect its population from gross human rights violations, specifically genocide, ethnic cleansing, grave war crimes, and crimes against humanity. Second, it holds the international community responsible for supporting states to live up to their responsibilities. Third, if states massively fail to fulfill their responsibilities, the international community, specifically the UN Security Council, is responsible for taking adequate measures in ensuring the protection of the population in question.

These formulations, defined in Articles 138-139 of the Outcome Document of the UN Millennium Summit, are already weaker than those of the ICISS report of 2001. The Commission clearly defined adequate measures to be taken and even proposed a set of criteria to determine the use of force, one of the most contentious issues. Well aware of the danger of a blockade by the UN Security Council, the Commission even suggested that the Permanent Members therein should refrain from using their veto rights regarding decisions on the R2P. The Commission also outlined an alternative way to activate the R2P. Using this alternative, the UN General Assembly would be able to authorize intervention along the lines of the “Uniting For Peace”-resolution.⁹ Articles 138-139 of the Millennium Summit are also weaker with regard to the kind of responsibility that they devise, namely for the international community to step in if states fail in their responsibilities. Finally, the ICISS also proposed a broader spectrum of situations to activate the R2P, while the Summit document limits this spectrum to cases of genocide, ethnic cleansing, war crimes and crimes against humanity. The outcome of the Millennium Summit has therefore been dubbed

8 Even this understanding never gave rise to a consistent state practice, but was in its application contested, or resulted in an “organized hypocrisy,” as coined by Stephen Krasner.

9 The “Uniting For Peace” resolution (UN GA 377A) was enacted by the UN General Assembly in June 1950 after the Soviet Union used its veto power in the UN Security Council to prevent the condemnation of North Korea’s aggression towards South Korea and consequent sanctions. Through Resolution 377A the UN General Assembly decided that, in cases where the UN Security Council could not meet its responsibility to maintain or restore international peace due to dissension, it would take over this responsibility and suggest to members of the UN how international peace could be reinstated. See: <http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp07/CourseDocs/VUnitingforPeaceResolution.pdf> (last accessed 2.12.2013).

“R2P lite” (Bellamy 2009; Brunnée/Toope 2005/2006). Despite these weaker formulations, the consensus that emerged after months of careful negotiations formally established the core of a responsibility to protect of nation-states vis-à-vis their populations and the connection of this responsibility to states’ right to sovereignty (Brunnée/Toope 2005/2006: 127).

Does this consensus suffice to speak of the R2P as a valid norm? Applying the standard account in norm research (Finnemore/Sikkink 1998: 901-902), a norm can be said to be in existence once a critical mass of states has agreed to be bound by it. The critical mass, i.e. the tipping point from emerging to established norm is achieved once those states that are critical for the enforcement of the norm, as well as a sufficient number of states in the international system as a whole, have agreed to its acceptance (Finnemore and Sikkink talk of one third of all states). This indicator is therefore fulfilled with the consensual adoption of the R2P in the Millennium Summit (see also Badescu/Weiss 2010: 360).

Since then, however, critical voices that doubt this achievement, at least as a normative development, have gained center stage. In their view, there has never been any consensus on the R2P norm, which is highlighted by the fact that it has provoked contestation from several states ever since its adoption (Focarelli 2008) and that its application remains inconsistent (Bellamy 2009). The R2P is still not properly institutionalized in the procedures of the United Nations, and its role in decision-making on humanitarian issues is ambivalent at best. It is often the case that states utilize the R2P to further their private goals, but ignore it in real crises on the ground (Bellamy 2009: 144; Focarelli 2008; Matthews 2008). Like the practice of humanitarian interventions that the R2P was designed to overcome, its application is equally crippled by selectivity and hypocrisy (Chomsky 2008: 16).

For some, this implies that the R2P cannot be called a norm (Matthews 2008: 137; Stahn 2007: 119), but rather a policy program. Some even argue that the R2P is “undoubtedly a great slogan though little else” (Hehir 2010: 234). Although the majority of observers does not embrace this claim, the normative status of the R2P is questioned, which comes out most pointedly in Gareth Evans’ question as to whether the R2P, given its contested application, is an “idea whose time has come *and gone*?” (our emphasis Evans 2008). In general, the R2P is at best characterized as an emerging norm or a norm-to-be (Badescu/Weiss 2010: 355; Brunnée/Toope 2005/2006: 133; Chataway 2007: 212-213) whose consolidation is dependent upon its institutionalization in assuring a consistent state practice.¹⁰

Justificatory or applicatory discourse?

