



RESEARCH ARTICLE

The hidden contestation of norms: Decent work in the International Labour Organization and the United Nations

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Abstract

The question of whether global norms are experiencing a crisis allows for two concurrent answers. From a facticity perspective, certain global norms are in crisis, given their worldwide lack of implementation and effectiveness. From a validity perspective, however, a crisis is not obvious, as these norms are not openly contested discursively and institutionally. In order to explain the double diagnosis (crisis/no crisis), this article draws on international relations research on norm contestation and norm robustness. It proposes the concept of *hidden discursive contestation* and distinguishes it from three other key types of norm contestation: open discursive, open non-discursive and hidden non-discursive contestation. We identify four manifestations of hidden discursive contestation in: (1) the deflection of responsibility; (2) forestalling norm strengthening; (3) displaying norms as functional means to an end; and (4) downgrading or upgrading single norm elements. Our empirical focus is on the decent work norm, which demonstrates the double diagnosis. While it lacks facticity, it enjoys far-reaching verbal acceptance and high validity. Our qualitative analysis of discursive hidden contestation draws on two case studies: the International Labour Organization's compliance procedures, which monitor international labour standards, and the United Nations Treaty Process on a binding instrument for business and human rights. Although both fora have different context and policy cycles, they exhibit similar strategies of hidden discursive contestation.

Keywords: contestation; decent work; International Labour Organization (ILO); norms; robustness; United Nations

1. Introduction

Certain norms that have long been perceived as globally valid and strong have recently been characterized as in crisis. This diagnosis is fuelled by anti-global developments, including the rise of populist governments and authoritarian regimes and, as a consequence, a partial retreat from multilateral organisations (Hooghe, Lenz and Marks 2018; Börzel and Zürn 2021), but also by the application of double standards in global governance institutions (Zürn 2021). Against this background, postcolonial critics have

questioned the global character of these norms and depicted them as liberal (Epstein 2017; Acharya 2017).¹

A closer look at a number of these norms, however, demonstrates their continuing relevance and acknowledgement in international institutions, law and political discourse (Wiener 2008: 65–67). To varying degrees, these norms include human rights-related norms, anti-slavery norms, sovereignty and the absence of torture. They are global and legal norms in the sense that they are institutionalized in international regimes and international law – in binding treaties as hard law, or in legally non-binding international agreements as soft law.²

This article explores whether certain global norms are in crisis. This question permits two contradictory answers, both of which are rooted in international relations (IR) norms research. On the one hand, certain norms are in crisis, given widespread non-compliance and a lack of implementation. On the other hand, a crisis is not obvious when these norms are not openly contested. Rather, they remain a pivotal part of global governance regimes, international institutions, international and domestic law and soft law.

These two answers represent a contradiction between two dimensions that IR norms research describes as essential to a norm's robustness (Deitelhoff and Zimmermann 2019): *validity* (its institutional and discursive acceptance) and *facticity* (its compliance and implementation). If both dimensions of a norm are well established, its robustness is high (no crisis); if both dimensions are significantly less evident, its robustness is low (crisis). But what if validity is high and facticity is low? In other words, how can we explain the 'double diagnosis' of a norm being in crisis regarding its facticity, but not in relation to its validity? For instance, governance actors worldwide embrace the norm of abolishing slavery, and binding international law and domestic law in all states formally and legally prohibit the practice. However, more than 40 million people are estimated to be enslaved around the world (Mende and Drubel 2020).

We address this double diagnosis by distinguishing between different forms of contestation. We introduce a matrix that categorizes four key types of norm contestation along the lines of open/hidden and discursive/non-discursive contestation: open discursive; open non-discursive; hidden non-discursive; and hidden discursive contestation. Discursive can be distinguished from non-discursive (e.g. behavioural) practices both conceptually and empirically, describing written or oral speech acts as forms of deliberation. Hidden as opposed to open (i.e. explicit) contestation refers to covert, implicit or disguised utterances. This article elaborates the hitherto less studied concept of the fourth key type – hidden discursive contestation.

Hidden discursive contestation denotes the explicit endorsement or invocation of a norm that implicitly challenges its meanings, reasons or designated aims. We argue that this key type of contestation provides an explanation for why a norm can be simultaneously in crisis and not in crisis. We identify and discuss four manifestations of hidden

¹These critics engender discussions of global inequalities and a liberal bias in norms research that juxtaposes presumably 'good' Western and 'bad' non-Western norms, yet it also raises the question of the extent to which depicting certain norms as liberal exacerbates global inequalities by inadvertently reinforcing a dichotomy between Western and non-Western norms instead of searching for overlaps and commonalities, complexity, internal contradiction and ambiguity (Bob 2019; Havercroft et al. 2020; Mende 2021). For this reason, and because of their international validity, we speak about global rather than liberal norms, without neglecting their potential bias.

