Norm challenges and norm death. The inexplicable?

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Abstract:

The death of a formerly strong norm is not often in the limelight of research. Thus, this paper investigates successful norm challenges and analyses the conditions under which they lead to the abolishment of norms rather than to limitations of the norms. It presents a theoretical account of norm challenges and develops hypotheses on mechanisms, success and specific outcomes. Six illustrative case studies show that norm contestations take place through non-compliance when norms are not embedded in international negotiation systems, while norm contestation through negotiations are frequently the case if norms are embedded in international regimes or organizations. Irrespective of the institutional context, the strength of norm challengers relative to norm proponents impacts the prospects for successful normative change. If norm challengers are stronger than actors defending the status quo, the specific outcome of norm challenges is influenced by the combination of norm precision and the stability of the normative environment. If the broader context undergoes change while the contested norm is precise, norms cannot be reinterpreted to accommodate the functional demand for norm change. As a result, in such instances, norms die. By contrast vague norms in combination with stable environments are not abolished after being subject to strong challenges, but merely reinterpreted in a manner delimiting their applicatory scope.

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1. Introduction

The international arena is highly regulated, not only by informal rules and customs, but also by institutionalized and codified norms. While theories of international cooperation assume that states normally adhere to the norms they have created (Keohane and Nye, 1977), compliance research has demonstrated that norm violations frequently occur across different policy fields and actors (Meyers, 2011). Accordingly, research placed emphasis on mechanisms that reduce discord among states and on how violated norms can be restored (Mitchell, 1996).

However, norm challenges can also result in the abolition of a formerly strong international norm. Prominent examples of norm death include the norm of colonial conquest and the permission of slavery (McKeown, 2009, Rosert and Schirmbeck, 2007). In other cases, the challenge of an established, codified norm led to a restriction of its applicatory scope (e.g. the anti-mercenary norm) or the renegotiation and substitution of a new norm for the old (e.g. the norm of forcible intervention). Despite extensive norm research, we know little about the circumstances under which a formerly embedded norm is either entirely abolished or curtailed in its application.[[1]](#footnote-2)

This article sets out to fill this research gap. Under what circumstances do norm challenges result in a reduction of the applicatory scope of a norm or in the abolition of a norm, and under what circumstances does a norm remains strong, despite actors challenging it? The paper presents three hypotheses on the negotiation system in which the norm is embedded, the relative strength of the actor challenging the norm, and the characteristics of the norm. In six case studies focusing on norms of international security, it shows that the mechanisms of norm challenges depend on the institutional context. If a norm is not embedded in an institutional negotiation system, it is usually not abolished by negotiations, but by norm violations. In this process, the configuration and strength of the actors involved play a crucial role for the prospects of successful norm challenges. If the challenger is weak, the validity of the norm remains untouched. However, if the norm challenger is strong, the norm may be replaced, significantly weakened, or even completely abolished. Which of these specific outcomes of norm challengesoccurs is largely contingent upon the characteristics of the norm. While a vague norm is most likely to be weakened (e.g. limited applicatory scope), a precise norm is more likely to be abolished.

1. The Puzzle

While interactions between states are not without conflict, norms play a crucial role in minimizing the extent of quarrels (Ahlbrecht et al., 2009, Czempiel, 1986). Apart from such regulatory purposes, norms can have deeper effects as well. Repeated and habitual behaviour often leads the actor to internalize norms, which over time may even become part of their identity – as the spiral model suggests (Risse-Kappen et al., 1999). However, the mere existence of a norm does not necessarily indicate that actors comply with it (Mitchell, 1996). Furthermore, even if norms are frequently violated, this does not automatically result in their abolition due to the counterfactual validity of norms (Kratochwil and Ruggie, 1986). The effect of norm challenges varies. A norm may survive despite instances of non-compliance and despite the efforts of actors to delimit a norm through renegotiations. For instance, the norm against wartime plunder and the nuclear non-proliferation norm have been repeatedly infringed upon, yet without being undermined or abolished (Panke and Petersohn, 2011). A norm may be weakened if its applicatory scope is restricted through practices. In this process, actors still refer to the norm, but previously inappropriate behaviour is now considered to be in accordance with the norm. The anti-mercenary norm or the norm against forcible intervention exemplify how infringements result in the weakening of a norm by restricting its regulatory scope (McKeown, 2009, Rosert and Schirmbeck, 2007). By contrast, a norm can be considered dead or abolished if practices of norm violation are not an exception but the rule, while the actors no longer make any effort to use the old norm as a reference point for their action (e.g. they do not frame their action as being in line with their interpretation of the old norm). Examples include the norm against unrestricted submarine warfare, the norm of colonization, the permission of slavery and the norm sanctioning nationally motivated terror (Thomas, 2005). In all of these instances, norm challenges rendered previously unaccepted behaviour acceptable.