Only few months after the Summit in 2006, the consensus of the World Summit was questioned when the UN Security Council had to decide as to whether it would formally endorse the R2P. Although resolution 1674 was finally adopted, it was preceded by extremely contentious negotiations inside and outside of the Council. Several states retreated from their former approval of the World Summit compromise (Evans 2008: 288; Wheeler/Egerton 2009: 124). Bellamy, therefore, even speaks of a “revolt against RtoP” in 2006 and 2007 (Bellamy 2011a: 28), as, for example, China tried to block R2Ps translation into practice. This conflict popped up again in resolution SR 1706, in which the Council referred to the R2P in calling upon Sudan’s government to agree to a deployment of UN peace troops. Whereas the follow-up resolutions regarding the situation in Darfur, Sudan refrained from any reference to the R2P (Bellamy 2010: 145), other conflicts, such as that in Somalia, were never even connected to it. On the other hand, natural disasters, such as the one Myanmar experienced after tropical storm Nargis, were selectively connected with the R2P,¹¹ but this interpretation was refused by the international community.

¹⁰ Badescu/Weiss (2010) as well as Brunée/Toope (2010) deviate from this mainstream assessment by arguing that norms can consolidate via contestation and wider interaction.

¹¹ In this case by France’s Foreign Minister Bernard Kouchner.

Similarly, the international community framed Russia's invasion into South-Ossetia and Georgia in terms of a misapplication of the responsibility to protect.

Contestation has also reigned in the latest crisis situations that the UN Security Council has been facing. The Council intervened in Libya with explicit reference to the R2P.¹² Resolution 1970 in March 2011 authorized targeted sanctions against Gaddafi and the top leaders of his regime. The follow-up resolution 1973 ordered a no-flight zone and authorized the use of force to implement it. In the case of Syria, on the other hand, the Council has not yet managed to adopt any resolution,¹³ despite the fact that UN Secretary General Ban Ki Moon highlighted in February 2012 that the policies of the Syrian government against its population possibly constitute crimes against humanity,¹⁴ an assessment that was underlined by massacres in Hama and El Kubeir in May and June 2012.

R2P can be described as a principally moral norm (see also Chataway 2007). It consists of a fundamental and thus abstract responsibility to protect, which is valid independent of cultural, social or political specificities. It therefore leaves the concrete application of the norm open to interpretation. Because R2P is inevitably abstract as a universal moral norm, its applicatory discourse is central in determining if R2P is the appropriate norm in a specific situation.

Furthermore, R2P is also a classic case of a norm requiring positive duties: If a state is not willing or able to carry out its responsibility to protect vis-à-vis its inhabitants, the international community is obligated to step in.¹⁵ How the international community is meant to intervene is open to interpretation, as is the question of when a state is not willing or able to meet obligations. This is what comprises the object of the applicatory discourse.¹⁶

The observed contestation in cases in which the R2P has been called upon is hence *prima facie* no sign of a failure of the norm, nor do they signal a lack of shared convictions. Disputes concerning its application are just a reflection of the necessary transition between an abstract norm and a concrete situation.

Despite recurring contestation, the core obligatory claims of the R2P have so far remained fairly unchanged. Hardly anybody seems to contest the existence and rightfulness of a responsibility of states towards their peoples. Similarly, the derived responsibility of the international community to step in if states massively fail in their responsibilities is equally undisputed. Rather, contestation surrounding R2P concerns the question as to whether specific situations fall under the R2P and what this actually implies in a concrete situation: a duty to intervene, or a permission (Bellamy 2010)? Equally contested is the question as to how intrusive such an intervention should be: Should it include military measures, even result in a regime change? Or should it refrain from such actions and be purely supportive in providing specific resources (see Bellamy 2011b)? These controversies are merely ideally typical cases for applicatory discourses, and not a signal for the decay of the norm. Following Badescu and Weis (2010), such controversies even strengthen the R2P because they initiate conceptual clarifications about the breadth of the R2P. Bernard

12 Some argue that the Security Council has not referred to the R2P, but to its powers under chapter VII of the UN Charter (Hehir 2011: 18-19). Although the Council has legally based its decision on chapter VII, it did justify it (the threat for international peace and security) with the R2P in "recalling the Libyan authorities' responsibilities to protect its population" (see the resolution at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement> (last accessed 2.12.2013).