²Cf. Abbott et al. (2000) on different degrees of legalization, which allows us to extend the term 'legal norms' to include norms enshrined in soft law.

discursive contestation: it occurs in cases of (1) deflection of responsibility; (2) forestalling norm strengthening; (3) displaying norms as functional means to an end; and (4) upgrading or downgrading single norm elements. The occurrence of hidden discursive contestation depends on the context and on how the explicit endorsement and implicit challenge of a norm are interconnected: an actor claiming to respect a norm that has not been implemented is not a case of hidden discursive contestation *per se*. It would be, however, if concrete measures to strengthen the norm were on the table, and the actor refrained from engaging with these measures *by* claiming to respect the norm.

Empirically, we base our discussion of hidden discursive contestation and its manifestations on the decent work norm, which vividly represents the double diagnosis of crisis/no crisis. On the one hand, it enjoys a high degree of validity. It is enshrined in internationally acknowledged soft law instruments and some aspects of the norm are part of legally binding instruments, both domestically and internationally. The decent work norm is thus a textbook example of a global legal norm that is not generally considered a Western norm. Its institutional and discursive acceptance is most visible in the International Labour Organization's (ILO) labour rights and the United Nations (UN) human rights regime, where it is used as a point of reference and included in a number of soft and hard law instruments. Its prominent place as a global norm is also expressed in the Sustainable Development Goals (SDGs), which list decent work as one of seventeen goals that all UN member states adopted as a 'universal agenda' to guide economic, social and environmental development (United Nations General Assembly 2015: Preamble). On the other hand, the decent work norm lacks facticity in major parts of the global economy and global politics, including severe cases of non-compliance (Drubel 2022), which suggests that the norm's weak facticity is not only due to a lack of capacities. This high validity and low facticity serve as our starting points for researching the decent work norm in the ILO labour rights (concerned with norm compliance) and UN human rights (dedicated to building hard law) regimes: the International Labour Organization's compliance procedures and the UN Treaty Process.

In the following, we introduce norms research perspectives on contestation and norm robustness, leading to our four-field matrix of contestation types (Section II). We employ this matrix to elaborate our concept of hidden discursive contestation, including its value-added for norms research, its required methodology and its four manifestations (Section III). Section IV empirically assesses the double diagnosis of the decent work norm; it introduces the decent work norm, our two case studies, presents the results of our extended qualitative content analysis and discusses the four manifestations of hidden discursive contestation in detail. The conclusion addresses further requirements for studying hidden discursive contestation.

II. Norm robustness and norm contestation

IR constructivist norms research offers two main concepts that are helpful for discussing the double diagnosis of a crisis/no crisis of global norms: norm robustness and the contestation of norms. Our concept of hidden discursive contestation draws on both (partially overlapping) strands. We take the relevance of facticity for studying norms into account, as suggested by the robustness literature, and conceptualize norm-related deliberation with a four-field matrix of contestation types, focusing on hidden discursive contestation.

Norm robustness: Validity and facticity

Norms are defined primarily by their acknowledgement as ideally and legitimately guiding behaviour and practices (i.e. their validity). They define a state as something with which reality should be brought into line. This may differ from empirically observed conduct (i.e. their facticity, cf. Deitelhoff and Zimmermann 2020, 53). The norms robustness literature combines the facticity and validity of a norm (Deitelhoff and Zimmermann 2019; Price 2006). It characterizes a norm as robust if both facticity and validity are high, and not robust if neither is. Legal perspectives add to that by considering norms as meeting the requirements of legality if they are robust – that is, if validity and facticity are high (Brunnée and Toope 2019). Accordingly, the norms research literature discusses the point at which a norm's inadequate compliance and implementation (i.e. its lacking facticity) undermine its validity (Deitelhoff and Zimmermann 2019). Deitelhoff and Zimmermann (2019) describe a continuum between strong and weak forms of norm robustness, which refrains from fixed tipping points and reveals ambiguous effects of certain indicators for a norm's robustness. Nonetheless, their approach focuses on parallel trends in the facticity and validity of a norm – that is, both rising or both decreasing.

