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Value changes in the international legal order from the perspectives of legal and political science

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A Metamorphosis of International Law?
Value changes in the international legal order from the perspectives of legal and political science*

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Abstract:

The paper aims to lay out a framework for evaluating value shifts in the international legal order for the purposes of a forthcoming book. In view of current contestations it asks whether we are observing yet another period of norm change (Wandel) or even a more fundamental transformation of international law – a metamorphosis (Verwandlung). For this purpose it suggests to look into the mechanisms of how norms change from the perspective of legal and political science and also to approximate a reference point where change turns into metamorphosis. It submits that such a point may be reached where specific legally protected values are indeed changing (change of legal values) or where the very idea of protecting certain values through law is renounced (delegalizing of values). The paper discusses the benefits of such an interdisciplinary exchange and tries to identify differences and commonalities among both disciplinary perspectives.

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Contents:

1. A metamorphosis of the international legal order?

Can we detect a metamorphosis while being part of it? Law is constantly evolving between its task to guarantee, protect and thus preserve certain values and the need to develop, and adapt to new exigencies. In certain periods change seems to accelerate. Currently, a sense is widely shared across different academic disciplines that the international order, and international law in particular, are undergoing a fundamental change. Indications are manifold but what remains difficult is the determination of the persistence and the direction of this transformation. The politics of the 1990s renewed interest in a "move to law" in international relations (Goldstein et al. 2000). To some, the new global scene also seemed to allow a further move: one towards a more value-based international legal order that would include and confer rights to a broader range of actors. Today, most scholars are reluctant to predict a straightforward rise of the international legal order, and one may interpret individual ruptures, contestations or straightforward rejections as signs of decline (Brunnée 2018; Krieger/Nolte forthcoming; McLachlan 2018; Scott 2018). However, for example, does the UK's intended withdrawal from the EU signal a general trend of re-nationalization and turning away from international institutions in general? Or are these special cases, in which the growing authority of some international institutions leads to their politicization (Zürn et al. 2012)? Is the Russian annexation of Crimea a symptom of a global power shift that puts established legal rules and their underlying values into question (Schaller 2018), or is it merely business as usual in a world that has always seen acts of great-power non-compliance? While some expect the "collapse of the world order" within reach (Kagan 2017), others argue "that the postwar order continues to enjoy many elements of stability" (Mazarr et al. 2017, 3).

Assessments and the normative evaluation of a change and its longue-durée direction depend on the yardstick applied, as much as on the standpoint of the observer. For example, Mazarr et al. (2017) find that states' participation in international institutions point to continuous commitment and that "until recently, measurable indicators of the rule-based order remained broadly stable and did not show evidence of a rapid decline" (p. 165). However, they also find that there "are important and well-publicized areas in which new institution-building clearly lags behind the apparent need. These areas include regulations for climate change, financial markets, and cyber activities, among others" (Mazaar 2017, 66). Nolte (2018), on the other hand, observes in relation to some of the constituting treaties of the international order, such as the UN Charter, that "when the general political climate changed after the turn of the century, significant slowdowns, impediments and even serious crises occurred for major treaties." In a similar vein, Pauwelyn et al. (2014) point out that formal international law-making has slowed down in the years between 2000 and 2010 (as compared to the five decades before).

This book brings together scholars of international law and international relations to assess whether we are currently observing yet another period of norm change (*Wandel*) or even a more fundamental transformation of international law – a metamorphosis (*Verwandlung*). A metamorphosis would require that more is changing than a single legal norm or a specific international institution. "Change implies that some things change but other things remain the same [...]. Metamorphosis implies a much more radical transformation in which the old certainties of modern societies are falling away and something quite new is emerging." (Beck 2016, 4). In other words, we suggest to analyze whether change occurs within the given system of legal norms or whether it is more of a fundamental systemic change (cf. Zürn 2018, 107). For this purpose we need to look into the mechanisms of how norms change from the perspective of legal and political

science and also to approximate a reference point where change turns into metamorphosis. We submit that such a point may be reached where specific legally protected values are indeed changing (change of legal values) or where the very idea of protecting certain values through law is renounced (delegalizing of values). Accordingly, the case studies in this book examine changes in political and legal discourse and social and legal practices which may or may not affect the social and legal validity of a norm and its underlying values. By contrasting norm change and metamorphosis we also aim to examine the conditions under which international legal values are preserved and to identify the mechanisms that give international norms resilience.

2. The benefits of an interdisciplinary exchange

The present book provides for an interdisciplinary exchange among scholars of international law and international relations (IR). We submit that tracing a possible metamorphosis of the international legal order benefits from or even calls for an interdisciplinary perspective. For the lawyer, applying traditional legal methods of norm identification, norm interpretation and norm application, it is difficult to evaluate the long-term effects of these processes (Nolte 2018) and thus identify whether a metamorphosis is taking place. For instance, an analysis of the Trump Administration's approach to international law which is based on a strictly positivist approach cannot reach much further than stating that politics of withdrawal are in line with consent-based international law and that "a cocky tone and a rude Narcissus at the head of the executive" do not matter to international law, because, "as long as international law does not know any language or behavioral rules, that does not belong to our topic" (Dörr 2018).[3] Here, the perspective of political science will add to the analysis by explaining the impact of discursive attacks or non-compliance on the authority of norms, as well as by mapping the turbulent biographies of some specific legal norms, observing trends, and providing causal explanations. An international relations perspective is well suited to examine if, how and why values embodied in international norms are changing. It usually takes a broader frame by considering both legal and non-legal norms as well as their interplay, and studies their development empirically. Thus, in an interdisciplinary exchange, political science norm-research helps to understand how the political context changes in which legal rules might be altered, how norms are affected by socio-political developments and to learn about the causalities of why certain legal norms come into existence, change, or cease to exist; much like the weather affects the growth and blossoming of plants.