13 A resolution that did not even explicitly refer to the R2P was rejected by China and Russia. See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/223/75/PDF/N1222375.pdf?OpenElement> (last accessed 2.12.2013).

14 See http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1459#.Up3F9Sh82HU (last accessed 2.12.2013).

15 On the other hand, one could argue that R2P demands negative duties of states due to the fact that these states must refrain from certain conduct (i.e. war crimes) taken up against civilians. The first (negative) responsibility, however, is much less the object of applicatory discourse than the positive duties derived from R2P.

16 There are specifications made through the limitation of R2P to cases of severe war crimes, genocide, ethnic cleansing and crimes against humanity. But defining when these things occur can be ambiguous: attempts to widen the applicable area of R2P in reaction to unprecedented events clearly illustrate this ambiguity.

Kouchner's call for the R2P to be applied to the situation in Myanmar after it had been hit by tropical storm Nargis and the military junta rejected foreign help, for example, have strengthened the R2P: the discourses that evolved after Kouchner's call made abundantly clear that the R2P was generally not to be applied to natural disasters, so long as the government itself is not responsible for massive injuries to its population (see Badescu/Weiss 2010: 362-363).¹⁷

Even the latest controversies surrounding Libya and Syria do not signal processes of norm decay, but similarly point to application processes. Libya has highlighted a general dilemma as to how a military intervention with the goal to protect civilians can be neatly differentiated from an intervention whose aim is regime change (see Bellamy 2011b; Brock/Deitelhoff 2012). This dilemma is exemplary for applicatory discourses, which in a best case scenario help increase the precision of the norm or its further development since they highlight characteristics of situations that have not yet been taken into account. In this way, applicatory discourses leave room to increase or decrease the scope of a norm. This does not concern the core claims of the norm, i.e. the rightfulness of a responsibility to protect one's people from harm.

At the same time, regional debates about R2P led indeed to slight reinterpretation, such as Brazilian responsibility while protecting (Benner 2012) or a more narrow R2P in ASEAN (Bellamy/Drummond 2011: 189). Again, in none of these processes was the R2P as such at stake. This can also be inferred from the fact that consensus on the norm still exists: The vast majority of the UN General Assembly decided not to allow a renegotiation of the R2P in 2009, but to instead further its operationalization and institutionalization (see GA 2009).

While the application of R2P remains inconsistent, these potential inconsistencies are also widely debated and criticized. Thus, these inconsistencies and – surely unsatisfactory – application of the R2P are regrettable, but this does not question its validity. Moreover, the recurring contestation can even strengthen the norm. However, this normative power of contestation is ambivalent as long as it cannot be channeled into institutions that bind applicatory discourses to the normative system. Legalizing a norm is a strategy to allow for such an institutionalization, but the institutionalization of the R2P has already begun to take place in the UN. UN General Secretary Ban Ki Moon, for example, issued a report on “Implementing the Responsibility to Protect” in 2009 and installed the position of a special advisor.¹⁸

Whaling: From Application to Justification

A radicalization of contestation from application to validity, in contrast, can be observed with regard to the ban of commercial whaling. Until the 1960s, the discourse around whaling was not a moral topic, industrial whaling, especially by the U.S. and European countries, took place since the 17th century. The first international conventions aimed at a better international management of whaling were signed in the 1930s. Large-scale, industrial whaling, aiming at harvesting whale oil and whale meat, did continue, however, which led to the rapid exhaustion of whale stocks after WWII (see also Bailey 2008: 294).

In 1947, 42 nations adopted the *International Convention for the Regulation of Whaling (ICRW)*, and established the International Whaling Commission (IWC). The aim of the ICRW was

“the proper conservation of whale stocks and thus [...] the orderly development of the whaling industry” (preamble, ICRW). The interests of the whaling industries frustrated any ‘proper conservation’,

however: The IWC set catch quotas that were too high, monitoring and enforcement methods were missing as much as sound scientific models to ascertain whale populations and their development (Peterson 1992). The growing exhaustion of whale stocks also led to ceasing profitability of most large-scale Antarctic whaling (Bailey 2008: 295).

¹⁷ The ICISS had included natural disasters in its report from 2001.

¹⁸ See the report at: <http://i.cfr.org/content/publications/attachments/R2P.pdf> (last accessed 2.12.2013).