By contrast, we assess cases in which a norm's validity (for the time being) remains high despite its low facticity. This also resonates with the perspective that “norms are counterfactually valid, and do not cease to exist simply because non-compliance occurs” (Panke and Petersohn 2012: 720).³ Thus the far-reaching lack of, for example, human rights implementation does not necessarily result in a rejection and weakening of human rights norms. It may instead engender a critique of their violation that takes the norm (its validity as ideally guiding behaviour) as a yardstick for critique. Nevertheless, at some point the realization that is absent might affect the norm's perception as valid, appropriate and legitimate, which is why we draw on the robustness literature to take a norm's facticity into account as well.

In addition, a norm's validity is based on different forms of justification. It can be considered valid for conventional, functional or ethical reasons (cf. von Wright's 1979 taxonomy of normative reasons). Conventional reasons are based on ideas about what has always been there, while functional and ethical reasons consider a norm as a means to an end or an end in itself, respectively.⁴ Norm justifications are part of a norm's validity; their strength increases from convention to ethics.

The justification literature also demonstrates how validity and facticity are both relevant for norm robustness. Norms based on conventions – having a high descriptive and maybe cultural validity (cf. Wiener 2014) can be deeply enshrined in social practice and therefore be very robust. They are accepted without question and enjoy a high degree of facticity. Their robustness lies in processes of normalization (cf. Huelss 2020), which may even exist independently of deliberative or democratic law-making processes. At the same time, if they are only based on convention, their (normative) validity is poorly justified. The norm's robustness against justificatory contestation (Deitelhoff and Zimmermann 2019) is then rather low. Added together, a norm is not invalid just because no one adheres to it, and it is not well justified simply because it is part of social practice.

³A number of other factors – such as whether non-compliance is sanctioned, whether non-compliance is an exception rather than the rule, or a norm's specificity (Panke and Petersohn 2012: 721) – explain how a norm can remain valid despite a realization gap. For an overview, cf. Wunderlich (2013: 39).

⁴Forst's (2015: 40–42) concept of a 'threefold normativity' provides a similar differentiation of justifications.

In sum, we draw on two key elements of the robustness literature and connect them with a norm's justification. First, taking (the lack of) facticity into account without short-circuiting a low validity allows us to address the double diagnosis of crisis/no crisis of global norms. This differs from norm understandings that take only one of the two into account – usually the validity of a norm. The second element is that a key indicator determining a norm's robustness is the type of contestation (Brunnée and Toope 2019; Deitelhoff and Zimmermann 2019: 14; Sandholtz 2019). This draws attention to the contestation-focused strand of norms research.

Norm contestation: Types of contestation

A pivotal strand in norms research has shifted the focus from a 'logic of appropriateness' (March and Olsen 2009) to a 'logic of contestedness' (Wiener and Puetter 2009: 6) which maintains that norms are contested even after they have been institutionalized (Wiener 2008). This logic differs from linear norm understandings, which assume a point of internalization once a norm has been established, and regard any contestation thereafter as a sign of weakening. Contestation approaches view contestation as inherent to norms because it fuels deliberations that constitute the norm's dynamic and ever-evolving meanings (Wiener 2014). They thus consider norms as continuous 'works-in-progress, rather than as finished products' (Krook and True 2012: 104). The effects of contestation on norm robustness are not determined and can go either way (Deitelhoff and Zimmermann 2020; Sandholtz 2019).

To assess how contestation influences norm robustness, norms research has begun to distinguish between different types of contestation. We suggest that these types can be conceptually integrated into a four-field matrix that strengthens their combined explanatory power (Table 1). All types of contestation, we argue, entail either discursive or non-discursive contestation (i.e. written and oral or other forms of practice, such as behaviour) and represent either open (explicit) or hidden (covert, implicit or disguised) types of contestation. As with all differentiations between types of contestation, our matrix

Table 1. Matrix of contestation types

	Discursive contestation	Non-discursive contestation
Open contestation	1. Open discursive contestation <ul style="list-style-type: none"> • Most studied • Explicit challenge • Validity contestation, applicatory contestation, procedural contestation, substantial contestation 	2. Open non-discursive contestation <ul style="list-style-type: none"> • Partially studied • Sabotage, dissent, inaction, lack of compliance • Behavioural contestation, procedural contestation
Hidden contestation	4. Hidden discursive contestation <ul style="list-style-type: none"> • Only marginally studied • Disguised, silent, implicit • Neglect, strategic contestation, backdoor contestation 	3. Hidden non-discursive contestation <ul style="list-style-type: none"> • Only recently studied • Disguised, silent, implicit • Covert validity contestation

represents an analytical and ideal-typical distinction. The four types are not mutually exclusive, can occur in parallel and exhibit strong overlaps.