Still, we do not want to question the basic idea of law's (relative) autonomy from politics (cf. Klabbers 2005, 36). We deliberately intend to feed some insights from legal positivist discourses and doctrinal scholarship into IR discourses on norm dynamics. The international lawyer's perspective is decisive for understanding how legal norms work, how they can be changed, and which purposes they fulfil, thus providing us with a standard against which we might evaluate whether we are currently observing yet another period of norm change or even a more fundamental transformation of international law and its underlying values – a metamorphosis. It is indispensable to understand the applicable secondary legal rules on law-making in order to evaluate if and how a legal norm has changed in relation to its content or validity. In particular, where there are no clear findings by courts, the decentral character of international law poses particular challenges.

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[3] "Neu ist der großspurige Ton und der ungehobelte Narziss an der Spitze der Exekutive – aber solange das Völkerrecht keine Sprach- oder Benimmregeln kennt, gehört das nicht zu unserem Thema."

Thus, if we bring international legal scholars and IR norm scholars together to discuss the "metamorphosis" of the international legal order, it is because they share a fundamental conviction, namely that international (legal) norms matter. Second, they share the assumption that law shields norms against certain challenges and stabilizes norms. While political scientists treat this as a hypothesis and investigate the conditions under which this is the case, legal scholars analyze legal structures and the practice of legal or legally relevant institutions and actors in order to discern when and how legal norms protect values.

3. Definitions

Any interdisciplinary exchange faces the challenge that it seems impossible to be truly bi-lingual in scientific terminology and methodology (MacIntyre 1988). Still, we think this observation does not have to be an impediment for a fruitful dialogue (see e.g. Dunoff/Pollack 2013; Simmons/Steinberg 2007). To avoid misunderstanding we suggest to exchange some common definitions. While the disciplinary definitions of concepts such as compliance and law overlap, the concepts of norms, values, contestation and norm change require clarification from the standpoint of each discipline.

a) Norms and values

In our book, lawyers and IR scholars study legal norms, how they come into being, cease to exist or change their meaning and validity through interpretative legal discourses according to the rules of the legal system or even through other discourses and practices. A particular focus will be put on the effects of contestation and other challenges, such as power shifts, on legal values. A common interest of both disciplines is whether the institutional context, in which norms are often (but not necessarily) embedded, shields them against attacks. For the lawyer, this context is the legal system, while IR scholars also look at non-legal institutional contexts.

In line with a generally accepted definition in the discipline of IR offered by Jepperson, Wendt, and Katzenstein (1996, 54), we understand a norm as "collective expectations about proper behavior for a given identity". This definition emphasizes a collective, i.e. not an individual but an intersubjective, expectation about the appropriateness of actors' behavior. Norms typically demand the avoidance of "bad" behavior, i.e. they constrain, and they typically permit or legitimate "good" behavior (cf. Winston 2017). Norms can therefore be characterized by "their prescriptive (or evaluative) quality of 'oughtness'" (Finnemore/Sikkink 1998, 891). Norms can be of a legal nature (embodied in treaty law, customary law, or as general principles), or they can be of a social nature (embodied in non-legally binding declarations and moral-political norms). Norm research in International Relations has stressed that norms guide behavior. This does not imply that actors do comply with all norms all of the time and in all situations. Instances of non-compliance, alone, do not undermine the validity of the norm, as long as those cases are disapproved by the collective and/or remain the exception. Exceptions may occur because actors lack the necessary capacities to comply with a rule (cf. Börzel et al. 2012; Chayes/Chayes 1993). As long as they still acknowledge the norm's validity, the norm itself is not challenged. When non-compliant states explain how a norm does not apply in a particular case, or that it must be weighed against the prescriptions of alternative norms, they affirm the general normative validity of a norm.

Conceptually, norms can be analyzed by taking a snap-shot in a given context (and time), which reveals their intersubjective meaning (in this context and time). As an intersubjective expectation, the norm may change and its meaning can be contested. We are interested in examining those