At the same time, an environmental movement gained force in the 1970s, based on British and U.S. animal welfare organizations, such as Universities Federation for Animal Welfare, and World Federation for the Protection of Animals, and later on Friends of the Earth, WWF and Greenpeace. This movement aimed at establishing species protection with regard to whales as the guiding norm (Bailey 2008: 295-297; Epstein 2008: 102). Their campaigns, which were based on scientific uncertainty around whale stocks, the dangerous influence of commercial interests in the IWC, but also on the special intelligence and humanity of whales and the cruelty of whale hunting, had world-wide success.¹⁹ Their activities led to a radical policy change of the U.S. from whaling country to supporter of a whaling ban, other former whalers, such as Great Britain, Australia and New Zealand followed soon. The movement's strategy was to make whaling a world-wide public issue.

This strategy showed success. In 1982, the IWC passed a moratorium on whaling after years of intense lobbying. In addition, this institutional decision was made possible by the active promotion of the admission of non-whaling developing countries to the IWC by the environmental movement in order to gain the necessary three-quarters majority to change the IWC rules.²⁰ The ban left two exemptions: both aboriginal subsistence whaling based on IWC determined quotas and whaling for scientific reasons remained allowed.²¹

For observers, the moratorium was a sign that a ban of commercial whaling had emerged,²² especially as many remaining whaling states withdrew their reservations on the moratorium. Spain and Brazil switched to being anti-whaling states. Chile, Iceland, Peru, South Korea and the Soviet Union (later Russia) ceased commercial whaling without much resistance.²³ Japan, Peru and the Soviet Union had all lodged official objections to the moratorium,²⁴ but later withdrew them. Norway kept its official objection in place but halted commercial whaling 1986 (see also Sakaguchi 2013: 199-206). Canada was the only whaling country which withdrew from the IWC in 1982. Yet it did not promote whaling internationally nor did it whale commercially (Epstein 2008: 220).²⁵

This success was not only due to 'persuasive power' but also to pressure by the U.S. (Nadelmann 1990: 518; Sakaguchi 2013). U.S. Congress passed legal means to sanction of states that did not comply with international fishery agreements.²⁶ This threat of sanctions was effectively used against remaining whaling states, such as the Soviet Union and Japan. Even scientific whaling by Iceland and Norway, which was allowed in the moratorium, ceased because of U.S. pressure (Bailey 2008: 311; Sakaguchi 2013: 199-204). As a result, no commercial whaling took place at the end of the 1980s. Although the ban was not endorsed by a third of the international community (as the IWC remains a rather small forum), all former whaling states but Norway had approved the ban and all states quit commercial whaling.

Applicatory or justificatory discourses

19 On the anti-whaling discourse, see Epstein (2008).

20 The so-called IWC schedule regulates whaling quotas (Bailey 2008: 198; Sakaguchi 2013: 199). See paragraph 10e of IWC schedule and ICRW, article VIII.

21 See IWC schedule, paragraph 13.

22 See for example D'Amato/Chopra (1991).

23 Yet these states did not switch to strong anti-whaling positions. Chile and Peru changed to being anti-whaling only recently, see Sakaguchi (2013: 201).

24 The ICRW includes this opt-out strategy of changes to the IWC rules.

25 It allowed small quotas for aboriginal whaling.

26 The U.S. had two domestic legal means to sanction non-compliance with the commercial whaling ban, the so-called Pelly Amendment and the Packwood-Magnuson Amendment allowed for the sanctioning of states that did not comply with international fishery agreements. In 1971, the U.S. Congress passed the Pelly Amendment to the Fishermen's Protective Act. Based on it, the president can ban the import of seafood products if a country was certified as diminishing the effectiveness of international fishery conventions. In 1979, the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act had the same aim: it could ban fishing allocations in the U.S. exclusive economic zone for the same reasons as the Pelly Amendment. In 1988, however, the U.S. reduced its fishing allocations to foreign countries to zero.

Since then the tide has turned, observers claim that both the ban of commercial whaling and the international organization managing that ban are on the brink of collapse. For Bailey (2008: 300) this is due to the missing clarity and specificity of the ban. Hurd (2012: 108) argues that a whaling ban “has reached its peak, and the minority who remains unconvinced in Japan, Norway, Iceland, and elsewhere retain domestic political influence that goes beyond both their numbers and their economic impact.” We argue that the commercial whaling ban has been seriously destabilized due to a radicalization of applicatory contestation to justificatory contestation.