The first type, *open discursive contestation*, is the one that is most often discussed in the norms research literature. It refers to deliberations and public debates in which a norm's meaning, validity or application is disputed (Wolff and Zimmermann 2016: 518), or what Wiener (2014: 2) refers to as explicit contestation. Deitelhoff and Zimmermann (2020) introduce two basic forms of open discursive contestation that are closely connected to norm robustness. *Validity contestation* targets a norm's general and context-independent validity and appropriateness – in other words, its robustness. *Applicatory contestation*, by contrast, addresses the specific form and appropriateness of a norm in a certain context. This form only concerns the application of a norm and not its substance, and thus does not usually undermine its robustness. A number of further distinctions between forms of norm contestation fall under this umbrella, as long as these are taken out discursively. For instance, Welsh (2013) distinguishes between procedural contestation, which addresses the forum in which a norm is discussed, and substantial contestation, which relates to a norm's content.⁵

The second type is *open non-discursive contestation*. Seminally, Stimmer and Wisken (2019) introduce the concept of *behavioural contestation*, and distinguish it from *discursive contestation*. They describe behavioural contestation as occurring 'when the actions of relevant actors imply the existence of conflicting understandings of the meaning and/or (relative) importance of a norm' (Stimmer and Wisken 2019: 521). This includes acts of sabotage and dissent or inaction. Moreover, Welsh's (2013) procedural contestation might take place in the form of behaviour rather than discourse. Most visibly, open non-discursive contestation entails a lack of compliance and implementation by norm-addressees (Stimmer and Wisken 2019: 521f). This links our four-field matrix to the concept of norm robustness. The facticity dimension of norm robustness represents a form of open non-discursive contestation.

The third type entails *hidden non-discursive contestation*. This emerging field of research mainly draws on practice theory. According to this approach, norms can be contested through behaviour, practices (other than discourse) and artefacts that silently change a norm (Bode 2022). While we categorize plain non-compliance as open non-discursive contestation, there are non-discursive types of not following a norm that are, for example, hidden behind technicalities of legal compliance (Búzás 2018). When legal norms do not sufficiently protect the normative objectives, actors can claim to be legally compliant and still violate a norm. Critics have framed this strategy as 'ticking the box' (Quijano and López 2021). Schmidt and Sikkink (2019: 106) use the example of how the United States shielded its behavioural contestation of the torture ban to describe 'covert validity contestation'. The United States brought forward legal arguments 'that, in effect, justified the derogation of a non-derogable norm', while the torture norm was secretly being violated at US detention facilities overseas or in undisclosed engagement in other states' territories (Schmidt and Sikkink 2019: 106). Silence, to take another example, represents a hidden form of contestation that may be regarded as non-discursive when the denied discursive utterance is perceived as behavioural practice.

⁵The compliance literature differentiates between procedural and substantial treaty obligations (Jacobson and Weiss 2000: 4). While the former includes reporting duties and compliance procedures, the latter refers to behavioural adaptations in line with treaty objectives.

The fourth type of contestation entails *hidden discursive contestation*. It comprises forms of contestation that are not acted out in practices and behaviour, and do not openly address or challenge a norm's meanings, validity or applications. Rather, this type of contestation refers to discursive acts that do not openly contest a norm, and that may even discursively claim to support it. Yet they challenge that norm between the lines, implicitly or secretly. Hidden discursive contestation thus involves explicitly endorsing a norm while implicitly challenging its meanings, reasons or designated aims by means other than the well-studied forms of open applicatory or validity contestation.

The norms research literature sometimes touches on such other forms of contestation. For example, Wiener (2014: 49) briefly mentions negation, neglect and disregard as modes of implicit contestation. In our matrix, however, verbal negation is a form of open discursive contestation, whereas the social practice of disregard can be described as open or hidden non-discursive contestation. Depending on its form, neglect can provide an example of hidden discursive contestation if further explored and theorized accordingly. Other research alludes to strategic or backdoor contestation, illustrating cases in which contestation seeks to undermine a norm's validity while pretending to address its application or related concepts (Deitelhoff and Zimmermann 2020: 57; Panke and Petersohn 2012: 723f). However, these approaches do not further explore these contestations from a conceptual perspective. We therefore draw on these mentions and advance norms research by further conceptualizing hidden discursive contestation not as a mere accident or add-on, but as one of four key types of norm contestation.