cases where the value protected by a norm is changing or where we can observe value change through changes in several norms.[4] We argue that values are always a component of single norms (cf. Winston 2017, 625f.), although several norms may refer to the same value. For instance, equality as a value underpins norms against unequal treatment, racial or religious discrimination, and women's rights. In stating proper behavior, norms assign a value to a behavior and to social or material facts, i.e. they make it possible to call into question behavior or structures: "norms create meaning through the construction of intersubjective (i.e. collectively held) understandings of who and what things are. This meaning includes whether or not the item in question (whether it be tangible, such as a reduced carbon footprint, or intangible, such as accountability or reconciliation) is valued" (Winston 2017, 3). Social norms relate to common identities, as they create expectations for the behavior of actors with a given identity (Jepperson et al. 1996). Within the context of IR, norms may relate either to the international community as a whole, to specific regional communities, or to other imagined communities (e.g. an alliance). Here, the interdisciplinary connection can be made to community interests or community values, as "it is precisely the prescriptive (or evaluative) quality of 'oughtness' that sets norms apart from other kinds of rules. […] We only know what is appropriate by reference to the judgements of a community or a society" (Finnemore/Sikkink 1998, 891).Many, but not all, international norms have been legalized, and hence find their expression in legal norms, being based on the traditional sources of international law as laid down in Art. 38 International Court of Justice (ICJ) Statute and interpreted on the basis of the Vienna Convention on the Law of Treaties (VCLT), in particular Arts. 31 and 32 VCLT. According to Art. 38 ICJ Statute, legal norms can be derived from different sources and can have different qualities: we can distinguish treaty law, customary international law and general principles of law. Legal acts, such as resolutions of international organizations, or other forms of legally relevant practice, derive their legally binding effect from the pertinent treaty regime, may reflect customary international law or may be considered as subsequent and other practice according to Art. 31 para. 3 lit. b and Art. 32 VCLT. Based on Arts. 53 and 64 VCLT as well as customary international law some legal norms are bestowed with a specific legal character of a ius cogens norm. From such a peremptory norm of international law no derogation is permitted and it can be modified only by a subsequent norm of general international law having the same character. A treaty that conflicts with such a norm is void.

Like social norms legal norms refer to values. Thus, we understand legal values as normative conceptions of certain interests or goods which are protected by international law. Values are traditionally based in ethics, philosophy, morals or religion, but the idea that ethical concerns or certain foundational interests should be formulated in legal propositions follows through the development of international law (Bernstorff/Venzke 2011, para. 2). Modern academic debates in the humanities have questioned whether today, the concept of "values" can at all serve as an appropriate analytical lens (cf. Joas 2013, 16-22) and, as Bernstorff and Venzke show, among legal and international relations scholars there is serious doubt about the idea of universal values and their use and function in international politics and law (e.g. Koskenniemi 2007, Kennedy 2004). Suffice it to say here that the perception that international law endorses certain foundational values is still a dominant element of international legal discourses (Klein 2017, 306). It has, for instance, been expressed by the International Court of Justice in the 1951 Advisory Opinion on the Genocide Convention whose object is "to confirm and endorse the most elementary principles of

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[4] Norm change is, of course, possible without a change in values, for example, when the behavioral prescriptions to attain a certain value change or when the norm is applied to a new problem.

morality."[5] In 2016, in the International Law Commission the proposal of a Draft conclusion on ius cogens defining peremptory norms as those norms which, inter alia, "protect the fundamental values of the international community" triggered an extensive yet critical debate [6] but demonstrated the persistence of this perception irrespective of its philosophical or theoretical grounding in natural law, sociology or communicative theories. In this vein, legally protected values include, inter alia, peace and international security, human dignity, human life and corporal integrity, gender equality, the environment and natural resources, sustainable development as well as accountability for serious human rights violations.

b) Contestation and change

For understanding how norms and their underlying values change we also need to clarify the concept of contestation.

Explaining change was a foundational goal of constructivism in IR, of which the research on norms remains its most prominent concern. The emergence of the concept of a three-stage norm "life cycle" was a defining moment in the scholarship and quickly became a central point of reference (Finnemore/Sikkink 1998). Once established, broadly accepted and internalized, norms were expected to be robust, taken-for-granted and even habitually complied with. This in turn sparked the development of further models such as the "boomerang" (Keck/Sikkink 1998) or the "spiral model" of norm diffusion (Risse et al. 1999). The cycle's stages were often treated as linear (with the third stage of internalisation as the final stage). Accordingly, the process of norm diffusion was sometimes implicitly assumed to be a model for progressive change. Recently, however, the view of "norms as things" with fixed content (Krook/True 2012) has been criticized for its insufficient account of the dynamics of norm change (Sandholtz 2008; Sandholtz/Stiles 2009; Müller/Wunderlich 2013; Lantis/Wunderlich 2018). In constructivist norm research within IR, there is now widespread consensus among scholars that the intersubjective nature of norms implies that their meaning is not fixed but open for interpretation. Norms are not stable, but contested (Niemann/Schillinger 2017; Wiener 2008, 2014; Deitelhoff/Zimmermann 2018). What norms prescribe differs: "The regulative and constitutive implications of norms but also their normative and prescriptive content differ depending on time, place, or social context" (Niemann/Schillinger 2017: 29-30). Accordingly, Sandholtz (2008, 105) argues that "all normative structures generate disputes" and Antje Wiener (2009, 179) holds that norms "are contested by default". According to Antje Wiener, whose approach on the contested nature of norms and theory of contestation has inspired much of the debate (cf. Niemann/Schillinger 2017, 38), contestation is a social practice of objecting norms, i.e. challenging the meaning or the meaning-in-use of norms (Wiener 2014).

Several scholars propose to distinguish different forms of norm contestation. And they hypothesize potential consequences. Welsh (2013) distinguishes procedural contestation and substantive contestation. While the first refers to the process of norm development and the question who should develop a norm, the latter refers to the content of the norm. Deitelhoff and Zimmermann (2018) distinguish applicatory and validity contestation. Applicatory contestation is quite frequent: it refers to the frequently expressed disapproval of a particular application of a norm, mainly with regard to a specific situation or a specific behavior, while the latter refers to the contestation of

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[5] ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, ICJ Reports 1951, 15, at 23.

