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Norm-instability as a Strategy in International Lawmaking

The Case of Self-defence against Non-state Actors

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1. Introduction

Is self-defence under Article 51 of the UN Charter available against non-state actors? Over three-quarters of a century after its entry into force, this question remains disputed. States, the International Court of Justice (ICJ), the UN Security Council, and scholars have all approached it in different and at times contradictory ways. The fact of the matter remains, though, that no treaty, resolution, judgment, or pronouncement of any type has to date settled the matter in a final and authoritative way. Thus, confronted with the question, no international lawyer can present in all honesty any solution as uncontroversial, even if certain reference points do exist. How can such pervasive uncertainty be accounted for?

One might begin to answer this question by saying that law is an open-ended discursive practice. Normative meaning in legal rules is not pre-fixed but rather built through practices of argumentation and authority.[1] In international law, moreover, this open-endedness is deeper.[2] Several structural reasons account for this. On the one hand, international legal texts generally have a low level of specificity, which leaves vast room for interpretation. On the other hand, non-textual legal norms are pervasive in international law, making argumentation a systemic precondition. More generally, though, international law lacks constitutionally established authorities that centralize lawmaking and adjudication in the way parliaments and judicial systems do in domestic contexts. This means that in practice

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[1] Manuel Atienza, 'Argumentación Jurídica' in Ernesto Garzón Valdés and Francisco Laporta (eds), *El derecho y la justicia*, vol II (Trotta 2000) 231–37.

[2] For an overview of classic thinking on the matter, see Herbert L Hart, *The Concept of Law* (Clarendon Press 1961) 209, 210; Georges Abi-Saab, 'Interprétation et auto-interprétation. Quelques réflexions sur leur rôle dans la formation et la résolution du différend international' in Ulrich Beyerlin and others (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarrecht, Staatsrecht: Festschrift für Rudolf Bernhardt* (Springer Verlag 1995) 13, 15.

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most international legal questions cannot be formally and conclusively settled—and the question of self-defence against non-state actors is a very telling example of this.[3]

But there is more than this structural open-endedness to account for the uncertainty surrounding Article 51. In international law, what actors do—their arguments, silences, unilateral acts, etc—has a substantial effect in shaping international legal norms. One sentence in a judgment of an international court, a seemingly innocuous paragraph in a resolution by an international organization, or the conspicuous silence of a minister of foreign affairs on a key issue all have the potential of becoming weighty elements in the interpretation of an international rule or in establishing their customary existence. Aware of this, international actors tend to conduct their international relations calculating the potential effect of their actions or omissions on their own legal position, and to some extent on the broader normative structure of international law.[4] Agency, therefore—and not only the systemic open-endedness of international law—is a key element in the often ambivalent evolution of international norms. Yet, agency does not necessarily mean that actors conduct themselves in unequivocal ways all the time. Sometimes actors may stay silent, and sometimes they may say one thing but do another. Sometimes they may even say things that are manifestly intended to create confusion. It is thus a mistake to think that there are only entrepreneurs or antipreneurs when it comes to the making of international rules.

This chapter approaches a rather understudied form of engagement with international law that goes beyond pursuance and opposition: the deliberate perpetuation of instability in international legal rules. Standing somewhere between full advocacy for a clear-cut rule and manifest opposition to the existence of a rule, norm-destabilization as a form of agency in international lawmaking is the reluctance by an international actor to concretize an argument about the meaning, scope, bindingness, or existence of a rule to an extent that would provide a straightforward answer to a given legal question. Normative instability is therefore understood here as a situation where an international rule fails to provide an unambiguous answer to a legal problem, either because its terms remain significantly unclear, or because the scope of its bindingness is very disputed.

Somewhat more narrowly—focusing mostly on diplomatic negotiation—scholars of international relations (IR) have sometimes approached the subject through the notion of *constructive ambiguity*, which has been defined as 'the

[3] David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 Wisconsin International Law Journal 28, 44; Martti Koskenniemi, 'The Politics of International Law' (1990) 1 European Journal of International Law 8.

[4] Wayne Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder' (2008) 14 European Journal of International Relations 102; Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421, 422–24; Stephen D Krasner, 'Realist Views of International Law' (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) 265, 265–68.

deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose'.[5] The focus in this chapter, however, is different in that norm-instability looks specifically at the content of a rule, and not only at the transactional, political, or diplomatic elements of ambiguity. Similarly, the notion of norm-instability, contrary to constructive ambiguity, is not limited to the use of language in the context of formal negotiation, but can include silences, equivocal attitudes, or overtly formalistic approaches in any setting of IR. What matters analytically for norm-instability, as understood here, is that the meaning, scope, bindingness, or existence of a legal rule is destabilized through the attitudes of international actors. Constructive ambiguity as used in IR would certainly fall into the category of norm-instability, but norm-instability would also encompass other types of destabilizing attitudes.

This chapter therefore seeks to bring an additional element into the discussion of how political change translates into change in international law—the question with which Nico Krisch and Ezgi Yildiz open this edited volume.[6] Norm-instability, it is argued here, works as a fender between political and legal change, allowing actors to pursue different courses of action without having to face the hurdles of changing international rules. In this sense, the notion of norm-instability helps account for the initial observation in the introduction of this work that not everything that happens in international politics is registered by international law or is registered unevenly in different sites. Particularly in the construction stage—to use the project's terminology—a strategy of norm-destabilization can have the effect of stalling a norm change attempt by creating legal uncertainty around it. The aim of this chapter is to better understand how this happens and explore some of the main paths of action through which norm-instability is pursued. In order to do that, focus is set here on the rule of self-defence against non-state actors (SD-NSA). This case is particularly telling because SD-NSA, much more than any other shifting rule in international law, has been both equivocally advocated for and equivocally contested since it started to be claimed in the late 1960s and to this day. It is therefore a case in point of norm-instability.

A clarification is pertinent before setting off, however. The term 'strategy', as used in this work, does not necessarily imply a planned, coherent, or continuous attitude by an actor. It includes these, of course, but it extends to much less articulated and less mindful forms of agency. What is central, in any case, is that the norm-destabilizing outcome is the product of a preference—whatever its motivation—for a legal formulation that does not clarify a crucial issue nor set a clear precedent, in contexts in which an actor could theoretically opt for a less ambiguous course of

[5] GR Berridge and Lorna Lloyd, 'Constructive Ambiguity' in *The Palgrave Macmillan Dictionary of Diplomacy* (3rd edn, Palgrave Macmillan 2012).