1. A model of mechanisms and outcomes of norm challenges

How can variation in the effects of norm challenges be explained? Why do some challenges result in norm death, while others only curtail the norm’s applicatory scope or even leave the norm untouched? In order to contribute to norm research, the subsequent paragraphs present a model capturing three aspects with relevance for pathways and outcomes of norm challenges. Thus, we elaborate on mechanisms of norm challenges (first hypothesis), the prospects for the success of norm challenges (second hypothesis) and the specific outcomes of successful norm challenges (third hypothesis). Through combining the three hypotheses that operate in a consecutive order, the model captures whether norms are challenged through violations or re-negotiations (DV1), whether the chosen norm challenge fails or succeeds (DV2) and which specific outcome (weakening of old norm or abolishment of old norm) a successful norm challenge has (DV3).

The first and necessary step to undermine or abolish an embedded norm is that the norm be ‘challenged’, either because a state seeks to avoid compliance-costs, or desires to adjust the norm to changed considerations of appropriateness or new interests. Irrespective of motivation, norms can be challenged in several ways, e.g. explicitly, implicitly, verbally or through actions. In any case, a challenge breaks with the common habitus, but does not necessarily result in norm-weakening. The mechanisms of norm challenges are not always the same, but are influenced by the institutional context of the norm. *It is more likely that a norm will be challenged through re-negotiations, if the norm is embedded in an international organization or regime. By contrast, if the norm is not embedded in an international organization or regime, it is more likely that it will be challenged through practices of norm violations* (hypothesis 1).

Accordingly, the first independent variable is the presence of an institutionalized negotiation system in which the challenged norm is embedded. It is operationalized as follows: An institutionalized negotiation system is characterized by the presence of procedural rules, which regulate and structure the negotiations in a distinctive field in regard to the challenged norm. If such rules are absent, there is no institutionalized negotiation system in regard to the norm in question.

Not every norm challenge is effective. Thus, hypothesis 2 sheds light on the prospects of successful norm challenges*.* Crucial to the success of either mechanism (negotiation or norm violation) is the relative strength of the norm-challenger compared to the actors interested in maintaining the status quo is decisive. The factors determining a challenger’s strength depend on the context. Within an institutionalized negotiation system, the distribution of negotiation power and the potential to threaten other actors is determined by rules. Most important in this regard is membership in the negotiation system and the procedural rules (agenda-setting power, distribution of votes). In the absence of an institutionalized negotiation system, the power to successfully challenge norms depends mainly on the position of the challenger in the respective policy field, i.e. whether the actor is crucial to achieve the norm goal (Finnemore and Sikkink, 1998, 901). In the security realm military highly capable states are among the most crucial actors, i.e. without them a norm practice can either not be successfully challenged or maintained.

Moreover, an actor cannot change a norm single handily, rather a majority (at least among crucial actors) is required. Therefore, the number of the actors favouring change or status quo is important as well to determine the relative strength. If actors in favour of normative change outnumber those actors who prefer the status quo, the former group is more likely to succeed. The norm will then most likely be abolished. If the situation is reversed, the status quo is most likely to be maintained, regardless of the norm contestation mechanism at work.

*In short, the group who can muster more relative power to facilitate it’s position, is more likely to be successful* (Hypothesis 2).

If strong actors successfully challenge a norm, the status quo is not maintained. However, the specific result of norm challenges – the weakening or abolition of the norm – is contingent upon the precision of the norm (hypothesis 3). A norm is precise if the regulatory aim is clear, procedures to achieve the aim are defined (no ambivalent or complex concepts, no overlapping rules) and the regulatory scope is clearly drawn. A norm is imprecise if the regulatory aim is clear, yet the procedures are vague (overlapping rules, unclear definitions of concepts or substantial leeway regarding the means to achieve the aim) and the regulatory scope vaguely drawn (e.g. the norm has many exceptions or the core concept is ill-defined).

If a norm is very precise there is a functional incentive to replace the norm or abolish it. The precision of the norm renders accommodating of changing circumstances problematic as there is little room for interpretation through the actors. This effect is particularly salient if the norm environment is subject to considerable changes and requires norm adjustments.[[2]](#footnote-3) If re-interpretation of the applicatory scope or of the norm’s aim is not possible, norm challengers have the option of either eradicating the old norm completely or substituting it with another norm. However, if the norm is vaguely defined, a functional necessity to abolish the norm does not arise in response to norm challenges. Moreover, due to the lack of precision, there is room for re-interpretation. Normative aims may be maintained rhetorically while the applicatory scope is in fact becoming increasingly restricted.