[6] A/71/10, 299.

the norm's validity and targets the core of its meaning. Deitelhoff and Zimmermann have emphasized that both types of norm contestation have different effects. Depending on the form of contestation, they can weaken (validity contestation) or strengthen (applicatory contestation) a norm. However, permanent applicatory contestations are also likely to weaken a norm, when actors fail to "achieve renewed consensus or compromise on a norm's meaning and application" (Deitelhoff/Zimmermann 2018, 8).

The research program on international norms moved from demonstrating their impact (e.g. Klotz 1995; Price/Tannenwald 1996), and explaining their emergence and diffusion (e.g. Finnemore/Sikkink 1998; Risse et al. 1999), to how actors react and relate to norms by adapting, translating, resisting or contesting them (Wolff/Zimmermann 2016). Research has thus shifted from a focus on norm emergence and norm diffusion (Finnemore/Sikkink 2001) to norm dynamics (Müller/Wunderlich 2013; Krook/True 2012; Sandholtz 2008). These include norm erosion (Rosert/Schirmbeck 2007), norm decay (Panke/Petersohn 2012; McKeown 2009) and norm replacement (Sandholtz in this book) but also norm strengthening. Change can occur with regard to a norm's substantive content but also with regard to its institutionalization (cf. Sandholtz/Stiles 2009, 7, 18: The norm can become more authoritative, more formal, more specific and/or more legalized; cf. Sandholtz/Stiles 2009, 18). The main debate has now started to shift to the conditions under which norms are resilient (Lantis/Wunderlich 2018), including the question which effects certain types of contestation generate (Deitelhoff/Zimmermann 2018).

Academic legal debates have started to adapt the political science discourse on contestations to legal research. For instance, for analyzing backlashes against international courts and tribunals Madsen et al. narrow the concept of contestations down to resistance and use resistance as an umbrella term describing "an attempt at blocking or reversing advancement in law triggered by international courts or more general political or societal trends that are associated [...] with international courts" (Madsen et al. 2018, 201). They distinguish two forms of "resistance": ordinary and extraordinary critique. The former, described as pushbacks, refers to instances where specific legal developments in a court's jurisprudence or specific judgments are criticised in order to alter the future direction of legal discourse within the system "with normal objections and contestations that should be expected in any system of law". In contrast, the latter concerns "the very institution and its authority" and "aims to overturn the system". It is often based on a "general resentment to a certain socio-political development" (Madsen et al. 2018, 199 et seq.). In their definition Madsen et al. distinguish between the process of resistance and the outcome of such a process. In terms of outcome they focus on an analysis as to whether resistance is consequential or inconsequential for the institution and/or the law (Madsen et al. 2018, 206). Against this background they focus on discursive critique and non-compliance stressing that only those forms of non-compliance are relevant forms of contestation which are raised publicly with a rejectionary intention (Madsen et al. 2018, 209). Thereby, they underline the necessity to interpret social practices in order to identify them as resistance and subscribe to a progress narrative of international courts which resistance aims to reverse.

From the perspective of a lawyer who aims to identify whether legal norms and the values they protect change, it is decisive to also take into account a positivist legal perspective. From a positivist perspective on international law not every social practice can directly affect the legal validity or the legal content of a norm but a legal norm can only be formed, terminated or modified through a legal act – a social practice by a competent actor, normally states, which is accompanied

by an intention to create, change, or end a legal norm (opinio iuris) and which is part of a legal agreement. Identifying whether a particular social practice qualifies as a legal act requires an act of interpretation which discerns the legal conviction of a state. In the interpretative process the form in which a certain social practice is exercised may be taken into account. Legal acts may thus take the form of a public statement made on behalf of states, a government's legal opinion, a diplomatic correspondence, or a decision of a national court (ILC 2018, Draft Conclusion 10).

Combining the insights from international relations and international legal theory we submit that for understanding norm change we need to look into three different aspects: the substantive content of a legal norm, its legal validity and its social validity. All three elements may change as a result of a process of contestation and a change in one element may affect the other elements. Of course, "law can always be changed by politics over time [...] and law and politics come together and co-evolve over time" (Abbott/Snidal 2013, 36) but an important difference in the perspective of both disciplines stems from their diverging starting points: Lawyers are predominantly interested in the legal validity of norms as well as the interpretative processes when applying norms to facts. Political scientists, while also interested in legal norms, argue that *all* norms impose obligations. Consequently they often turn to the social validity of a norm. For them, norms derive their power from a shared acceptance and intersubjective meaning. Therefore, changes in the collective acceptance and meaning of a norm are taken as a sign that the norm itself changes. And norms that do no longer guide state expectations and state behavior are no longer regarded as international norms. Given that norm death is rare, the focus is on the degrees to which a norm is weakened or remains robust. This is why norm scholars trace to what extent the norm is either shared (and unquestionably present, i.e. not even talked about) or to which extent the normative validity is reflected in the political discourse and to what extent actors still by and large comply with the social expectations that a norm creates.