[6] Nico Krisch and Ezgi Yildiz, 'The Many Paths of Change in International Law: A Frame' in Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023).

action.[7] That is to say, the relevant element of analysis here is the acceptance by an actor of a destabilizing normative result, regardless of whether its intention is to actually destabilize or not. For example, diplomatic compromise could be the reason for supporting an unstable outcome, without instability being itself the primary objective. What would make such an instance relevant for the purposes of this work is that the unstable outcome is preferrable to a stable one for certain actors, and thus they passively or actively orient their behaviour towards perpetuating the instability of a rule. Distilling the exact reasons for these preferences is, nevertheless, beyond the scope of this work.

The chapter is structured as follows. After this introduction, the second section briefly provides an account of the historical trajectory of the rule of SD-NSA, going from the enactment of the UN Charter in 1945 to recent times. The third section then jumps into the core of the matter and analyses different strategies of norm-instability as observed in the case of SD-NSA. The fourth section zooms out of SD-NSA to reflect on the extent to which norm-destabilization strategies are a broader phenomenon in international law. The conclusion brings the main findings together.

2. The Historical Trajectory of Self-defence against Non-state Actors

For analytical purposes, the history of SD-NSA can be neatly summarized along three main chronological phases. The first one runs from the entry into force of the UN Charter in 1945 until roughly 1969.[8] During this period, self-defence seems to have been generally understood as operating exclusively between states—the hypothesis of a non-state actor launching a full-blown armed attack not really having been conceivable for most international lawyers and diplomats at the time. Evidence of this is the fact that, while the final text of Article 51 of the Charter did not define who the author of an armed attack triggering the right to self-defence had to be, the *travaux préparatoires* of 1945 indicate that the matter was in fact

[7] See, in this regard, Byers' approach to strategic ambiguity: Michael Byers, 'Still Agreeing to Disagree: International Security and Constructive Ambiguity' [2020] Journal on the Use of Force and International Law 1, 23, 24.

[8] 1945 is taken to be the point of departure in this historical account despite the fact that the right to self-defence as part of *ius ad bellum* came into being well before the foundation of the UN. This is because the advent of the UN Charter in that year in many ways reset *ius ad bellum*, inter alia by outlawing the unilateral use of force and placing self-defence as the only narrow exception to it. Whether SD-NSA was outlawed before 1945 seems difficult to determine considering the contradicting practice. For insights into this issue, see Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7 The International and Comparative Law Quarterly 712, 732. For a more detailed review of the pre-1945 practice, see Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) ch XII.

never discussed during the negotiations in San Francisco.[9] Moreover, state practice and the records of debates at the UN Security Council (UNSC) evidence that self-defence was invoked exclusively in the context of armed activities among states. This was strictly the case in the conflicts between Israel and its Arab neighbours, Tunisia and France, the UK and Yemen, and North Vietnam and the US, where no argument was made involving non-state actors in the invocation of self-defence.[10] Only two cases departed from this narrow interstate setting during this period, one relating to the early Indo-Pakistani conflict and the other to Lebanon and Jordan's struggle to control internal anti-government movements in 1958.[11] However, in both cases the reference to non-state actors was only made with the purpose of denouncing the use of non-state proxies by foreign governments attacking the countries concerned, thus confirming that SD-NSA per se was not thought to be covered by Article 51. This assessment is further confirmed by the academic debates on *ius ad bellum* of this period. Most academics simply did not include SD-NSA in their accounts of the laws of war, and the few that did rejected the idea.[12]

The second phase of the history of SD-NSA covers the period from 1969 to 2001. During these years, in contrast to the previous period, some states started to invoke SD-NSA without resorting to any element of attribution to a state. Israel was the first and most consistent state to do so, mainly in relation to its periodical military operations against Hezbollah and the Palestine Liberation Organization (PLO) in Lebanese territory—claiming that the inability and unwillingness of the Lebanese government to prevent the use of its territory for attacks against Israel entitled it to resort to self-defence directly against the non-state aggressors.[13] This argument would come to be known thereafter as the *unwilling or unable doctrine*. In addition to Israel in Lebanon, other instances in which SD-NSA was invoked include by Southern Rhodesia—although its status as a state was not recognized—targeting anti-apartheid Zimbabwean liberation forces in Mozambican territory; by Israel pursuing alleged terrorists in Tunisia; by South Africa against the African National

[9] Kimberley Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, OUP 2015) 685.

[10] See Repertoire of the Practice of the UNSC, supplements of 1946–51, 1956–58, 1964–65, and 1966–68.

[11] See Repertoire of the Practice of the UNSC, supplements of 1946–51, at 448 and 1956–58, at 174–76.

[12] See eg Hans Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations' (1948) 42 The American Journal of International Law 783, 783, 791, 792; Myres McDougal and Florentino Feliciano, 'Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective' (1959) 68 Yale Law Journal 1134; 'Panel on "Force, Intervention and Neutrality in Contemporary International Law"' (1963) 57 Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969) 147, 147; Josef L Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations' (1947) 41 The American Journal of International Law 872, 872,878; Brownlie, 'International Law and the Activities of Armed Bands' (n 7) 731; Brownlie, *International Law and the Use of Force by States* (n 7) 278–79, 379, 380.

[13] See Repertoire of the Practice of the UNSC, supplements of 1969–71, at 206; 1972–74, at 223; 1975–80, at 402; 1981–84, at 326; 1985–88, at 427; 1989–92, at 942; and 1996–99, at 1172.

Congress forces in Botswana, Zimbabwe, and Zambia; by Iran against terrorists groups sheltering in Iraqi territory; by Angola against Cabindan separatists in the territory of the Democratic Republic of the Congo (DRC); by Tajikistan against armed opposition groups operating from Afghanistan; by the USA against terrorists operating from Sudan and Afghanistan; by the DRC against anti-governmental forces taking shelter in Rwanda, and by Liberia against rebel groups operating from Guinea.[14]

What is remarkable about the practice in this period, however, is that while these cases did trigger thorough debates at the UNSC on the interpretation of Article 51—mainly regarding the claim of preventive self-defence and the issue of proportionality—no state ever objected to them on the basis of the argument that self-defence could not be invoked against non-state actors. In fact, not only did the point go uncontested, but it was not even mentioned in these discussions. Interestingly, something similar can be said about academic work of the time. As in the first phase, a clear majority of *ius ad bellum* scholars continued wholly to ignore SD-NSA, though sometimes referring to the related topic of indirect aggression.[15] Just a few considered it openly, though always in passing and ultimately rejecting it or expressing perplexity about it.[16] The only clear exception seems to have been Israeli author Yoram Dinstein, who unambiguously wrote about and endorsed SD-NSA in 1988.[17] However, it is fair to say that, despite the fact that SD-NSA was already taking place on the ground, it largely passed unnoticed in discussions on *ius ad bellum* among both diplomats and scholars, as it had done before 1969.