III. Hidden discursive contestation

In this section, we introduce the concept of hidden discursive contestation, focusing on its explanatory power as well as its methodological demands, because implicit meanings are too intricate to be revealed empirically. We then identify four manifestations of the concept.

Explanatory power

The concept of hidden discursive contestation can explain what we call the double diagnosis of a norm's crisis/no crisis. The 'no crisis' part of this diagnosis is based on the observation that certain global norms are not subject to open discursive contestation. This relates to the validity of norms (demonstrated by how they appear in treaties, institutions and deliberations) as well as references to the norm that encourage action to strengthen it and/or to sanction its violation (Deitelhoff and Zimmermann 2020: 53–54). The 'crisis' element of the double diagnosis considers what the robustness literature calls facticity, and what can be described as open non-discursive contestation. In its plainest form, this involves a lack of compliance and implementation. The distinction between behaviour and discourse has also been fruitfully applied to the study of different grades of compliance, as shown by Zürn's (2005: 9) differentiation. It yields explanations of the severity of non-compliant behaviour, such as a 'compliance crisis'.⁶

⁶Zürn (2005: 9) differentiates between 'good compliance' (norm-compliant behaviour and discourse), 'recalcitrant compliance' (norm-compliant behaviour and applicatory contestation), 'beginning compliance' (change of behaviour after observations of non-compliance) and 'compliance crisis' (recurrent non-compliant behaviour and norm contestation after observations of non-compliance).

Note that other factors can also explain the lack of implementation and compliance, such as a lack of political will, free-riding and cheating (Axelrod and Keohane 1985; Stein 1994), missing capacities or resources to strengthen norms (Chayes and Handler Chayes 1993), ambiguous or low-threshold rule formulations and legalization, or a norm's lack of legitimacy (Hart 2012; Abbott et al. 2000).⁷ Focusing on norms research, we seek to explain the double diagnosis (no crisis/crisis) at the discursive level. Hence we investigate the forms of hidden discursive contestation rather than the conditions that increase or decrease the decent work norm's robustness.

In sum, the concept of hidden discursive contestation provides the missing link between the 'crisis' and 'no-crisis' diagnoses of certain global norms and explains the concurrence of affirmative references and potentially norm-weakening (but hidden) contestations of a norm. We therefore investigate how contestatory discursive references to a norm differ from the types of contestation discussed above in order to assess how they may challenge a norm's robustness.

Methodological demands

It is methodologically demanding to trace something that is hidden in discourse. This applies even more to contexts marked by diplomatic demeanour and language. Investigating hidden discursive contestation therefore requires qualitative interpretive analysis that can inductively detect and interpret meanings, ideas and the ways these construct reality, as well as latent meanings, gaps and tacit knowledge. At the same time, especially when dealing with large amounts of data – as is often the case with deliberations in the United Nations, the International Labour Organization or other international organisations – we need a method that allows us to deductively sort the data, identify patterns and establish relationships between concepts. A more recent development in IR research accordingly seeks to combine interpretive and explanatory approaches:

Certainly the terms are not interchangeable, but in practice there is considerable overlap. Those who say they explain behaviour also interpret meaning, and those who focus on understanding language also explain action to some degree (Klotz and Lynch 2007: 15; cf. Klotz 2009: 1; Wight 2009: 29f; Yanow and Schwartz-Shea 2006; and much earlier, Carlsnaes 1992). We contend that such integrative approaches are best suited to detecting forms of hidden discursive contestation.

We therefore use the integrative approach of an extended qualitative content analysis (Mende 2022) that combines elements of both qualitative content analysis (Schreier 2012) and grounded theory (Strauss and Corbin 1998). This approach captures both the explicit and implicit elements of hidden discursive contestation. The explicit norm invocations and references are captured by classifying the data, identifying variables, and developing categories and subcategories. The implicit elements can be addressed by further dealing with the codes and applying axial coding and theoretical sampling, thereby using the theory-building power of grounded theory that allowed us to inductively develop the four manifestations of hidden discursive contestation.

⁷For an overview of sources of (non-)compliance see, for example, Zürn (2005); Breitmeier, Young and Zürn (2006). For an overview of the compliance and effectiveness literature, see Mitchell (2010); Raustiala (2000).

Manifestations of hidden discursive contestation

Based on our extended qualitative content analysis of norm-related discourse, we have identified four manifestations of hidden discursive contestation that we introduce here in their conceptual form. Section 3 will add the empirical flesh and contextual background to these by no means exhaustive manifestations. The empirical material will also show how context determines whether discursive contestation is hidden.