Accordingly hypothesis three expects: *If a norm is very precise, it will more likely be abolished than weakened. If a norm is vague, it is more likely that it will be weakened than abolished.*

The plausibility probe of these three theoretical expectations – the mechanism of norm contestation (H1: negotiations vs. norm violations), the success of the norm challenger (H2: status quo vs. change of norm) and the specific result in case of the success of the challenger (H3: undermining/weakening the norm vs. abolition of norm) – is based on six illustrative cases. The selection of the case studies was subject to the following considerations. The cases were chosen due to their variation on the independent variables. Cases one (nuclear non-proliferation norm), three (norm against forcible interventions) and four (permission of nationalistic terrorism) are embedded in an institutionalized negotiation system, which suggests that they could be challenged through negotiations. Cases two (norm against wartime plunder), five (anti-mercenary norm) and six (norm against unrestricted submarine warfare), in contrast, are not embedded in a negotiation system and as such could only be challenged through practices of non-compliance. The norm challengers were weak in cases one and two, which resulted in maintenance of the status quo. In contrast, the norm challengers were strong in cases four, five and six. Finally, the norm is vaguely defined in cases three and five (H3 expects norm weakening), and precise in cases four and six (H3 expects norm abolishment).

1. Six illustrative case studies

Case 1: Nuclear non-proliferation norm

In the late 1940s, the United States vigorously promoted the idea of nuclear non-proliferation. With the development of nuclear capabilities in the former Soviet Union, France, the United Kingdom and China, the necessity of a multilateral approach became evident (Bunn, 2003). In 1968, negotiations at the United Nations were concluded with the Non-Proliferation Treaty (NPT). Subsequently, the non-proliferation norm became strongly institutionalised, comprising several treaties. Today, the NPT is almost universal in scope, with 188 member states in total, and indefinite duration (Rublee, 2009, 38).[[3]](#footnote-4)

Due to its institutional embedding it can be expected that any changes of the regulatory scope require negotiations (Hypothesis 1). Indeed, negotiations appear to be the predominant mechanism to change the NPT as it subject of a review conference very five years. However, the regulatory scope of the norm has also been challenged frequently from states outside the regime. Several non-member states, i.e. India, Israel, North Korea and Pakistan, have acquired nuclear weapons and thereby infringed upon the norm of non-proliferation (Shaikh, 2002). Moreover, NPT-member Iran has violated the non-proliferation norm by developing a nuclear programme (Sagan, 2006).

However, normative change can only be expected if the norm challengers are stronger than the norm supporters (Hypothesis 2). First, the group of norm-challengers is weakened as many of them are not members of the NPT and therefore cannot engage in negotiations, and by their lack of coherent opposition. Some norm challengers do not reject the regime itself. Israel, for instance, supports the aims of the NPT, yet sees itself unable to follow it due to security concerns. India and Pakistan in contrast not only infringe upon the norm but also reject the regime (Cohen, 1998, xviii, 470, Perkovich, 1999, xii, 597). However, the overwhelming majority of states yet remain committed to non-proliferation. In several regions of the world nuclear weapon free zones have been declared (Rublee, 2009, 39). Furthermore, states with the technical capabilities to produce nuclear weapons such as Germany, Spain, Canada, Italy and Japan, refrain from developing nuclear weapons programmes. Moreover, countries such as Ukraine, South Africa and Belarus, relinquished possession of nuclear weapons, or weapons programmes. Hypothesis 3 is only applicable if the norm challenger is stronger than the actors who prefer the status quo. The latter condition is not met in this case; as a result, hypothesis 3 cannot be examined.

In sum, despite the fact that several countries have become de facto nuclear power, the NPT-norm was not abolished through norm violations. There is still overwhelming support for non-proliferation. Still, although the norm is embedded in institutionalized negotiation system, the disarmament element was challenged to some extent by the major nuclear powers through their modernization programmes. Hypotheses 1 can therefore not be corroborated, yet hypothesis 2, the norm remained unchanged.

Case 2: Norm against wartime plunder

The norm against wartime plunder prohibits the removal and appropriation of historical and cultural valuables and art by the victorious power. Already in the 17th century, the idea took hold that art requires particular protection during times of war. However, it was not until the 19th century that such a protection was effectively implemented in practice. After the victory over Napoleon in 1815, the Allied forces returned art plundered by the French to its home countries. In 1874, the norm became codified in a very precise manner consisting of two articles included in the Brussels Declaration. According to Article 38, plunder was prohibited without exception. In addition, Article 8 prohibited the confiscation and intended destruction of historical monuments, art and academic works. However, the norm was not embedded in an institutionalized negotiation system in which the actors regularly convened, but was integrated into the Hague Convention (Sandholtz, 2007, xi, 71-100).[[4]](#footnote-5)