This radically changed in the third and last phase of the trajectory, which began with the terrorist attacks of 9/11 in 2001. From this point on, the practice of SD-NSA expanded considerably, and this time the topic became explicitly and extensively debated in both institutional and academic fora. In the aftermath of 9/11, the US formally communicated to the UNSC that it was exercising its right to self-defence against Al-Qaeda and the Afghan Taliban regime separately, by taking forcible actions 'designed to prevent and deter further attacks on the United States'.[18] A vast coalition formed by Western allies followed suit informing the

[14] See Repertoire of the Practice of the UNSC, supplements of 1975–80; 1985–88, at 430–31; 1993–95, at 1150; 1996–99, at 1176, 1178; and 2000–03, at 1007, 1016.

[15] Thomas M Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States' (1970) 64 American Journal of International Law 809, 809, 817, 821; Quincy Wright, 'The Middle East Problem' (1970) 64 American Journal of International Law 270, 270, 274; Oscar Schachter, 'Self-Defense and the Rule of Law' (1989) 83 The American Journal of International Law 259, 259, 271; Linos-Alexandre Sicilianos, 'L'invocation de la légitime défense face aux activités d'entités non-étatiques' (1989) 2 Hague Yearbook of International Law 147, 147, 161; Albrecht Randelzhofer, 'Article 51' in *The Charter of the United Nations: A Commentary* (OUP, CH Beck 1995).

[16] Pierluigi Lamberti Zanardi, 'Indirect Military Aggression' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff 1986) 112, 113; Jean Combacau, 'The Exception of Self-Defense in UN Practice' in ibid 22, 23.

[17] Yoram Dinstein, *War, Aggression and Self-Defence* (Grotius 1988) 200, 221–23.

[18] UNSC, 'Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (S/2001/946)'.

UNSC of its actions of collective SD under Article 51 directly against Al-Qaeda. This included the UK, Canada, France, Germany, Australia, the Netherlands, New Zealand, Poland, and Belgium.[19] In the years that followed, several states claimed SD-NSA in other contexts. Unsurprisingly, Israel was one of them, continuing to pursue its unwilling/unable doctrine against Hamas, PLO groups operating from Syria, and again Hezbollah in Lebanese territory.[20] Another state that followed a similar path was Russia, which invoked SD-NSA in the context of the conflicts in South Ossetia and Northern Abkhazia.[21] Uganda, Kenya, and Turkey did so too in different regional contexts.[22] Then, another major breakthrough came towards the end of 2014, when a coalition of mainly Western allies was formed to fight the advance of ISIS in the territories of Syria and Iraq, using SD-NSA as their main legal basis.[23] The US, Australia, and Canada joined under the unwilling/unable argument, while France, Germany, the UK, Denmark, the Netherlands, Norway, Belgium, and Turkey also undertook military action under SD-NSA, yet without resorting to the unwilling/unable criteria. However, for the first time in history, the invocation of SD-NSA as a legal basis awoke a minor degree of explicit opposition within some states, namely Brazil[24] and Mexico.[25] In terms of academic voices, 9/11 marked a turning point as well. From 2001 on, SD-NSA became a hotly debated and somewhat unavoidable element of any discussion on self-defence, in contrast to its almost complete concealment in academic circles in the previous phases. Against this background, it seems that today a majority of scholars is of the opinion that SD-NSA could be covered by Article 51, although the feeling that the matter is rather obscure is still widespread.[26]

[19] See Repertoire of the Practice of the UNSC, supplement of 2000–03, 1013.

[20] ibid 1010–12; supplement of 2004–07, 1024, 1026.

[21] See Repertoire of the Practice of the UNSC, supplement of 2000–03, 1015.

[22] See Repertoire of the Practice of the UNSC, supplements of 2004–07, 1025; 2010–11, 571; and 2014–15, 353.

[23] See Repertoire of the Practice of the UNSC, supplement of 2014–15, 352.

[24] UNSC, '8262nd Meeting (S/PV.8262)' para 44; UNSC, '8395th Meeting (S/PV.8395)' para 62.

[25] UNSC, '8262nd Meeting (S/PV.8262)' (n 23) para 47.

[26] For an idea of the different positions in the academic debate on SD-NSA, see the following. In favour of SD-NSA: Thomas M Franck, 'Terrorism and the Right of Self-Defense' (2001) 95 The American Journal of International Law 839, 839; Christian J Tams, 'The Use of Force against Terrorists' (2009) 20 European Journal of International Law 359, 359; Amin Ghanbari Amirhandeh, 'Examination of the Plea of Self-Defence vis a vis Non-State Actors' (2009) 15 Asian Yearbook of International Law 125, 125; Terry D Gill and Dieter Fleck, 'Part III Military Operations within the Context of the Right of Self-Defence and Other Possible Legal Bases for the Use of Force, Ch.8 Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law' in *The Handbook of the International Law of Military Operations* (1st edn, OUP 2010); Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors" (2012) 106 American Journal of International Law 106; Raphaël Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 Leiden Journal of International Law 183, 183; Trapp (n 8); Pemmaraju Rao, 'Non-State Actors and Self-Defence: A Relook at the UN Charter Article 51' (2016) 56 Indian Journal of International Law 127, 127; Nicholas Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule International Law and Practice: Symposium on the Fight against ISIL and International Law' (2016) 29 Leiden Journal of International Law 801, 801; Christian Henderson, *The Use of Force and International Law*

On the whole, therefore, the evolution of state practice and the debate in academic settings around SD-NSA show that, from being basically a non-issue in 1945, it has evolved into a legal argument that is recurrently used by states nowadays, and an unavoidable topic for scholars dealing with *ius ad bellum*. Nevertheless, uncertainty as to its validity under Article 51 of the UN Charter persists.