However, for the sheer legal validity of a norm, non-compliance is not decisive. What remains decisive for the end of the legal validity of a norm is a formal legal act which expresses a corresponding legal will. This can be exemplified through the concept of desuetudo. Desuetudo is sometimes defined as "the rejection of a rule through subsequent non-enforcement or non-compliance" (Wouters/Verhoeven 2008, para. 1). However, examples are rare and the predominant view holds that factual causes of change are insufficient for terminating or modifying a treaty or a rule of customary international law. Instead, an explicit or tacit agreement to terminate or modify a rule of international law is required (Wouters/Verhoeven, paras. 10/15/17). Discerning such an agreement requires an interpretation of social practice as to whether they embody a legal conviction. Thus, the lawyer, for evaluating any process of norm erosion or norm death, does not only focus on expressions of legal convictions but also takes a lesser interest in compliance. Still, because of law's binary structure (in force – not in force), processes of norm erosion are difficult to conceptualize. We submit that processes of erosion may consist of various legally relevant phenomena which reduce the legal effects of a rule or a principle, thereby also signaling a shift in the prioritization of values. For example, while states are entitled to lawfully withdraw from treaties, any withdrawal reduces the sphere of application of any multilateral treaty rule. Likewise, interpretative changes may affect legal rules. A restrictive reading of the constitutive elements of a prohibition as well as an extensive reading of its exceptions may reduce the scope of a prohibition and thereby its legal effects. Whereas interpretative disputes are at the heart of processes of norm change (Kleinlein 2018), some such disputes may stretch the limits of *lege artis* interpretation, in particular in view of the object and purpose of a given norm. While such phenomena do not

terminate the legal validity of a rule, they may affect the rule's scope and effect and thereby represent an erosion in relation to the rule's objective.

A point on which both disciplines agree is that the content of a legal norm and its legal validity may depend on politics (Abbott/Snidal 2013, 34 et seq.). While this may be a general observation or even a truism on the relationship between law and politics, it is particularly relevant for the analysis of international law because of its specific structures: the dominant role of states in the creation and application of international law as those being primarily obliged by international law; the lack of a strong independent enforcement mechanism; and the decentralized form of law-making. The creation and interpretation of international law strongly depends on the practice of states. Unlike national law, international law lacks robust enforcement mechanisms. Thus, international law needs functional equivalents to induce compliance by states. One equivalent is offered by specific rules of interpretation for international treaties. In deviation from the standard means of interpretation in national law, in international law the subsequent practice of the parties in their application of a treaty is taken into account according to Article 31, paragraph 3 VCLT which in turn mirrors the creation of customary international law. A feedback of the evolving practices and attitudes of states may promote compliance and contributes to keeping the legal and the social validity of legal norms in line by guaranteeing that a treaty continues to reflect the will of the state parties (cf. Nolte 2018).

Moreover, while a legal norm can only be created, changed and terminated by a legal act, different kinds of social practices may exert an indirect impact on the overall development of international law in that they influence the overall structures, the political context and the general discourse against which claims for changing legal norms are put forward and general trends are formulated. In international law, the structural context is presumably more important as compared to national law because of its decentralized character. Given that there is no central legislator and only a rudimentarily central judiciary, customary international law and interpretations of treaty law emerge in a partly empirical process and depend on normative evaluations by numerous different actors with diverging competences, such as states, courts, treaty bodies, or even academics. While changes in the political discourse do not directly alter international legal rules, they may still affect international law by setting the frame against which states, courts, and legal experts formulate their assumptions about the development of the international legal order and the interpretation of its rules. In international law, the assertion of a 'trend' often plays an important role in legal arguments and decision-making, for example regarding the emergence of community values (Krieger/Nolte forthcoming). The identification of trends, as well as assertions regarding which of several trends is likely to prevail, will, however, be influenced by the overall context and the relevant political discourse. An impression of backsliding may exert a chilling effect on such interpretative processes (Krieger forthcoming). Thus, changes in power relations in commitment to treaty law, in dominant discourses over certain values, and/or in long-term compliance may affect international law in that the necessary support for certain values is fading.

4. A metamorphosis of international law?

A number of recent empirical observations supports the conclusion that both legal norms and the authority of international courts have become increasingly contested. State and non-state actors contest the validity of legal norms, lobby for a substantial change, and/or re-interpret specific norms. In addition, some governments call the authority of international courts into question

and/or try to limit international institutions' powers to monitor compliance or adjudicate disputes. Furthermore, we observe that states seek to regain autonomy by lowering their level of commitments to international law, i.e. by withdrawing from treaties. Finally, institutional hierarchies are put into question. There is most likely no single cause for these contestations: shifting identities, changing power constellations and diverging interests may all have an effect.

a) Current challenges

Shifting identities are observable in many regions of the world that turn away from global multilateralism and emphasize regional or national identities. In a number of countries norms that were long considered as robust are seriously challenged. In Eastern European countries, for example, domestic power shifts have limited basic civil and political rights, such as freedom of the press. In these cases, autocratic, populist, and/or nationalist movements openly fight the substance of norms. It remains to be seen whether European human rights institutions will be able to contain these challenges. A populist-nationalist turn is also visible in Western countries, apparently in the United States of America (US) under the Trump presidency, where even those international institutions come under attack that the US had long supported, such as the norms of free trade.