As hypothesis 1 suggests, the norm was challenged by norm violations rather than negotiations. During World War I (WWI), the parties mainly complied with the norm. Although some artefacts were destroyed, no party resorted to plunder. Only during WWII did Germany systematically challenge the norm. Hitler’s troops confiscated vast amounts of art in all occupied countries. The actions were rhetorically justified by the necessity to retrieve German art lost in previous wars, and the right to confiscate Germanic art. However, such actions directly contradicted the norm against wartime plunder (Sandholtz, 2008, 115). Germany’s challenge of the norm did not lead to a weakening or the abolition of the norm as a strong alliance of states backed the norm. During the war, the Allies signed a declaration condemning the confiscation of historical artefacts and art in occupied territories.[[5]](#footnote-6) Accordingly, the Allied powers returned stolen art systematically after the end of the war (Sandholtz, 2008, 117-120). Finally, the national socialist leaders were charged with the plundering of the occupied territories during the Nuremberg Tribunals (Sandholtz, 2008, chapter 6 and 7). These considerations appear not to be influenced by a cost-benefit analysis, as the Allies could have easily confiscated German art after their victory. The rejection of wartime plunder was instead rooted in the conviction that cultural treasures are an expression of the identity of a nation and should therefore not be taken as spoils of war.[[6]](#footnote-7) Only the USSR initially requisitioned German art, yet ceased the practice after four transports (Sandholtz, 2008, chapter 6). In the case, the Allies were militarily stronger than the norm challenger Germany. After the Germany’s defeated the Allies reinstate the status quo of the norm (Hypothesis 2). Hypothesis 3 assumes that the precision of the norm has an influence on the specific outcome of norm challenges, namely whether the norm is partially weakened or dies completely if the norm challenger is stronger than the actors who prefer the status quo. Since the latter condition is not met hypothesis 3 cannot be examined.

Case 3: Norm against forcible intervention

Article 2 IV of the United Nations Charter (UNC) contains one of the core principles of the international community: the prohibition of threatening or using force against the territorial integrity of another state (Simma, 1999, 1-22). Although the norm against forcible intervention is widely accepted, it has been incrementally curtailed since the 1980s. In many cases of gross human rights violations, forcible interventions appeared to be the only feasible solution to protect innocent lives. The norm and the enforcement of human rights standards contradicted each other. Any attempt to comply with both norms generated a cognitive dissonance. The genocide in Rwanda in 1994 underscores this problem. Although the international community was well informed about the events in the country, no intervention was conducted. In hindsight, then-UN Secretary General Kofi Annan described the absence of intervention as a ‘sin of omission’[[7]](#footnote-8) and former US president Bill Clinton even apologized to survivors (Shattuck, 2003, 390).

A normative change took place within the UN negotiation system. A first attempt to change the norm was undertaken in the Security Council (SC). In 1992, the humanitarian situation in Somalia was depicted as a breach of international peace according to UNC Chapter VII. This enabled the SC to authorize the use of force to remedy the plight of the people. On the same basis, the interventions in Haiti (1994), Bosnia (1995) and East Timor (1999) have been legitimized (Malanczuk, 1997, 402-415). The advantage of authorizing forcible interventions through the Security Council was that the norm *against* forcible intervention was not violated. However, the disadvantage was the dependency on consensus in the SC. This became apparent during the Kosovo Crisis in 1999. Disagreements between SC members prevented a resolution sanctioning intervention. Eventually, NATO forces intervened without a UN resolution. In order to avoid the occurring cognitive dissonance of breaking the norm to protect human rights, rhetorically the Kosovo operation was deemed illegal according to the letter of international law, but legitimate in a moral sense (Independent International Commission on Kosovo., 2000, 372). This allowed an emphasis on both the need to protect human rights and the compliance with the norm against forcible intervention.

Against the backdrop of these developments, a Canadian-initiated Commission – the International Commission on Intervention and State Sovereignty (ICISS) – formulated the concept of contingent sovereignty (International Commission on Intervention and State Sovereignty, 2001, IX). The new concept left the state sovereignty under normal circumstances untouched, yet allowed intervention in the domestic affairs of states in cases of gross human rights violations. The ICISS even considered a ‘responsibility to protect (R2P)’ people in cases of gross human rights violations to be in existence. R2P was not deemed to abolish the norm against forcible intervention, yet was considered to limit its application under particular circumstances.

In line with hypotheses 1 and 2, the norm against forcible intervention was successfully altered through negotiations. A watershed event in this regard was the UN World Summit in 2005. Canada and the Group of 77, the main supporters of R2P, planned to use this forum to persuade other actors. The African Union also supported normative change as it had already set a precedent by establishing mechanism to implement R2P in Africa (Bellamy, 2006, 158). However, globally the terrain was difficult as most of the important permanent UN Security Council members were hesitant to support the norm (Ibid, 152). During the summit negotiations between the sceptics and the proponents took place and resulted in a tacit consensus. The final document of the UN World Summit in 2005 however indicated a broad international support for alteration (Bellamy, 2005, 31-53). Over the course of the last decade this initially tacit support has grown significantly. In particular the Security Council has incorporated R2P in its resolutions numerous times.[[8]](#footnote-9) R2P is an important international norm curtailing the norm on forcible intervention (Bellamy and Williams, 2011).