3. Strategies of Norm-destabilization

The trajectory just described is plagued with discontinuities, ambiguities, and conspicuous silences that are perhaps not evident at first sight, but that have played a big role in determining the development of SD-NSA. Crucially, they evidence the extent to which strategies of norm-destabilization have been operating in the background at least since Israel started using the argument of SD-NSA in 1969. As will be seen, these range from arrangements in multilateral settings, to erratic judicial decisions and sporadic displays of individual opposition. Whatever form they take, it is contended here that these strategies reflect a certain reluctance by different actors to acknowledge manifestly their position in favour of or against the rule, purposefully obstructing a transparent debate on the matter, and thus blocking the consolidation—or stabilization—of SD-NSA in one way or another. This section describes and analyses these strategies as seen in the case of SD-NSA.

(CUP 2018); Jutta Brunnée and Stephen J Toope, 'Self-Defense against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?' (2018) 67 International & Comparative Law Quarterly 263, 263. For positions expressing uncertainty or ambiguity: Marcelo Gustavo Kohen, 'The Use of Force by the United States after the End of the Cold War, and Its Impact on International Law' in Georg Nolte and Michel Byers (eds), *United States Hegemony and the Foundations of International Law* (CUP 2003) 206, 207; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010) 529, 530; Georg Nolte and Albrecht Randelzhofer, 'Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression: Article 51' in Bruno Simma and others (eds), *Oxford Commentaries on International Law* (OUP 2012) 38, 41; André De Hoogh, 'Restrictivist Reasoning on the Ratione Personae Dimension of Armed Attacks in the Post 9/11 World' (2016) 29 Leiden Journal of International Law 19, 19; Robert Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum* (Edward Elgar 2018) 385; Marja Lehto, 'The Fight against Isil in Syria. Comments on the Recent Discussion of the Right of Self-Defence against Non-State Actors' (2018) 87 Nordic Journal of International Law 1, 1; Anne Peters and others, 'Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War' [2017] Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No 2017-07 <https://papers.ssrn.com/abstract=2941640> accessed 16 October 2022; For positions expressly rejecting SD-NSA: Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010); Mary Ellen O'Connell, Christian J Tams, and Dire Tladi, *Max Planck Trialogues on the Law of Peace and War, Vol. I, Self-Defence against Non-State Actors* (Anne Peters and Christian Marxsen eds, CUP 2019).

3.1 Multilateral Ambiguity

Multilateral ambiguity is the endorsement by multilateral institutions—ie international institutions in which decisions are taken by membership vote—of legal positions that touch upon a certain issue, but without resolving or addressing important related legal questions that could reasonably be expected to be solved or addressed. More often than not, this type of ambiguity is the result of compromise. States might have conflicting views on a given matter but be constrained by circumstances to act in concert. The avoidance of an issue in these contexts is therefore a technique of negotiation that seeks to divert attention from meaningful disagreements by focusing on finding solutions to the immediate, pressing issue on the table, where the disagreement might be more tenuous or irrelevant. In these cases, diplomatic pragmatism is the reason behind ambiguous formulations or selective silences in multilateral settings, much in the sense of the notion of constructive ambiguity, referred to above.

The history of SD-NSA has very telling examples of this strategy. The clearest one is the role played by the UNSC in the last twenty years. Most authors point to its rare pronouncements on the matter as an authoritative indication of the consolidation of SD-NSA in international law. However, only under extreme conditions has the UNSC come close to openly endorsing it—never actually crossing the line of explicit recognition. In fact, only in three resolutions has the UNSC moved in this direction, and in each of them it left a door open for counterargument and counterinterpretation. The first two were resolutions 1368 and 1373, adopted in the aftermath of 9/11. To put it briefly, in both instances, the Council recognized in preambular paragraphs the 'inherent right of individual or collective self-defence in accordance with the Charter' and condemned 'the horrifying terrorist attacks' in New York, qualifying them as a 'threat to international peace and security'.[27] Yet, neither referred explicitly to the use of force against Al-Qaeda, went beyond mentioning self-defence only in the pCreamble, nor gave any express indication that the terrorist attacks of 9/11 were to be understood on their own as an armed attack for the purpose of Article 51. Rather, the UNSC qualified the attacks as a threat to the peace under Article 39 and emphasized the duty of all states to 'refrain from organizing, instigating, assisting or participating in terrorist acts'—a point placing the focus of the resolutions on states as sponsors of terrorists rather than on terrorists themselves. As a result, while the resolutions certainly provided a very plausible basis for the US and its allies to consider their claims to SD-NSA backed by the UNSC, a plausible argument could also be made that the UNSC's focus and intention were elsewhere, and that its reference to self-defence was not at all meant to endorse SD-NSA.[28]

[27] UNSC, 'S/RES/1368 (2001)'; UNS, 'S/RES/1373 (2001)'.

[28] Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 The American Journal of International Law 333, 334.

The third example is even more telling of this ambiguity: resolution 2249 of 2015. Adopted unanimously in the wake of the coalition against ISIS, it made a call for 'Member States that have the capacity to do so' to 'take all necessary measures, in compliance with international law […] on the territory under the control of ISIL […] to redouble and coordinate their efforts to prevent and suppress terrorist acts'.[29] A masterpiece of multilateral ambiguity, it clearly gave a green light to the states intervening in Syria based on the argument of SD-NSA, without even mentioning self-defence in the resolution—let alone SD-NSA.

What does it mean to say that there was a strategy of norm-instability behind these resolutions and how do we know this was the case? The first element to note is that, as seen in the previous section, a host of Western countries notified the UNSC of their use of force against Al-Qaeda and ISIS explicitly on the basis of SD-NSA. One could thus reasonably think that they would have ideally opted for a resolution at the UNSC unambiguously endorsing SD-NSA—as they actually did in other multilateral fora.[30] Doing this, however, would have made little difference in practice: it sufficed for their objectives to have some loose language interpretable as authorizing military operations in Afghanistan and Syria. Expediency in getting troops on the ground outweighed the potential value of a solid precedent. On the side of the non-Western permanent members, while in 2001 all diplomats in the UNSC had clear instructions from their capitals to collaborate with the US, it seems very unlikely that Russia, and more so China, would have been so easy-going about an express endorsement of SD-NSA in resolutions 1368 and 1373.[31] That was even more clearly the case with resolution 2249 of 2015, where Russia had direct interests in the Syrian civil war and China had a much more hardened foreign policy of non-intervention.[32] For both, establishing a precedent on SD-NSA seems to have been off the table. Yet, it was a reasonable compromise to pass watery resolutions giving Western countries their way without conceding on a point that could have compromised their positions in the future. Consequently, resolutions 1368, 1373, and 2249, ambiguous as they were on the point of SD-NSA, provided a pragmatic solution suiting all the main stakeholders.