Deflection of responsibility

The realization of global norms rests, among other aspects, on ascribing responsibility for such realization. Hence, a norm's robustness depends on its ability to identify a subject of responsibility (the actor who is responsible for something) and an object of responsibility (that an actor is responsible for) (Hart 1948; Stahl 2006). We identify hidden discursive contestation, when responsibility is deflected in ways that lead to endless loopholes – for example, by holding non-actors beyond the confines of governance responsible. Then, seemingly affirmative references to a norm forestall the ascription of responsibility or undermine the normative claims against others. Such references either deprive the rights holders of their rights claims or render the addressees of these claims unavailable. They can have detrimental effects on the realization of the norm (Drubel 2021), not by questioning the norm's validity, but by undermining its facticity.

Forestalling norm strengthening

Deliberations may entail plenty of affirmative references to a norm, but also forestall activities that may contribute to its realization. Thus, we identify hidden discursive contestation, when references to a norm strive to appear as a confirmation of it *and* simultaneously imply or contend that no further action is needed to further strengthen it. The main strategy used in this manifestation is the claim that the norm is already being fulfilled. This differs from open forms of contestation. Indeed, it argues the opposite: that the norm is being explicitly invoked and addressed. However, the norm's validity is being asserted in order to undermine its facticity.

Displaying norms as functional means to an end

A norm's validity is based partly on whether it is justified as an ethical end in itself, or whether it is simply a functional means to an end. Sometimes actors refer to functional norm justifications in an attempt to improve a norm's recognition and hence norm compliance (cf. Ulbert 2005 on child labour as impediment towards economic development). The norm as an *end in itself* is then substituted by using the norm as a *means to an end*. While functional reasons can be inherent elements of a norm, their invocation is considered contestation if this weakens a norm's validity. Hidden discursive contestation diminishes more robust, ethical reasons for a norm's validity by invoking less robust functional reasons for its existence.

Downgrading or upgrading norm elements

Hidden discursive contestation occurs when references to one aspect of a norm undermine other parts of it. This includes the creation of causal relationships between norm components that allow for their hierarchization (Drubel 2022). It can foster the connection between whole norms or elements of norms and other norms. This can occur when upgraded elements of norms are particularly compatible with outside

norms. These interlinkages can either strengthen a norm's robustness (cf. Carpenter 2007; Kelley 2008) or lead to the subversion of specific norm components and initial aims (Shepherd 2006).

Prior norms research has addressed some of these dimensions. What makes our approach novel is not so much the question of whether certain forms of contestation have been discussed elsewhere; rather, we aim to advance international relations norms research by conceptualizing these forms of contestation as one of the four key types – namely as hidden discursive contestation. In the remainder of this article, we elaborate our conceptual approach with our empirical findings on the decent work norm.

IV. The decent work norm in context

Our conceptual discussion of hidden discursive contestation is built on our empirical study of the decent work norm. Given its high validity and low facticity, this norm serves as a hard case for our double diagnosis, as shown below. This double diagnosis serves as our starting point, which we aim to explain by applying the concept of hidden discursive contestation. This section presents our empirical findings. After outlining the relevance of the decent work norm for studying hidden discursive contestation, we introduce our case studies and methodological approach and illustrate the four manifestations of hidden discursive contestation that we traced in the deliberations.

The double diagnosis of the decent work norm

The decent work norm strongly demonstrates the double diagnosis of crisis (low facticity) and no crisis (high validity). Its high validity is reflected in its codification in international treaties, agreements and initiatives. The International Labour Organization's labour law regime and the United Nations' human rights regime build the most important legal frameworks for the delineation of decent work and its substance. Since 1919, the International Labour Organization has closely linked the decent work norm to questions of employment creation (ILO 1944, Art. III; Drubel 2021). The International Labour Organization defines decent work as 'intrinsically important to people – because it provides a sense of identity and a means to participate in society with dignity' (Frey and MacNaughton 2016b: 198).

Decent work gained prominence through the International Labour Organization's Decent Work Agenda (DWA), which rests on four strategic pillars or goals: (1) rights at work; (2) employment creation; (3) social protection; and (4) social dialogue (ILO 1999, 2008). These pillars rest on several so-called fundamental, governance and technical conventions that are legally binding for ratifying states (see NORMLEX database). The first pillar comprises core labour standards (ILO 1998): the right to freedom of association and collective bargaining; the prohibition of forced labour and (the worst forms of) child labour; and non-discrimination.⁸

Decent work, including full employment, also enjoys high validity under international human rights law. The UN human rights regime serves as an ineluctable normative, political and legal reference frame for global politics (Herdegen 2018, 330–32; Mende

⁸Cf. ILO (1998: 2) on core labour standards as defined in the corresponding fundamental Conventions C87, C98, C29, C105, C138, C182, C111, C100. Fundamental Conventions are binding for all ILO member states; however, different compliance procedures apply depending on the ratification status.