As anticipated by hypothesis 3 that norm precision influenced the specific outcome of normative change. At first glance, the norm appears to be precise. Different norms with overlapping regulatory scopes clearly indicate the prohibition of forcible interventions.[[9]](#footnote-10) The norm addresses all members of the international community and does not permit any deviations. However, the UNC contains three exceptions: UNC Article 51 permits self-defence, which includes the violation of the territory and sovereignty of the aggressor; UNC Chapter VII authorizes the Security Council to decide on forcible measures; and UNC Articles 53 and 107 specify the ‘enemy state clause’. Moreover, the exceptions are defined only vaguely and allow for great leeway in their interpretation.[[10]](#footnote-11) Since the non-intervention norm was of little precision, the norm was not challenged directly and the vagueness of the norm allowed for incremental curtailment of its regulatory scope within the UN negotiation system in the form of R2P.

Case 4: The permission of nationalistic terror

The term ‘terrorism’ is difficult to define and concerns in the broadest sense any violence aimed at intimidating political opponents in order to achieve one’s own political objectives (Hoffman, 2001, 15). The term came into use during the French Revolution and referred to an instrument of the state to enforce order and prevent anarchy. However, with the excesses of the French Revolution and the emergence of democratic principles, state terror lost its legitimacy as an appropriate instrument of governance. This perception did not change during the 1930s, when authoritarian regimes used terror to intimidate and subdue their populations. In the 1980s and 1990s, terrorism had been outlawed domestically and the use of force by non-state actors had been generally delegitimized internationally (Thomson, 1994). Although initially a legitimate tool in the hands of the state, terrorism was no longer an appropriate means to achieve political goals.

In contrast to this general trend, however, one specific form of terrorism was still considered legitimate during the 20th century: nationalistic terror employed by non-state actors against an oppressor or occupying force (Sandholtz, 2008, 110). Three factors play into the existence of a norm permitting the use of terror for nationalistic purposes. First, many states supported nationalist movements, which employed terroristic means. Second, in the debate on the international level on non-state actor violence, terrorism had a special status. Members of the United Nations repeatedly declared violent non-state actors as illegitimate. However, in the very detailed enumerations of violent groups, groups resorting to terrorism were never included (Sandholtz, 2008, 118). Third, international initiatives, which were initially meant to prevent terrorism, supported the legitimacy of the political demands of terrorist groups. For instance, the ad-hoc committee of the UN General Assembly on terrorism exempted groups employing terrorist means against imperialism, exploitation and apartheid from anti-terror measures (Franck and Lockwood, 1974, 46-91, Sandholtz, 2008, 114-117).

This norm was embedded into the UN negotiation system. Accordingly, as expected, it was challenged during negotiations within the framework of the system (Hypothesis 1). In the early 1980s, the legitimacy of terrorism as a means to fight oppression was decreasing. A new consensus emerged within the United Nations. General Assembly Resolution 40/61 (1985) declared terrorism unanimously as a criminal act. Subsequent resolutions in the 1990s aimed at eliminating terrorism (1994), preventing terrorist attacks (1997) and preventing the financing of terrorism (1999) (Sandholtz, 2008, 120). Likewise, the Security Council condemned terrorist acts in several resolutions since 1985 (Bantekas, 2003, 315-33).

Hypothesis 2 anticipates a strong norm challenger to successfully push for normative change. Influential members within the UN system, such as Western states and permanent SC members, sought to abolish this norm. However, their initiatives were met with resistance –developing countries in particular further advocated the differentiation of ‘common’ and ‘political’ violence (Verwey, 1981, 69-92). This resistance, however, did not prevail. Indeed, some of the developing states are still opposed to the Western view, but nevertheless (although hesitantly) supported later resolutions of the General Assembly.

The norm was precise, as it did not legitimize terror in general, but only nationalistic terror.[[11]](#footnote-12) The norm environment in the 1980s was rather unstable. First, terrorist attacks had continuously increased since the 1960s. While there were 132 attacks in 1968, the number had risen to 438 attacks in 1985.[[12]](#footnote-13) Furthermore, the threat had become internationalized. Hijacked airplanes or cruise liners, as well as the hostage situation at the Olympic Games in Munich, convinced many states of the necessity of counterterrorism measures. Second, many of the newly independent states considered their role rather as defenders of the status quo rather than as facilitators of revolutions. Many were opposed to an increased role of non-state actors on the international level. In particular, the spread of democratic procedures opened new avenues for participation and conflict resolution (Sandholtz, 2008, 121). The high precision of the norm led to its rapid degeneration, culminating in the death of the norm. While nationalistic terror was a legitimate tool during the 1960s and 1970s, it became delegitimized during the 1980s.

Case 5: Anti-mercenary norm

The prohibition of mercenarism is widely accepted in the international community as100 resolutions critical of mercenaries passed by the General Assembly. Even the Security Council condemned the use of mercenaries in the 1960s and 1970s (Percy, 2007a, 373-374). The mercenary ban has been included in many international treaties, for instance the Additional Protocol of the Geneva Convention (AP I) (1978) or the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989). However, the strength of the norm is not rooted in international law, which provides many loopholes due to definition weaknesses (Schaller, 2005). In spite of weak international law, strong social norms can exist (Percy, 2007a, 367-397). The social anti-mercenary norm has developed considerable strength. Its emergence is intertwined with the emergence of the modern state. During the 19th century, non-state actor violence was increasingly delegitimized. The authority over the use of force was monopolized by the state. Mercenaries employed forces outside the state structure, which led to their criminalization. This taboo remained influential during the last century (Thomson, 1994, 96). Although mercenaries never disappeared completely, they did not play a crucial role in 20th-century warfare.