As these examples reflect, when it comes to norm strategizing in multilateral institutions, the underlying decisive element is the capacity of institutions to set authoritative precedents.[33] Avoiding the adoption of authoritative statements, resolutions, or any other form of decision that might become an unavoidable legal standard in the future can be of utmost importance when a state's strategic interests are at stake. The resolutions of the UNSC, to take the case at hand, are of major

[29] UNSC, 'S/RES/2249 (2015)'.
[30] NATO, 'Statement by the North Atlantic Council (Press Release (2001) 124)', 12 September 2001.
[31] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (CUP 2011) 32.
[32] Sebastian von Einsiedel, David N Malone, and Bruno Stagno Ugarte, 'The UN Security Council in an Age of Great Power Rivalry' (2015) 04 United Nations University Working Paper Series 3.
[33] Nico Krisch, 'Liquid Authority in Global Governance' (2017) 9 International Theory 237, 240–41.

precedential value, among other things because of the constitutional hierarchy of the Council and their potential irreversibility in practice. In international law, furthermore, this dynamic is reinforced precisely by the legal value that institutional precedent and practice have both for treaty interpretation and for customary law. As such, the norm-consolidating capacity of a resolution of a UN organ—and particularly of the UNSC—is high.[34] In these conditions, it is only reasonable for states to think twice before they support the multilateral endorsement of a rule, even when they use it on occasion. Keeping a multilateral institution quiet or evasive, and thus avoiding limiting their scope of manoeuvre in the future, is in many cases a safer bet.

3.2 Selective Protest

A second strategy of norm-destabilization often used in international law is selective protest. Selective protest is the silence by an actor with regard to a given normative development, coupled with its active opposition to other normative developments surrounding or related to—yet distinct from—the first one. The purpose of this strategy is usually to oppose legally and politically the actions of the actor wielding the norm in question, without taking a final stance on its legality. In these cases, the reactionary actor often truly opposes the related normative development and thus is willing to be vocal against it but is uncertain about the main norm invoked by its adversary, and therefore has an incentive not to compromise its position by explicitly denouncing it. In this sense, there is usually less of an element of compromise than there is in multilateral ambiguity, and more of a somewhat calculated hypocrisy. The outcome in legal terms is in any event destabilizing for the norm because the opposition to the related normative developments creates an aura of disapproval that impacts the main norm indirectly, leaving nevertheless a discursive avenue open for eventual endorsement.

The case of SD-NSA is, again, a very telling example of this strategy. The first element to note is the attitude of states individually at the UNSC for nearly five decades. As explained in the historical overview above, a stunning feature of the trajectory of SD-NSA is that no state explicitly challenged SD-NSA qua legal rule until Brazil and Mexico decided to do so in recent years. Indeed, from 1969 to 2001, a multitude of states did denounce Israel time and again for its use of force against Hezbollah and Hamas, and the same happened with regard to the operations of Southern Rhodesia, South Africa, and the US against non-state actors in foreign territories. However, the legal arguments used against them did not mention at all the point that self-defence might not be available against NSA under Article

[34] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 7, 8.

51 of the Charter. The recurring legal arguments were, rather, the baselessness of the claim of pre-emptive self-defence, and the disproportionality of the military reprisals.[35] Unsurprisingly, there was also no open endorsement of SD-NSA by these opposing states. A neutral observer would therefore not have been able to tell whether these states actually opposed SD-NSA—the general impression would have been that they disagreed with what was happening on the ground. The attitude therefore cast a shadow of doubt over SD-NSA, without truly objecting to it.

The same can be said of states acting in diplomatic clusters. The clearest example is the stance taken by the Non-Aligned Movement (NAM) since at least 2004. Their interventions at the UNSC debates and in the final documents of their summits usually included the following statement: '[…] consistent with the practice of the UN and international law, as pronounced by the International Court of Justice, Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted' without adding anything further.[36] Clearly, the scope of this claim is very vast and ambiguous, and could be reasonably read as discarding everything beyond the hypothesis of interstate self-defence from the scope of Article 51—including of course SD-NSA. Such has been the reading by several scholars and diplomats, who often take it as an example of consistent opposition to SD-NSA, mainly because the statement has been made in contexts where non-state actors were involved.[37] Yet, there is no indication whether the NAM actually opposes SD-NSA or not. In fact, many states that participate in the NAM have in other settings endorsed SD-NSA. That is the case of Iran—a leading member of the NAM—which has itself resorted to SD-NSA to justify military action in Iraq. It is also the case of African states—over 40 per cent of the NAM's membership—which in 2005 adopted a formal definition of aggression including hostile acts by non-state actors, under Article 1(C) of the African Union's Non-Aggression and Common Defence Pact. Hence, it appears that the NAM members, when acting through the NAM, have an interest in projecting an anti-interventionist attitude that suggests opposition to SD-NSA, but that does not in fact compromise their individual positions on the topic.[38]

Selective protest is therefore a way of amplifying the discursive effect of a statement of disapproval. By expressing legal opposition in a general way, states achieve the political goal of delegitimizing—before other states and before public opinion—a situation that they disagree with or that is prejudicial to their interests. But by formulating it in an ambiguous way, states simultaneously eschew any commitment to

[35] See section 2.

[36] '17th Summit of Heads of State and Government of the Non-Aligned Movement, Final Document (NAM 2016/CoB/DOC.1. Corr.1)' para 25.2.

[37] See eg Corten (n 25) 432; Peters and others (n 25) 20; O'Connell, Tams, and Tladi (n 25) 78.

[38] A similar thing can be said of a statement by CELAC of 2018. See CELAC, 'Measures to Eliminate International Terrorism. Statement by the Permanent Mission of El Salvador to the UN on Behalf of the Community of Latin American and Caribbean States (CELAC)' 3 <https://celac.rree.gob.sv/wp-content/uploads/2018/10/Measures-to-Eliminate-International-Terrorism.pdf> accessed 16 October 2022.

the concrete implications of their opposition, stay free to use the norm opposed in the future, and liberate themselves from the burden of justification in case allies resort to it. On the whole, the strategy has a clear norm-destabilizing effect in that the norm will remain widely unendorsed. Crucially, though, the destabilization will not take the change attempt to the point of failure.