2021).⁹ For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR 1976) codifies social human rights that underpin or equate to the International Labour Organization's decent work norm (see Art. 2; 6–10 ICESCR). Governments are obliged to realize decent work at all times, including during economic recessions (Frey and MacNaughton 2016b, 192). Decent work is considered a normative priority globally and within the UN system, and the norm's inclusion in the SDGs indicates this prominence. In sum, it is justified through a human rights lens and enjoys high validity on ethical grounds. While functional considerations and the link between economic growth, employment and decent work also play a role (Frey and MacNaughton 2016b: 192), ethical considerations are just as relevant (cf. Drubel 2022).

At the same time, and in contradiction to the norm's increased prominence, it suffers from a gross lack of facticity – for example, see ILO, Walk Free Foundation and IOM (2017) on modern slavery and forced labour. Major decent work deficits include a lack of access to labour markets or insufficiently paid work. Working poverty (earning less than US\$3.20 per day in purchasing power parity terms) is increasing both in advanced economies (ILO 2016) and developing countries. In 2019, more than 630 million workers were affected (ILO 2020).¹⁰ There are also severe deficits in occupational health and safety: 2.3 million workers die from work-related injuries and diseases and 473 million suffer from non-fatal work-related injuries and diseases each year (ILO 2022). Undocumented and migrant workers are even more vulnerable to poor working conditions, unpaid salaries, exploitation and abuse, given their limited access to remedies and the risk of losing their job or facing deportation (Hill Maher 2002: 20). While there are a number of explanations for the gap between the high validity and low facticity of the decent work norm as discussed above, we argue that another reason for the norm's double diagnosis lies in the hidden discursive contestation that occurs in ILO and UN deliberations.

Case studies in the United Nations and International Labour Organization

We trace discursive references to the decent work norm in two case studies: the United Nations Treaty Process (UNTP), related to a binding instrument for the regulation of business responsibilities and human rights, and the International Labour Organization's institutional procedures for monitoring and increasing compliance with international labour standards.

Examining two case studies strengthens the validity of our results, as they demonstrate the pertinence of our double diagnosis as well as the strong similarities between the manifestations of hidden discursive contestation in otherwise differing cases. The differences between the cases relate to their embedding in different regimes (human rights and labour rights) and their respective institutional fora. Furthermore, our two case studies represent two different phases of the policy cycle: deliberations over the creation and drafting of a new international treaty (UN); and discussions of compliance with (and the application of) international treaties (ILO). Both fora are relevant for studying the decent work norm, as it was the International Labour Organization that

⁹Human rights enjoy impartiality. Nonetheless, social human rights were subordinated in terms of justiciability, implementation possibilities, legal character, scope, and compared with political human rights. Since the Maastricht Principles (1997), this gap has progressively been closed (Felice 1999; Schutter et al. 2012).

¹⁰Cf. Scherrer and Verma (2018) on decent work deficits in Southern Agriculture.

established the decent work norm in the first place, while the UN forum illustrates how this norm is elaborated as a part of global human rights and of corporate responsibilities for human rights.

The International Labour Organization case study focuses on the single case discussions and the General Survey discussions of the Conference Committee on the Application of Standards (CAS) based on the work of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CAS and the CEACR are the International Labour Organization's competent bodies for monitoring and ensuring compliance with international labour standards. The CEACR examines the application of international labour standards in purely legal terms based on state reports, including comments by the social partners. The CEACR notes cases of non-compliance with a particular Convention by a state in a so-called 'Observation'. The CAS then selects single cases from these Observations. The respective governments are invited to respond and discuss the situation in question in a tripartite setting during the International Labour Conference, in which states and social partners are required to provide information on the application of labour standards.¹¹

The UN case study analyzes the deliberations in the 'open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights'. This working group was established by the UN Human Rights Council in 2014 to draft a binding instrument that regulates the impact of business companies on human rights. It hence makes an attempt to establish binding international regulation, as opposed to soft law and non-binding instruments, in the issue area of business responsibilities for human rights, via the so-called UN Treaty Process (UNTP). The working group's annual sessions are chaired by Ecuador, one of the main initiators of the UNTP, and are continuously marked by an extensive participation of civil society, businesses and other non-state actors, besides states and a few international organisations such as the International Labour Organization.¹²