Over the last two decades, a new market for force has developed alongside the state system (Avant, 2005, 310). Private Military and Security Companies (PMSCs) are offering force and force-related services in several conflict zones across the globe. In Iraq, for instance, approximately 30,000 armed guards protected personnel and convoys, while in Afghanistan, between 18,500 and 28,000 perform similar armed services (Rimli and Schmeidel, 2007, 15). In short, commercial non-state actors selling armed services were present in war zones. One of the main reasons why the anti-mercenary norm is being violated again is the advantages these actors provide to their clients. PMSC services bought on the market are considered to be more cost-efficient than in house-solutions (Carafano, 2008, 242). Moreover, PMSCs are able to relieve regular troops of maintenance and support duties. However, despite this widespread practice, no actor openly challenged the norm. On the contrary, the differences between mercenaries and PMSCs are emphasized in order to keep PMSCs from being subsumed under the regulatory scope of the anti-mercenary norm. The UK Parliament’s Foreign Affairs Committee argued that PMSCs are tasked not to provide military services but to provide protective services. Hence, they cannot be considered mercenaries (Foreign Affairs Committee, 2002). Although such services are very difficult to differentiate, the interpretation that PMSCs provide defensive tasks while mercenaries engage in offensive operations has taken hold (Pelton, 2007, 109, Percy, 2007b, 227-228). This interpretation was recently corroborated by the Montreux Agreement[[13]](#footnote-14), which has been signed by 25 states. PMSCs are considered market actors, permitted to use force in self-defence. However, the anti-mercenary norm does not differentiate between different types of force (Petersohn, 2014). This begs the question of how defensive use of force by market actors became legitimate again.

The social anti-mercenary norm, in contrast to the weak legal norm, is not formally embedded in a negotiation system. However, the debates on both norms cannot be not entirely separated and merge into each other. In line with hypothesis 1, the normative changes were initiated by norm violations, yet the UN was an important arena for the following debate (Krahmann, 2012). Crucial proponents of change are certainly the US and UK as they are home to the largest PMSC markets. However, they were not alone, outsourcing military services to the private sector is a global trend (Dunigan and Petersohn, 2015). As anticipated by hypothesis 2, the norm challenge was successful. During the 1990s, the use of PMSCs was less widespread, and mainly weak states relied on their services (Musah and Fayemi, 2000). At that point in time, the firms were still often labelled as mercenaries. However, the discourse changed in the early 2000s when the United States and United Kingdom started to employ PMSC services extensively. Increasingly, the firms were called private military or private security companies, and associated with defensive services. Their role in supporting legitimate governments was emphasized, and mercenaries were increasingly associated with offensive operations (Petersohn, 2014). The UN Special Rapporteur on the use of mercenaries, Enrique Ballesteros, was strongly opposed to the new development, and tirelessly warned about the dangers of the new mercenary trend and the emergence of paramilitary actors (Ballesteros, 2001, Ballesteros, 1997). However, his actions were not able to prevent the incremental change of the norm.

The vagueness of the old norm[[14]](#footnote-15) as well as the interest of strong actors to curtail the regulatory scope of the anti-mercenary norm resulted in an incremental change. Although the norm was maintained rhetorically, the exemption of PMSCs restricted its regulatory scope. The weakening of the old norm was facilitated by the extent of PMSC deployment since 2003 and by repeated acknowledgement of PMSCs as legitimate violent actors. Only a decade after their emergence, the applicatory scope of the two-hundred-year-old norm became considerably restricted, weakening it accordingly.

Case 6: Norm against unrestricted submarine warfare

Submarines have been used in warfare since the 19th century. Already at the Washington Conference in 1922 and the London Conference in 1933, the main maritime powers – the United States, the United Kingdom, France, Italy and Japan – set out to regulate the use of this weapons system (Goldman, 1994, 293-294). Over 30 states signed the 1922 and 1933 agreements, including Russia and Germany. The agreements stipulated that the laws of maritime warfare also applied to submarines. Most importantly, commercial ships could only be attacked and destroyed if the crew could be brought to safety. In the absence of these circumstances, an attack was prohibited.