3.3 Compromised Support

A third type of strategy with norm-destabilizing effects is compromised support. For the purpose of this chapter, compromised support is understood as the partial display of approval for a certain normative development, yet refraining from articulating this support in a clear and unambiguous way. Compromised support usually takes the form of silence on a crucial point. This can happen, for example, by hinting the normative endorsement of a given rule but not clarifying the necessary details to make the endorsement unequivocal, or by explicitly claiming to endorse a rule, but then omitting a key element in the formulation. In these cases—in contrast to the previous strategies—there is usually no active intention to destabilize the normative development in question, but rather an element of caution or self-restraint seeking not to compromise one's position. The result, nevertheless, is destabilizing because these attitudes block the establishment of a precedent and withhold the discursive authority that comes with endorsement, invariably leaving room for counterinterpretation of the actor's sayings or doings.

Compromised support can be seen in the case of SD-NSA in the attitude adopted by the UN Secretary General (SG) in the aftermath of 9/11 and in the following years. Kofi Annan, SG at the time, condemned on many occasions and in different fora the terrorist attacks against the US, usually commending the international community for acting with determination and cohesion through the UNSC.[39] In these documents he usually did not address the legal dimension of the claim under which the coalition of Western countries was intervening in Afghanistan—SD-NSA—nor could one reasonably have expected him to do so.[40] Yet, it is apparent that he supported the claim. In one of these speeches, for example, he spoke in an approving tone of the solidarity with the US shown by many governments in cooperating in the UNSC and acknowledging its right to self-defence under Article 51 of the UN Charter.[41] This cannot but be read as a timid endorsement of SD-NSA. More telling than these speeches, though, is the landmark report of 2004 *A More Secure*

[39] See eg UN Secretary General, 'Address to the General Assembly on Terrorism (Press Release G/SM/7977-GA/9920) (1/10/2001)'; 'Address to the General Assembly (23/09/2003)'; UN Secretary General, 'Address to the Los Angeles World Affairs Council (3/12/2003)'.

[40] Jayantha Dhanapala, 'The United Nations' Response to 9/11' (2005) 17 Terrorism and Political Violence 17, 20, 21.

[41] UN Secretary General, 'Address to the Los Angeles World Affairs Council' (n 38).

World: Our Shared Responsibility, commissioned by the SG to a panel of sixteen prominent former diplomats and experts.[42] The report allocated a section to the issue of preventive self-defence, ultimately rejecting it in concluding with the categorical statement: 'we do not favour the rewriting or reinterpretation of Article 51.'[43] This view reflected a strong personal stance taken by the SG—repeated in many other documents—against the legal grounds invoked by the US for its intervention in Iraq. In passing, however, the section tacitly endorsed SD-NSA in that it spoke of terrorism as a ground that would not justify a claim of preventive self-defence but hinting that an *imminent* terrorist threat would indeed trigger Article 51.[44] In other words, the SG's panel had a problem with invoking self-defence against the possibility of terrorist attacks in the future, but not per se with invoking self-defence against terrorist groups. It seems valid to assume that, in a time and context in which SD-NSA was a hot topic, the panel would have expressed its doubts about it, had it had any, just as it did with preventive self-defence. But it did not. At the same time, however, the panel refrained from making any open endorsement of SD-NSA, something that could seem appropriate in a report discussing the legal meaning of Article 51. One can only venture to suggest that this was because doing so would have provoked discomfort in some diplomatic circles. In any case, what is certain is that this dance of silence around SD-NSA did more to destabilize it than to concretize it.

A second example of clear compromised support regarding SD-NSA is provided by the Institut de droit international's resolution 'Present Problems of the Use of Armed Force in International Law' of 2007. In addressing the topic of SD-NSA, the resolution recognized in its tenth paragraph that, '[i]n the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle'.[45] The relative clarity of this statement, though, is eroded by its subparagraphs, which only mention two rather uncontroversial scenarios as 'preliminary responses to the complex problems arising' out of the topic: the case where an attack by a non-state actor is instructed, directed, or controlled by a state; and the case where an attack by a non-state actor is 'launched from an area beyond the jurisdiction of any State'.[46] The fact that the resolution does not address the most discussed and relevant hypothesis, namely the launching of an attack by a non-state actor without the sponsorship of a state but from within the territory of a state, certainly shows that the Institut attempted in good faith to address the topic but could not manage to get its members to agree on anything useful. This did more to destabilize and fuel doubts than to bring SD-NSA forward.

[42] For the composition of the Panel, see <www.un.org/en/events/pastevents/a_more_secure_world.shtml> accessed 16 October 2022.

[43] UN Secretary General, 'A More Secured World: Our Shared Responsibility, Report of the Secretary-General's High Level Panel on Threats, Challenges and Change' (2004) A/59/565, para 192.

[44] ibid 188–94.

[45] Institut de droit international (IDI), 'Present Problems of the Use of Armed Force in International Law (A. Self-Defence)' (2007) Session de Santiago, para 10.

[46] ibid.

Compromised support, therefore, is in a way the other side of the coin of selective protest. Whereas selective protest has the purpose of destabilizing a norm by objecting to the normative developments surrounding the main norm, compromised support destabilizes it by timidly supporting the main norm but doing it in an ambiguous way. The common element is silence. What hinders the main norm here is thus leaving it unaddressed and disavowed; missing the chance of openly discussing it and withholding any authoritative endorsement that could contribute to its consolidation. The result is, of course, instability: the perpetuation of a situation in which arguing for and against a norm are both legally plausible.

3.4 Cryptic Precedent

A last possible form of norm-destabilizing strategy is the use of cryptic precedent. A cryptic precedent consists of a bald authoritative statement—usually by an international court—seemingly disfavouring a given normative development, but without fully engaging with it, basing it on a very narrow factual base, or leaving its implications for other cases unclear. Cryptic precedents usually come in the form of *obiter dicta* or are presented as such, and they are formulated in a downplaying and simplifying tone. Through them, courts or other authorities actively refrain from endorsing the normative development in question, but also seek to evade dealing head-on with any of the hurdles implicated by this position. This can be in order to dodge the potential compromising implications it could have on the institution, or because internal disagreements among the bench or the members of the decision-making body block less ambiguous formulations. Yet, cryptic precedents have a fateful potential on a given normative development. They tend to become consequential ammunition for legal argument and they commit the body issuing it and other bodies to follow the precedent in future cases. Therefore, cryptic precedents can have long-lasting consequences in destabilizing an international legal rule.