Changing power constellations bring long-held resentments against allegedly 'western' norms or legal instruments to the fore. A case in point are human rights in general and women's rights in particular, but also Gambia's assertion of the International Criminal Court (ICC) as being racist. Japan's most recent announcement to withdraw from the International Whaling Commission or the former announcements of African countries to withdraw from the Rome Statute have alerted us to the fact that the outcome of legalization may not be permanent.

Several transnational crises, such as the general refugee crisis around the world or the world financial crisis, and, most prominently, new threats to security, have led to a reformulation of interests and have been accompanied by a criticism of the existing normative order. In this context, states have voiced concerns that legal frameworks are either ineffective or unfair, i.e. that they generate unequal distributive effects. In addition, some have argued that norms limit necessary and potentially effective states' action. Consequently, some states have tried to widen their range of action, if necessary by challenging those very norms that limit potential responses. More recent examples include the post 9/11 attempts to widen the right to self-defence against non-state actors, and to circumvent the prohibition of torture and ill-treatment.

While these developments clearly indicate that many legal norms, for example human rights norms, are no longer progressing in a linear way, we need to explore the consequences of these pressures thoroughly. IR and international law's research have not been oblivious to these signs of crisis. In fact, there has been considerable movement in research on contestation and its consequences, such as the norm 'death' or disappearance, and norm regress or erosion (Deitelhoff/Zimmermann 2018; McKeown 2009). Others have interpreted current backlashes as contestations of the liberal internationalism (Ikenberry et al. 2018; Jahn 2018) or more broadly as contestation of the liberal western script (Börzel/Zürn) or even a "Return of Anarchy" (Slaughter 2017). International Relations theory and international legal science alike have started to analyze backlashes against international courts and tribunals (Alter et al. 2016; Kunz forthcoming; Madsen et al. 2018) while developments in treaty law have either been viewed through the lens of stagnation (Pauwelyn et al. 2014), of rise or decline (Nolte 2018) or as contestations of

multilateralism (Bosco 2017; Cohen 2018). Some focus on signs of crisis in specific policy fields, such as human rights law (Alston 2017; Hopgood 2013; Moyn 2018) while others choose a broader approach and examine "The Rise and Decline of the Post-Cold War International Order" (Maull 2018) or the rise or decline of the international rule of law (Krieger/Nolte/Zimmermann forthcoming).

The recent explosion of literature on crisis, contestation, and rise or decline suggests that we are indeed currently observing a fundamental transformation of international law which presents a particular challenge to identify this transformation while going through it. Therefore, it is necessary to develop methodologically solid yardsticks for assessments and interpretative evaluations. It is for this purpose that we suggest to focus on tracing value changes in the international legal order from the perspectives of legal and political science.

b) Change or metamorphosis?

We submit that we will find strong indications for a metamorphosis of international law if the values protected by international law change in their acceptance or their prioritisation, or if the idea that such values should be legally protected is dismissed.

aa)   The role of value transformation

The very idea that the international legal order as it has been carved out since 1945 and again since 1990 protects common values (interests or goods) can be seen as one of its defining features. When Wolfgang Friedmann characterized the metamorphosis of the international legal order from a law of co-ordination to a law of co-operation in his 1964 book on the changing structure of international law, the role of values constituted an important argument:

> *Unlike the traditional law of nations, which is predicated upon the assumption of conflicts of national interest, which it seeks to stabilize and regulate, co-operative international law requires a community of interests […]. The challenge posed by the changes in the structure of the international society of our time does not mean the abolition of self-interest in international relations; it does, however, radically affect the dimensions and objectives of self-interest. Such new developments as the international financial and welfare agencies, or the developing European communities, are a tentative expression of new world-wide interests in security, survival and co-operation for the preservation and development of vital needs and resources of mankind […]. International law […] is today overwhelmingly an agent of progress and evolution (Friedmann 1964, 57 et seq.).*

This embracement of the progress narrative of international law based on common values has ever since been one of the dominant narratives in international legal scholarship: Since the 1990s, it has developed theoretical frameworks for describing a perceived move towards a stronger value-based international order. The most far-reaching analysis and prediction which is closely related to the (over-)optimistic atmosphere of the 1990s (Krieger 2016) is that of a 'constitutionalization' of international law (e.g. Klabbers/Peters/Ulfstein 2009). Drawing on earlier research on the 'international community' (Dupuy 1986; Mosler 1980) and its constitutionalization (Verdross 1926), the 'value poverty' of classical bilateralist international law was said to be overcome through an orientation along common values of a legally constituted international community, as enshrined in concepts of 'community interests' or 'community values' (Simma 1994; Franck 1995; Paulus 2001; for

a conceptualization of community interests outside the framework of constitutionalism, see Benvenisti/Nolte 2018). Contrary to a simple process of juridification these values needed to exhibit a "certain quality of validity" (Kadelbach/Kleinlein 2006, 253). Thus, some authors underscored the evolution of hierarchies in international law on the basis of norms with jus cogens character or erga omnes quality (De Wet/Vidmar 2012; Tomuschat 1993). Such an "attachment of states to higher values" (Frowein 2004, 428) allowed to conceive international law as an autonomous body of law vis-à-vis the state which limits sovereign power and the accompanying hierarchisation of legal norms reflects a prioritization of certain values over others.