During the Spanish Civil War, the norm displayed remarkable robustness. When Italy violated the norm, several states enacted sanctions, despite the fact that the norm was not embedded in an institutionalized negotiation system and each state had to bear the cost of the sanctions alone (Legro, 1997, 31-61). Regardless of earlier support for the norm, during WWII, unrestricted submarine warfare became the rule rather than the exception. The WWII norm violations resulted in the norm’s decline, as the norm was not embedded in an institutionalized negotiation system. Norm challengers, were among the strongest naval powers at the time, and had large submarine fleets at their disposal. Without their support the norm could not be maintained. In 1940, the German empire declared unrestricted submarine warfare around the British islands in reaction to the armament of British cargo ships. Later, Germany waged unrestricted submarine warfare against all cargo ships supplying Great Britain. This set an escalation spiral into motion; when the US entered the war with Japan in 1941, it immediately declared unrestricted submarine warfare (Legro, 1997, 31-61). No other state supported the maintenance of the norm.

The norm was very precise. Its goal was to limit the extent of submarine warfare; complex clauses were avoided and the description of how to deal with civilian cargo ships or naval warships was detailed and precise. Deviations from the rules were prohibited by the norm. However, changes in ship manufacturing, underwater navigation and weapons technology took place required accommodation (Goldman, 1994, 157 and 212).[[15]](#footnote-16) As a consequence, the norm challengers succeeded to abolish the norm against unrestricted submarine warfare. In contrast, merely delimiting the norm’s scope was not possible due to its high precision.

1. Conclusions

Most international norms do not die, but are either persistent or subject to incremental change. Nevertheless, as the norm of colonial conquest or the permission of slavery illustrate, formerly strong international norms can indeed be abolished. Since the subject of the death of formerly strong norms is seldom in the limelight of political science research, this paper has investigated successful norm challenges. It sheds light on the conditions under which norm contestation leads to the abolition of norms rather than to their limitation. It presents a theoretical account of norm challenges and specifies hypotheses on the mechanisms thereof (H1), prospects of success (H2) and specific outcomes of norm challenges (H3).

The mechanism of used for norm contestation is contingent upon the degree of institutionalization of the norm, i.e. whether a challenged norm is embedded in a negotiation system or not (H1). The results are mixed with regards to hypothesis 1 (see table 1). The article was able to demonstrate that norm contestation through practices of non-compliance was important when norms were not embedded in international negotiation systems. In the case of the norm against wartime plunder and the norm against unrestricted submarine warfare violations were in fact the only mechanism for change. Likewise, negotiations always played a role in cases of institutionally embedded norms. However, only concerning the norm against nationalistic terror negotiations were negotiations exclusive mechanism for change. Overall, the relationship is fuzzier. The social anti-mercenary, partly embedded in a negotiation system, was changed through a combination of violations and negotiations, and the non-proliferation norm was challenged through violations, despite being embedded in a negotiation system.

**Table 1: Results**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Embedded** | **Mechanism** | **Strength Challenger** | **Precision** | **Outcome** |
| **Non-proliferation** | Yes | Negotiation/ Violation | Weak | ---- | **Maintained** |
| **Wartime plunder** | No | Violation | Weak | ---- | **Maintained** |
| **Forcible intervention** | Yes | Negotiation/ Violation | Strong | Vague | **Curtailed** |
| **Anti-mercenary norm** | Yes/No | Negotiation/ Violation | Strong | Vague | **Curtailed** |
| **Nationalistic terror** | Yes | Negotiation | Strong | Precise | **Abolished** |
| **Submarine warfare** | No | Violation | Strong | Precise | **Abolished** |

The relationship between the strength of the norm challenger and the fate of the norm is clearer (H2). There is a distinct pattern that powerful actors play a crucial role in the development, weakening or even death of challenged norms (see table 1). The nuclear non-proliferation norm, and the norm against wartime plunder underscore that norms survive the challenge as the challengers are weaker than those actors interested in the status quo. In contrast, the norm against forcible intervention, the anti-mercenary norm, the norm of nationalistic terror, and the norm against unrestricted submarine warfare exemplify that norm contestation leads to norm death or curtailment if the status quo-oriented actors are weak and unable to sanction rule violations. Irrespective of any other factor, the strength of norm challengers impacts the prospects for successful normative change.

However, this is not to say that powerful actors can change normative orders at random. As hypothesis three suggested, the specific outcomes of norm challenges are influenced by the norm’s level of precision (see table 1). If the contested norm is precise, norms cannot be reinterpreted to accommodate the functional demand for norm change especially if the broader context undergoes change. As a result, in such instances, norms die. Actors in this situation can easily undermine the norm as there is little leeway for interpretation and adjustment. The nationalistic terror norm, and the norm against unrestricted submarine warfare showcase this. By contrast, vague norms often are not abolished after being subjected to significant challenges, but merely reinterpreted in a manner delimiting their applicatory scope. As the anti-mercenary norm corroborates, actors achieve this by rhetorically maintaining the norm while de-facto curtailing its regulatory scope.

Overall, this investigation illustrates that powerful actors are an important factor concerning norm challenges. The more strongly a norm is institutionalized, the higher the hurdles to change it become. If the norm is embedded in a negotiation system, it cannot simply be changed by norm violations (although they may play a role); a negotiation process is required. This is certainly one of the most effective mechanisms for stabilizing normative orders. Norm characteristics are also influential. A vague norm contributes to the stability of a norm. Again, norm violations alone are not sufficient to alter or abolish the norm. The actors involved may be able to incrementally change the norm, but this requires a substantial investment of time and resources. Finally, norms with a low degree of institutionalization and a high degree precision can be abolished rather quickly through norm violations.