Applicatory discourses

Applicatory discourses were indeed very pronounced in relation to the whaling ban because of the missing precision of the commercial whaling ban. Application fueled many conflicts, which, however, did not question the ban per se.

One major line of contestation revolved around the interpretation of the exemptions of the IWC moratorium, scientific and aboriginal whaling. The IWC’s interpretation of aboriginal whaling, for example, is constantly questioned by indigenous groups. Currently the IWC gives out whaling quotas to four indigenous communities.²⁷ However, quotas are only given to indigenous communities that can demonstrate a continuous subsistence on whales. One bone of contention had therefore been, for example, the application of the U.S. Makah for a whaling license. Industrial whaling had extinguished whale stocks in their coastal area and had made whaling impossible for the Makah for 70 years (see also Hodges 2000).

The Makah are an example for the overall strengthening of claims of indigenous groups on the issue of whaling. Since 1990, more and more indigenous organizations have participated in IWC meetings and have successfully organized around the issue, claiming stronger recognition of cultural autonomy (Bailey 2008: 302-303; Epstein 2008: 235-243). Still, aboriginal communities that do whale or acclaim to whale publically strongly refer to international law and IWC decisions in this matter, they do not question the whaling ban per se.²⁸

The same logic applies to the contestation over the question if Japan’s scientific whaling, the only country whaling under such a permit today, meets international standards. This is constantly questioned by an international NGO coalition, which also takes direct action to stop Japanese Antarctic whaling (for example Sea Shepherd and Greenpeace). Japan, however, spends much effort to justify its whaling as being legal under the IWRC. Australia has finally taken Japan before the International Court of Justice on the issue, whose decision is currently pending if Japan’s whaling fits the IWC scientific whaling exemption.

At another level, applicatory contestation revolves around the IWC institutional structure and how it should be applied and interpreted. Based on the IWRC, states can lodge an objection to new items that are included to the IWC schedule.²⁹ Norway lodged an objection against the whaling moratorium and never withdrew it, although it stopped commercial whaling for a time. Iceland, in contrast, first agreed to the moratorium, then withdrew from the IWC altogether in 1992. It rejoined the IWC in 2002, yet with an objection against the moratorium. While the anti-whaling

27 Among them bowhead whaling in Alaska, humpback and minke whaling in Greenland and gray whaling in Siberia, as well as humpback whaling in the Caribbean. See IWC schedule, para. 13.

28 See for example statements by the Makah Tribal Council and the Makah Whaling Commission, Makah Tribal Council and Makah Whaling Commission, <http://www.makah.com/pdfs/makahwhalingqa.pdf> (last accessed 03.09.2013). Pro-whaling states also fought for a possible exemption from the whaling ban for small coastal communities. Especially Japan worked hard on the inclusion of this category in the exemption list of the moratorium, justifying it with the cultural and subsistence arguments on which aboriginal whaling is based (Epstein 2008: 228). In 1997, the Irish even presented a proposal on this issue, adding small coastal whaling as an exemption in trade for a complete ban of any, even scientific Antarctic whaling. This compromise did neither gain support by pro-whaling nor by anti-whaling countries (Sakaguchi 2013: 206).

29 ICRW, article V, 3.

coalition claims that current whaling of Iceland and Norway is illegal and that Iceland's objection is not in line with ICRW rules,³⁰ both Iceland and Norway insist on their legality.

While these applicatory discourses led to major conflicts at both a domestic and an international level, this contestation did not question the ban on commercial whaling as such. Especially Japan, which had been the main target of NGO anti-whaling campaigns, went to great length to justify its behavior as being in line with the IWC schedule and ICRW rules.

Justificatory discourses

Yet, during the 1990s, justificatory discourses were growing to a level that today puts the commercial whaling ban under serious pressure. First, the ban of commercial whaling itself had been justified not as a long-term measure by the anti-whaling states in the 1980s but as a temporary strategy to overcome scientific uncertainty over whale populations. Since then, several whale populations (such as of the Minke whale) have been declared not endangered and pro-whaling states aim at lifting the ban at least for these species. Proposals for such changes, which had been presented by the ICW's Scientific Committee, have been blocked or delayed by the anti-whaling coalition, however.