Of course, in international legal discourse this interpretation did not remain uncontested as Bernstorff/Venzke have pointed out (2011, paras. 4-12): Other scholars have underscored the abusive intentions that a reference to values in international law might entail. This concerns, for instance, the reliance on human rights in order to justify war (Kennedy 2004) or the close interrelatedness between the idea of a shared universal morality and European imperialism (Anghie 2004). But this criticism may also be interpreted as "disagreements about the degree to which the international legal order does in fact reflect aspirations of all those affected by it, about the extent to which it does already work towards justice, and about the potential and promises that international law can actually sustain" (Bernstorff/Venzke 2011, para. 30). Therefore, this criticism does not exclude to conceive the turn to a value-based international order as an essential characteristic of international law as it has developed since 1945 and accelerated since 1990.

For understanding the relationship between contestations, norm change and metamorphosis, we start from the following assumptions: In view of persisting deep-seeded value conflicts and huge differences in development and power distribution across the globe, it is one of international law's purposes to offer a framework and a vocabulary through which the highly differing actors can formulate their demands and claims, justifications and contestations for identifying common values and establishing institutions to implement them (Hurrell 2007; Krieger 2016). However, once common values have been identified and are protected by international legal instruments, they represent a consensus reached, sometimes a very fundamental one. Here, a second function of international law becomes relevant, namely to "lock in" (Moravcsik 2000) certain values and behavioral prescriptions. Based on their legally binding effect and their enforcement mechanisms these legal instruments shall keep change within limits. Governments (and other actors) use international organizations and institutions, and they use law to effectively enforce the policy preferences (and their underlying values) at a particular point in time against future policy choices (Abbott/Snidal 2013, 35). Thus, law oscillates between promoting stability and allowing for change. Institutions or substantive legal norms can change in order to be improved and adapted. The sphere of application of a particular norm may become broader or narrower as the result of change: the inclusion of non-international conflicts and systematic violations of fundamental human rights into the concept of "threats to peace" under Art. 39 UN Charter may be seen as a pertinent example. New justifications for the infringement of a norm may emerge, such as the debate as to whether humanitarian interventions would or would not infringe Art. 2 para 4 UN Charter. But if the values embedded and protected by a norm or a norm cluster change, this implies something fundamental. A trend – even a hidden and implicit one – to question that the use of force should be outlawed in international relations would open the way into another type of international (legal) order. Thus, where values change despite their legalization, change itself is fundamental. This assumption reflects approaches in social science: societal change is a core element of modernity which itself is defined by a permanent sense for and process of

development. This process of development and change, however, does not touch upon certain foundational concepts and certainties. Once these certainties are breaking away transformation becomes fundamental (Beck 2016).

The accelerated processes of legalization in the 1990s have resulted in a consensus to identify and lock in a number of common values, which even have expressed a value prioritization with a hierarchy of norms based on the concept of peremptory norms. International law had apparently changed the emphasis of Charter-based international law from state-oriented principles and underdeveloped human rights obligations towards a more value-based order which aimed to protect the individual as well as other common goods or interests, such as the earth's atmosphere, nature and living resources, common spaces, or sustainable development (Krieger/Nolte forthcoming). A break-up of the consensus that these common values should be legally protected by international law would fundamentally question the wide-spread progress narrative of international law and transform the idea of an international law of co-operation.

We are, however, hesitant to analyze the question whether we already face norm change or even a metamorphosis through the particular lens of contesting liberal internationalism and liberal values. Liberal internationalism is a term often used to describe a particular set of US foreign policies starting with Woodrow Wilson. Liberal internationalism aims to establish an international (legal) order based on "openness, sovereign equality, respect for human rights, democratic accountability, widely shared economic opportunity, and the muting of great power rivalry, as well as collective efforts to keep the peace, promote the rule of law, and sustain an array of international institutions tailored to solving and managing common global problems" (Deudney/Ikenberry 2012, 7 et seq.). According to this reading the US as the leading liberal power in the twentieth century created a liberal international subsystem in the Western Hemisphere during the Cold War and, after 1990, aimed to expand this system globally (Jahn 2018). Focussing on this perspective, current processes of contestations may be seen as a crisis of US American hegemony (cf. Byers/Nolte 2003; Grewe 2000, 701 – 725) which transformes the international order into a post-American or post-western order still rule-based (Acharya 2014; Ikenberry 2011). A variation of this perspective assumes that without US hegemony liberal internationalism itself is in crisis and as a consequence governance structures based on open trade, multilateralism and cooperative security erode (Boyle 2016; Speck 2016). Even more fundamentally, some authors claim that the progress narrative of liberal modernity is ending (Mishra 2017).

Of course, international law has to some extent been part of the progress narrative of modernity (Altwicker/Diggelmann 2014). Human rights that are embodied in the International Covenant of Civil and Political Rights (ICCPR) are often seen as the core of liberal values and recent publications have, for instance, emphasized the role of liberal internationalism for the creation of the prohibition on the use of force (Hathaway/Shapiro 2017). However, a focus on the claimed liberal character of this international legal order as a product of American hegemony entails the risk to analyze current contestations within an antagonistic frame of "the rest against the West" and to glue over indications that part of the metamorphosis is specifically expressed in a disintegration of traditional paradigms, such as North and South or the West and the rest (Beck 2016). For instance, the protection and development of women and LGTBQ rights on the UN level was, inter alia, opposed by Christian-conservative NGOs and Muslim actors, the so-called "Baptist-Burqa Connection" (Bob 2012). References to reproductive rights of women were struck from the outcome document of the Rio+20 conference of 2012 and businesses' human rights obligations were not