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1. For exceptions, see: (McKeown, 2009, Thomas, 2005, Rosert and Schirmbeck, 2007) [↑](#footnote-ref-2)
2. The normative environment is subject to significant instability if extreme developments (technological or academic) result in a paradigm shift, if numerous new norms emerge within a short period of time, or if similar norms are violated frequently in a short period of time. The environment is stable if the normative, scientific or regulative context wherein the norm has emerged is not subject to change, i.e. no technological innovations or other factors trigger change in the way actors think about the world. [↑](#footnote-ref-3)
3. The NPT has three elements: non-proliferation, disarmament, and peaceful use of nuclear technology. Due to space limitations, we focus on the first element only. [↑](#footnote-ref-4)
4. The Convention binds together 14 international agreements, though each was negotiated and ratified separately, and has different signatories http://www.icrc.org/ihl.nsf/INTRO?OpenView [↑](#footnote-ref-5)
5. A total of 16 states signed the declaration, including the United Kingdom, the Soviet Union, the United States and the French National Committee. [↑](#footnote-ref-6)
6. The contradiction between rational calculus and normative convictions is underscored by the attempt of the US foreign ministry to confiscate German paintings. However, the military as well as the US public were opposed to such actions (Sandholtz, 2008, 117-120). [↑](#footnote-ref-7)
7. Press Release (26.3.2004): Memorial Conference on Rwanda Genocide Considers Ways to Ensure More Effective International Response in the Future, AFR/868; Available at <<http://www.un.org/news/Press/docs/2004/afr868.doc.htm>>. [↑](#footnote-ref-8)
8. http://www.globalr2p.org/resources/335. [↑](#footnote-ref-9)
9. Articles 53 and 69 of the Vienna treaty convention (1969) consider the norm *jus cogens*, which means that Article 2 IV UNC is compulsory international law without any exceptions. The regulatory scope of the paragraph overlaps with Article 2 VII. Paragraph VII prohibits any external interference in the domestic affairs of a state, regardless of the means. Although these norms are not completely overlapping, they represent a core pillar of the international order, the prohibition of forcible intervention into domestic affairs. [↑](#footnote-ref-10)
10. It is not clear under what conditions Article 51 UNC applies. Does it only apply to an ongoing attack, or does it also comprise imminent attacks? There is no consensus in the literature on this question. While some advocate the latter interpretation, others tend towards a literal interpretation of the article (Malanczuk, 1997, 311-312). Likewise the sole authority of the Security Councils in matters of war and peace is contested (Malanczuk, 1997, 312-385). In 1950, the UN General Assembly (GA) passed the ‘Uniting for Peace Resolution’, which claims that the GA also has a voice in such matters. Since then, the Uniting for Peace Resolution has been invoked ten times. [↑](#footnote-ref-11)
11. Likewise, the range of actors became increasingly limited. Terrorism employed by criminal organizations or by states remained illegitimate; only freedom movements were permitted to resort to terrorism. Although there was no specification of the measures, it was clear that the measures taken needed to be suitable to spread fear. Annihilation of or direct participation in hostilities was not permitted. Admittedly, it remains unclear how a freedom movement is actually defined and what means are suitable to spread fear. However, the norm is sufficiently precise to differentiate terror from other violent acts. [↑](#footnote-ref-12)
12. RAND Terrorism Database of Worldwide Incidents, available at <http://www.rand.org/nsrd/projects/terrorism-incidents.html>. [↑](#footnote-ref-13)
13. Available at <http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm>. [↑](#footnote-ref-14)
14. The regulatory strength of the norm depends on the definition of the term ‘mercenary’. The classical understanding defines a mercenary as a foreign fighter, i.e. someone without any national affiliation to a party to the conflict, motivated by pecuniary interests and using force outside the state structure (Zarate, 1998, 78-79). The vagueness of the norm stems from several exceptions. First, although being foreign is an important component of the norm, not all foreigners participating in combat are deemed mercenaries. Second, monetary interests are the prime motive of a mercenary, yet armed forces also offer regular soldiers monetary incentives, career opportunities or even citizenship (Lynch and Walsh, 2000, 19). Soldiers, however, are not considered to be mercenaries. Not even all non-state actors participating for money in combat are deemed mercenaries. For instance, those in Sierra Leone fighting over access to diamond mines were categorized as rebels. Thirdly, foreign fighters integrated in state armed forces are not mercenaries. For instance, German soldiers fighting during the American War of Independence were not considered mercenaries (Percy, 2007b, 267). [↑](#footnote-ref-15)
15. Technological innovations included, for instance, new alloys or new types of ships (Goldman, 1994, ix, 157, 212, and 352) [↑](#footnote-ref-16)