At the domestic level, support for whaling increased in the main whaling states Japan, Norway and Iceland in the 1990s, while whaling had been a rather apolitical issue in the 1980s (Epstein 2008: 11; Sakaguchi 2013). The Nordic countries perceive the representation of 'nature' of the anti-whaling supporters as urban and artificial (see on the difference of Norwegian and U.S. environmental discourse, Bailey 2009; Epstein 2008: 221-222) and support the sustainable use of all natural resources as laid down in other conventions on international resource management. In addition, several Caribbean and African states now vocally reject the ban at an international level. They are not necessarily interested in whaling, but internationally support a right for sustainable use of domestic resources for 'food security' (Epstein 2008: 231-235). Overall, the fight for whaling includes now a strong element of fighting former colonial powers and a "Western" environmental movement making dietary decisions for the rest of the world (Epstein 2008: 231-235; Sakaguchi 2013: 203).

This contestation has been intensified by ongoing campaigning of the environmental movement against pro-whaling states, and the ongoing threats of sanctions of the anti-whaling advocates against countries which perceive themselves as 'green' produce outrage in the targeted countries. Together with the accusation of hypocrisy (especially of the U.S. because of its ongoing high meat consumption and its missing action regarding the Kyoto Protocol) this supports a full rejection of a ban of commercial whaling.³¹

How did this radicalization of contestation influence the overall stability of the norm? So far, these critical actors have not succeeded in doing away with the moratorium, they have only seriously diminished its validity. Efforts to found an alternative institution by the Nordic countries (Norway, Iceland, Greenland, Faroe Islands), the North Atlantic Marine Mammal Commission (NAMMCO), which is based on a norm of sustainable management of smaller Cetaceans and pinnipeds, have not led to a rival to the IWC.

Instead, efforts are still directed at changing the norms inside the IWC setting. Japan copied the strategy of the anti-whaling coalition and supported the admission of developing and micro states to the IWC (Epstein 2008: 235; Strand/Tuman 2012). Based on this new support base, in 2006, the pro-whaling states passed, for the first time since 1982, a pro-whaling resolution, called St. Kitts and Nevis Declaration, which summarized this contestation of the validity of the ban. Yet, a three-quarters majority necessary to change the IWC rules is still missing. As Hurd puts it, the IWC has

30 See ICW Schedule para. 10e, see IWC homepage on status of Iceland, http://iwc.int/_iceland.htm (last accessed 2.12.2013).

31 For a strong critique see Stoett (2011: 631-632).

89 members today (in contrast to 25 in the 1970s) and “political pressure and side payments are used to keep both blocs together” (Hurd 2012: 106), holding the IWC in a constant deadlock.

A joint “the Future of the IWC process” to find a way out of this dilemma has recently failed due to strong campaigns of both an anti-whaling and a pro-whaling NGO coalition. This compromise stipulated the acceptance of low whaling quotas for commercial whaling,³² yet, at the same time the end of the objections and reservations to new items of the IWC schedule (Hurd 2012: 106).

In contrast to observing a non-compliance spiral leading to norm decay, as projected by Panke and Peterson (2012), pro-whaling states, at least for the moment, put their resources into the reformation of the existing IWC. Non-compliance with the whaling ban has not dramatically risen. Iceland officially resumed scientific whaling in 2002 and commercial whaling in 2006 (Stoett 2011: 633);³³ Norway resumed commercial whaling already in 1993 (Sakaguchi 1993, 203). Yet their hunting remains small.³⁴ Neither did other types of whaling considerably rise.³⁵ At the same time, whale meat consumption has continuously decreased in pro-whaling states and has not risen linked to the conflict over whaling (Epstein 2008: 224-225; Sakaguchi 2013: 202).³⁶

In summary, we observe a weakening of the norm’s validity, and less shaming of non-compliance, which is not accompanied by a non-compliance cascade yet. The aim of pro-whalers is not full commercial whaling, nor the destruction of the existing norm (Bailey 2008: 303), although this might be the effect in the long run.

5. When does contestation radicalize?

What factors supported this shift of contestation in the case of the commercial whaling ban? One central factor was the strategies of anti-whaling advocates linked to their missing openness to compromise. The ongoing campaigns for U.S. sanctions against whaling of Iceland, Norway and Japan led to a serious backlash in the population of the three countries. The direct assaults on whaling vessels by Greenpeace and Sea Shepherd intensified this backlash (Bailey 2008: 310-312; Sakaguchi 2013). Thus, whaling became a matter of principle, while it was no longer of any considerable economic interest for the remaining whaling states (Epstein 2008: 224). This led to the copying of the aggressive public strategies of the pro-whaling advocates (see also Bailey 2008: 308): first, by turning IWC meetings into major battles of civil society groups;³⁷ second, by copying the strategy of the anti-whaling advocates to recruit new members to the IWC leading to the current split of the organizations.