The case of SD-NSA is paradigmatic of cryptic precedent. The International Court of Justice (ICJ), in three decisions spanning over two decades, has played a remarkably reactionary and destabilizing role vis-à-vis SD-NSA, sometimes willingly and sometimes unwillingly. The first crucial cryptic precedent—unwilling this time—was the *Nicaragua* case of 1986. In it, the Court held that the application of self-defence under the Charter and customary international law was not limited to cases of 'action by regular [state] armed forces across an international border', but that it also applied to cases where an attack by a non-state armed band would be somehow attributable to a state under the rules of state responsibility.[47] The ICJ here did nothing more than endorse the doctrine of indirect

[47] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America). Merits, Judgment. ICJ Reports 1986, p 14, para* [195].

aggression—something that was not particularly ground-breaking at the time. It did not, at any rate, pronounce itself on the hypothesis of SD-NSA—an issue that was not on the table and which arguably no one involved in the proceedings had in mind. Yet, this precedent became after several years—especially after 9/11—one of the main argumentative bulwarks of the opposition to SD-NSA, who chose to read the judgment as *requiring* that an armed attack be attributable to a state in order for self-defence to become available.[48]

This understanding of the *Nicaragua* decision was then confirmed, cryptically, in two cases after the critical juncture of 2001—though unrelated to 9/11. The first of these was the *Wall* Advisory Opinion of 2004. In it, the Court discarded, with an appalling lack of discussion, Israel's argument that the construction of a wall in occupied territories had been done under the legal entitlement of Article 51. Rather than discussing the legal absurdity of a permanent wall in occupied territory as a means of self-defence, as Israel contended, the Court determined, in four arid lines, that Article 51 was not relevant since it only 'recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State', and 'Israel [had not claimed] that the attacks against it [were] imputable to a foreign State'.[49] Then, the third decision relevant for SD-NSA, only one year later, was *Armed Activities (DRC v Uganda)*. Here, again, the ICJ assessed Uganda's claim of self-defence against the Lord Resistance Army (LRA) in Congolese territory under the logic of attributability. As if self-evident—and in line with *Nicaragua* and the *Wall* Advisory Opinion—this meant for the Court that self-defence was unavailable for Uganda because the LRA's acts were not attributable to the other state involved— namely the DRC. This notwithstanding, a paragraph later, in a seldom-matched display of cryptic reasoning, the Court rejected explicitly the need to pronounce itself on the matter of SD-NSA, as if it had not precisely just ruled against it.[50]

The reasons why the Court decided in this way are uncertain and should not be over-interpreted. Both the *Wall* Advisory Opinion and *Armed Activities* were adopted by highly divided benches on the point of the interpretation of Article 51, which makes it likely that the arcane outcomes were the product of compromises among the judges, rather than well-thought elements of case theory. What is certain, however, is that the three cases did much to convince a good portion of the international legal community that SD-NSA was a groundless legal subterfuge, rather than a widely followed and virtually uncontested practice among states. These precedents therefore became crucial elements in any argument against SD-NSA in

[48] See eg Corten (n 25) 188, 191.

[49] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p 136, para 139.

[50] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), Judgment, ICJ Reports 2005, p 168, paras 146, 147..

the following years.[51] There is good reason to think that, had the Court decided the *Wall* Advisory Opinion differently, not conceding to Israel's extravagant argument, but at least taking seriously both the old and more recent state practice on Article 51, the trajectory of SD-NSA would have been different. As it happened, the ICJ's precedents destabilized the rule enormously by making it a taboo in certain circles; a claim that only apologists of interventionism could make.

It is therefore fundamental to this strategy that the reasoning of the precedent being created is obscure. Not putting the facts out on the open and not discussing thoroughly the legal merits of a claim can be decisive because it conceals any disagreement, portraying the issue as straightforward when it actually is not. As a precedent, therefore, a cryptic statement substitutes the burden of argument: instead of having to argue why a legal claim is invalid on its own merits, an actor has only to point to the authoritative precedent barring the argument. In the case of SD-NSA this is clear. After the ICJ's intervention, arguing against SD-NSA became a matter of citing *Nicaragua*, the *Wall* Advisory Opinion, or *Armed Activities*, instead of, for instance, explaining the lack of legal value of the whole 9/11 practice—a much more cumbersome exercise to pull off. Cryptic precedent, therefore, has a huge norm-destabilizing potential.

4. Norm-destabilization in International Politics

To what extent are the four strategies just described generalized patterns of behaviour in international lawmaking or, conversely, peculiar to SD-NSA? In the case in focus, it was crucial that both supporters and opponents of SD-NSA were in tacit agreement that the absence of a clear precedent was desirable under the circumstances. On the one hand, this might have been related to the high salience of the matter, which made the creation of a precedent hugely consequential—more likely to constrain states eventually than to yield any tangible benefit. On the other hand, the individual nature of the legal entitlement implied by self-defence made it possible for states to act unilaterally, without there being a practical need for external endorsement of their legal basis. Hence, overall, it seems that a stable, unambiguous rule of SD-NSA was too difficult to accomplish, too compromising, and in fact unnecessary. But do all of these conditions have to be met in order for actors to pursue norm-destabilization strategies in international law? The answer is a straightforward no. Three examples concerning very contrasting subfields of international law are used here to put the observations regarding SD-NSA into perspective.

[51] See eg the argument of the Brazilian representative: UNSC, '8262nd Meeting (S/PV.8262)' (n 23) 44.

The first one, from international trade law, concerns the bargaining that took place between developing and developed states around the Generalized System of Preferences in the GATT regime during the 1960s and 1970s. During this time, developing states found themselves empowered by their growing numbers and by the threat posed to GATT by the creation of the UN Conference on Trade and Development under the sponsorship of the Eastern bloc.[52] Emboldened by this, they challenged the foundational principle of reciprocity and demanded, as a bloc, the adoption within GATT of an exception to the Most-Favoured-Nation (MFN) rule allowing them to have privileged access to the markets of developed countries. The outcome was the Enabling Clause, adopted in 1979 by the GATT contracting parties, which authorized developed countries to grant preferential treatment to developing countries if they so wished.[53] The rule, however, was a far cry from the stable, unambiguous rule sought by the group of developing states. It merely enabled developed countries to graciously adopt preferential measures, but it did not at any rate establish clear criteria under which this should be done, nor any binding obligation to do so.[54] Instability here—achieved through multilateral ambiguity—appears therefore as half-hearted concession by the powerful, meant to appease and preserve the status quo.