dealt with due to the efforts of an alliance of the G77, Canada and the United States (Hopgood 2013). Moreover, such a prism tends to overlook that the international legal order also contains significant elements which are not grounded in liberalism, such as second and third generation human rights, anti-discrimination norms including gender and LGTBQ rights, in particular where they intend to regulate private legal relations, International Labour Organization norms, norms on environmental protection and sustainable development. Many of the legal norms and institutions which were developed since the end of the Cold War were formally consented by states world-wide from different ideological backgrounds. Treaties, such as the United Nations Framework Convention on Climate Change (with currently 196 states and 1 regional economic integration organization as parties) or the ICC Statute (with currently 133 states parties) have enjoyed and still enjoy high numbers of ratifications. With the 2005 World Summit Outcome Document states proclaimed a global legal order based on such values irrespective of their asserted ideological origins. In contrast, many of the foundational conventions, which epitomize the move to a value-based international law of co-operation, were opposed by the United States, not ratified, or blocked in their progressive development ranging from the Additional Protocols to the ICCPR over the United Nations Convention on the Law of the Sea to the Kyoto Protocol. In the security-related context, from the legality of extraterritorial use of drones to the prohibition of torture, American interpretations of legal norms have challenged fundamental values of the international legal order (Liese 2009). Thus, we assume that a focus on liberal internationalism is not conducive for understanding current turmoils.

bb)   Research Design

We propose to systematically assess changes in values by observing changes in the meaning, composition, and strength of specific international norms. In this context strength refers to a high degree of social validity, a broad sphere of application, the relative priority of this norm in relation to other norms (ius cogens norms or other international legal norms) and strong enforcement mechanisms. We have chosen norms which are both representative for the concept of a value-based international law of co-operation and currently contested: the prohibition on the use of force, the prohibition of torture, women's rights, and international criminal justice. Moreover, we have chosen norms that represent different stages of *legalization* and *institutionalization*, as well as norms that vary in their *duration* of validity. This enables us to assess contestations and norm transformations with a comparative lens.

The effects of contestation are likely to depend on the degree of legalization and institutionalization of a norm. For one, it is conceivable that legalized norms are more often contested or denounced, because states seek to reverse what they perceive as over-legalized commitments (Helfer 2002). However, not all contestations affect the validity of a norm. In international relations, it is widely assumed that legalized norms are more robust than non-legalized ones, because they come with a higher degree of obligation and because non-compliance can be sanctioned. We have chosen norms such as the prohibition of the use of force, which are in view of their ius cogens quality highly legalized, norms such as women's rights, which are codified in treaties, and norms such as sustainability norms, which are yet in a process of being legalized. We understand the degree of legalization as a combination of obligation and enforcement: Do norms enjoy the character of a legal norm as a peremptory or non-peremptory norm of international law? Is the norm part of a norm cluster with a strong enforcement and/or adjudication mechanism or are such mechanisms weak and rudimentary? This implies that we do

not distinguish between legalization as a process of adding, changing or substracting from the law and the law itself as a result the result of this process (Abbott/Snidal 2013, 34) because such an approach overemphasizes the static element of law but we use the term legalization for describing the transformation of a social norm into a legal norm which is often accompanied by the creation of formal legal enforcement mechanisms. Legalization is therefore a gradual concept and can thus be used to compare different norms or norm clusters.

We also seek to pay attention to the 'age' of a norm, i.e. the duration of its existence. Younger treaty norms are likely to be less contested and show only few changes, if at all, simply because they mirror recent state consensus and more recent commitment. Older norms, whether derived from practice or treaty law, are more likely to come under pressure when state preferences, societal expectations, or the underlying problems change and/or when global power structures change. In order to delineate change and metamorphosis it is important not to only examine processes of erosions, but to also analyze the creation of new (legal) norms to see whether in times of turmoil new structures, new norms, new values or even new forms of norm creation are emerging. For this purpose, the book looks at the nuclear taboo where a norm with a strong social validity is currently legalized by the Nuclear Ban Treaty. Another policy field where processes of norm creation are currently on-going is the policy area of development and food security.

Inspired by constructivist research, we seek to refocus on the idea that disputed norms change in recursive cycles as a result of the interplay between rules and behavior, or more precisely, between expectations, actions, arguments over the meaning of the norm and its range of application, and rule change (Halliday 2009; Sandholtz 2007; Sandholtz/Stiles 2009). We suggest to compare different forms of actors' engagement with norms, such as contestation in discourse (cf. Deitelhoff/Zimmermann 2018; Wiener 2014) or non-compliance in practice (cf. Glennon 2005; Panke/Petersohn 2016). Are the consequences of these engagements similar or do they vary across different norm cycles and issue areas? Changing values and the idea of their legal protection are not the only possible indications for a metamorphosis of international law. The values which a legal system aims to protect are embedded in its structures and its institutions. Deep value contestations also put pressure on the institutions to develop new practices in order to remain capable of acting and it will also affect legal structures (cf. Krieger forthcoming). Thus, it is important to be precise about the specific object of contestation. In answering these questions, we may then be able to infer broader dynamics of change or metamorphosis in the international legal order.

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The Kolleg-Forschergruppe "The International Rule of Law – Rise or Decline?" examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.