A second factor was the institutional setting in which contestation was processed. Neither group can currently change existing rules because of supermajority decision rules (Hurd 2012: 103-104); a mediating body to decide about contentious points and about the right application of the IWC does not exist.

Thus, institutions are missing for the commercial whaling ban which ensure that contestation does not encroach on obligatory claims (the normative core) by assuring that only the specific

32 Lower than current whaling under IWC exemptions or objections.

33 See Iceland Review Online, 1 April, 2012: Commercial Minke Whaling to Start in April, http://www.icelandreview.com/icelandreview/daily_news/Commercial_Minke_Whaling_to_Start_in_April_0_388729.news.aspx (last accessed 2.12.2013).

34 It totaled 516 minke whales in small type whaling by Norway and Iceland in 2012. See figures, International Whaling Commission, Catches Taken: under objection and reservation, http://iwc.int/table_objection.htm (retrieved 22.8.2013).

35 They totaled 5 fin, 12 humpback, 152 minke, 143 gray, and 69 bowhead whales under the aboriginal whaling exemption in Greenland, St. Vincent and the Grenadines, Russia and the U.S. (Alaska), and 3 sperm, 100 sei, 34 bryde’s, and 287 minke whales by Japan, the only Antarctic whaler, under a scientific permit. International Whaling Commission, Catches Taken, ASW, http://iwc.int/table_aboriginal (retrieved 22.8.2013). International Whaling Commission, Special Permit catches since 1985, http://iwc.int/table_permit (retrieved 22.8.2013).

36 It declined in both Norway and Japan and has never been high in Iceland.

37 While the World Council of Indigenous People was present at the IWC as early as 1980, the 1990s saw a massive increase of attendance of both indigenous organizations and other pro-whaling groups, from the World Council of Whalers to a Whale Cuisine Preservation Association.

characteristics of a situation are subject to discourse and that arguments remain in the realm of the normative system (i.e. seeing to it that actors can only draw on legitimate technical and normative arguments).

Both factors are also of relevance for the further development of the responsibility to protect. Strategies of norm entrepreneurs which ensure the emergence of a norm can very well backfire if they are linked to pressure and sanctions and if their activities are perceived as 'unfair' by their targets. At the same time, the institutionalization of interpreting bodies is in the long-term important to prevent a radicalization of contestation.

6. Findings and Conclusion

The two case studies on the responsibility to protect and a whaling ban underline the importance of a differentiation of applicatory and justificatory discourses for norm stability. While applicatory discourses evolve around the question if a norm should be applied in a given situation and what it specifically requires from actors in that situation, the second revolves around the validity of the norm as such. Applicatory discourses around a norm are not only to be expected for all norms (albeit in varying degrees) but usually strengthen a norm's validity since they give rise to learning processes among addressees regarding the claims that a norm involves, i.e. the meaning of these claims. This dynamic relationship is often overlooked due to the enduring structuralism in IR norm research. It certainly belongs to the things we lost in the fire of the battle to make research on norms a respected field of IR.

While the responsibility to protect has been diagnosed as missing validity and as already fading, this judgment seems premature. There is no need to join the crisis diagnosis on the R2P. The R2P, as we have tried to show, is a moral norm that, like all norms, relies on the application to concrete situations. Since the R2P primarily formulates positive duties, conflicts regarding its application, i.e. diverse and repetitious applicatory discourses, are in no way distressing.

Yet, the limits of such applicatory discourses are also not investigated by more critical norm research. Worries should set in when contestation begins to radicalize by reaching out to the obligatory claims of a norm. This radicalization can be observed in the case of the commercial whaling ban. Here, missing precision led to intense applicatory discourses. These, however, radicalized, since the mid-1990s, into growing justificatory discourses. This radicalization was due, on the one hand, to the backfiring of aggressive strategies of norm entrepreneurs, and, on the other hand, to the missing institutionalization of procedures which could help process applicatory discourses. Both factors might, in the long term, also lead to a radicalization of R2P contestation.

Still, so far this radicalization of contestation has not led to a decay of the ban of commercial whaling. However, without a proper institutionalization such a development seems not unlikely.

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