The second example concerns the effects doctrine under the laws of jurisdiction in general international law. Here the story began with the US Court of Appeals for the Second Circuit ruling in 1945 that it was legitimate for US courts to exercise antitrust jurisdiction in cases where the relevant conduct had taken place abroad and had been undertaken only by foreigners, as long as it had had a negative effect in US markets.[55] This inaugurated unilaterally an exception to the long-standing principle of territoriality in jurisdiction.[56] During the following fifty years, US judges and policymakers continued to implement the effects doctrine in antitrust matters, despite the loud protests of the country's Western allies.[57] No effort was undertaken by the US during this time to bring clarity to the rule by discussing it in a multilateral setting or by seeking the endorsement of international institutions. Moreover, when the tides of global economy eased the confrontation in the 1990s, and most countries adopted the effects doctrine through legislation, it was precisely the US who sought to keep the topic from being addressed in fora such as the

[52] Robert E Hudec, *Developing Countries in the GATT Legal System* (CUP 2010) 39, 51.

[53] Mitsuo Matsushita (ed), *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015) 699.

[54] George A Bermann and Petros C Mavroidis, 'Introduction' in George A Bermann and Petros C Mavroidis (eds), *WTO Law and Developing Countries* (CUP 2007) 2.

[55] *United States v Aluminum Co of America*, US Court of Appeals for the Second Circuit, 148 F2d 416 (2d Cir 1945) [444]; Maher M Dabbah, *International and Comparative Competition Law* (CUP 2010) 434.

[56] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 49.

[57] AV Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution' (1985) 34 International and Comparative Law Quarterly 724, 727.

World Trade Organization.[58] Thus the effects doctrine has been, for over seventy years, deliberately kept in the shadowy realm of unilateral state action, despite its ever-broadening endorsement. Instability, it appears, has been the product of the self-sufficiency of the powerful state making use of the effects doctrine.

The third and last example regards the rules for continental shelf-delimitation. Towards the end of the 1950s, the equidistance principle seemed to be the leading emerging rule for continental-shelf delimitation—especially since its codification in the 1958 Geneva Convention on the Continental Shelf. At face value, this was a stable norm inasmuch as it determined clearly how delimitation ought to be carried out. Yet, several countries, disfavoured by the equidistance principle in view of the configuration of their littoral, argued that international law demanded not a 'one size fits all' method, but rather the general principle that a boundary ought to be 'fair and equitable'—a rather instable rule.[59] The matter eventually reached the ICJ, which decided, in the *North Sea Continental Shelf Cases* of 1969, that the equidistance principle had not yet crystallized into customary international law, and that custom required delimitation to be undertaken 'in accordance with equitable principles, and taking account of all the relevant circumstances'—a precedent that is in hindsight remarkably cryptical.[60] This left the law of continental shelf-delimitation extremely instable, as reflected in the outcome of the UN Convention on the Law of the Sea in 1982. Only much latter would the *North Sea* precedent be adjusted, the competing rules merged, and the matter restabilized to a certain extent.[61]

These instances show how norm-instability can be present in vastly different contexts. In the case of the Enabling Clause in GATT, there were radically opposed interests regarding the establishment of an unambiguous norm: the less powerful states needed a clear rule, while the most powerful saw it as harmful. The unstable normative outcome thus came as a veiled imposition from the latter through the means of multilateral ambiguity—seeking to appear as a substantial concession but preserving the asymmetric nature of the system in force. The effects doctrine, in contrast, has to this day remained unstable because its main proponent—the US—has never seen a meaningful added value in seeking external endorsement. As in SD-NSA, the individual-entitlement nature of the rule in question made this possible. The opponents of the effects doctrine, who suffered harm from this instability over many decades, could not do much about it. Thus, instability was for the most part an individual game of the US. Lastly, in the case of the rules for

[58] Henning Klodt, 'Conflicts and Conflict Resolution in International Anti-Trust: Do We Need International Competition Rules?' (2001) 24 The World Economy 877, 877, 886; Matsushita (n 52) 819.

[59] Malcolm Evans, 'Maritime Boundary Delimitation' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 257.

[60] *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, p 3, para [101]..

[61] Ezgi Yildiz and Umut Yüksel, 'Understanding the Limitations of Behavioralism: Lessons from the Field of Maritime Delimitation' (2022) 23 German Law Journal 413. <https://pathsofinternationallaw.files.wordpress.com/2020/05/working-paper-23.pdf> accessed 16 October 2022.

continental-shelf delimitation, instability was the result of a successful strategy of cryptic precedent by the countries resisting the consolidation of the equidistance principle. Here, the authority of the *North Sea* judgment was the crucial stronghold of the minority against the majority, who relied on it to erode the solidity of the emerging equidistance rule. Instability was a means of keeping an undesired norm at bay and allowing a rival norm to emerge.

These instances show that destabilization strategies can be observed in contexts that are far less exceptional than the one seen in SD-NSA. What seems to be the common denominator is the incentive for most stakeholders in each case—or for the most powerful ones—to avoid the consolidation of a clear-cut, unambiguous rule. The value of instability, one might speculate, is that it preserves the freedom of action of the stakeholders involved. While stable rules leave little doubt as to what is prohibited, norm-instability maximizes the spectrum of possible courses of behaviour andpreserves an appearance of legality and—crucial in a discursive environment governed by the idea of the rule of law—legitimacy. Thus, in many contexts, preserving normative instability by avoiding the consolidation of an unfavourable rule will be a rational course of action to follow for actors in international law.

5. Conclusion

This chapter has given an overview of the phenomenon of norm-destabilization in international law. Focusing on the example of the case of SD-NSA, it has analysed four possible strategies of destabilization: multilateral ambiguity, selective protest, compromised support, and cryptic precedent. Although the case of SD-NSA seems exceptionally prone to normative instability, the chapter has also sought to take the issue into different legal contexts in order to show that strategies of norm-destabilization are not at all exceptional in international law. Norm-instability, it is suggested, will be pursued whenever actors in international law—for whatever reason—seek to preserve a wide margin of manoeuvre with regard to an issue in which a clearly constraining rule might be emerging. The added value of norm-destabilization, in contrast to bald opposition, is that it conducts the challenge within the boundaries of legal discourse and the rule of law, preserving for the opposing states the appearance of legitimacy, while at the same time eroding the stability of the norm in question.