Both cases entail an extensive corpus of data that we assessed separately, while ensuring intracoder and intercoder consistency by closely cooperating on the collection, comparison, compilation and interpretation of data from both cases (Thomas and Harden 2008). We applied the method of extended qualitative content analysis to combine a deductive, classificatory method with an interpretive, inductive approach (Mende 2022). This entailed several rounds of coding. In the first rounds we identified

¹¹The ILO data corpus contains the single-case discussions of the CAS during the period from 2009 to 2021, the discussion and approval of the CAS report at the International Labour Conferences from 2014 to 2021, and two General Survey discussions in the CAS in 2019 and 2021. The work of the CAS relies heavily on the compliance observations and General Surveys provided by the CEACR. The documents are available from the ILO database NORMLEX. A list of all documents is also provided at 'Key ILO bodies and documents' on the ILO web page (<https://www.ilo.org/global/standards/information-resources-and-publications/key-ilo-bodies-and-documents/lang-en/index.htm>). The illustrative quotes from these documents are labelled with the formal name of the document, the year and the page number of the quote, supplemented by the abbreviation CAS or CEACR.

¹²The Treaty Process data corpus contains all submissions by state, international and non-state actors to the UN open-ended working group's annual sessions between 2015 and 2019, as well as supplementary external commentaries during the period 2013–2018. The list of documents is available on Harvard Dataverse: doi.org/10.7910/DVN/XK3JX6. The illustrative quotes from these documents are labeled with the title of the document as published by the open-ended working group (usually including the authoring stakeholder), the year of the document and the page number of the quote. All UNTP documents are also marked "UNTP".

all text segments that refer to decent work or related concepts. While we also encountered single norm components, as in the four pillars or core labour rights, we only incorporated these when they displayed a distinct decent work reference. The ensuing rounds of inductive coding facilitated an intensive analysis of the segments that involved identifying and interpreting dimensions, sub-dimensions, relations and patterns, thereby constructing the four manifestations of hidden discursive contestation. In the final coding cycles, we revisited the material in light of these four manifestations and reassessed their occurrence in both case studies. These coding rounds included searching for concrete manifestations of hidden contestation, such as relations between economic growth and decent work.

All interpretations were first elaborated within the single cases. Only then did we discuss the two cases together in order to identify forms of hidden discursive contestation that occur in both fora.

The hidden discursive contestation of the decent work norm

In both the International Labour Organization's labour law regime and the UN Treaty Process, hidden discursive contestation manifests in one of the following forms of deflecting responsibility, forestalling norm-strengthening measures, displaying norms as functional means to an end, and downgrading or upgrading individual norm elements. This section presents our empirical analysis of these four manifestations.

Deflection of responsibility

Deflection of responsibility constitutes a manifestation of hidden discursive contestation when it undermines the character of rights as claims (not in a judicial sense). We identify three forms of deflection: (1) when governance actors pass responsibility among them; (2) when governance actors relativise their responsibility by blaming actors that do not appear (and therefore cannot be addressed) as governance actors – that is, mainly criminal actors and informal markets; and (3) when governance actors shift responsibility to individuals, thereby transforming claims into individual capabilities (or the lack thereof).

In the first form of deflection, states pass responsibility for decent work regulations or decent work deficits onto businesses. They argue that business actors are responsible for improving job security and social protection, and ensuring decent minimum wages. While this deflection of responsibility is done in the open, the contestation of decent work as a claim right is hidden. The latter becomes visible when states try to evade legitimate complaints against them. For instance, Bolivia 'recalled that the responsibility of promoting decent work and generating employment also fell on the employers and [regrets] the stigmatization of a democratic Government' (CAS: Bolivia 2016 Part II B: 151).

In these cases, states deny their role as legitimate duty bearers by identifying businesses as claim addressees. Legitimate claims are denounced as 'stigmatization' (CAS: Bolivia 2016 Part II B: 151) and the state's status as a democratic entity is valorised against private actors. Moreover, states argue that the causes of unacceptable forms of work, such as forced labour, lie abroad in the migrant workers' country of origin – and therefore with companies or even other states. Foreign labour service providers charge high recruitment fees and hence perpetuate systems of debt bondage. Unions from the United Arab

Emirates,¹³ for example, argue that the prevalence of forced labour in Qatar is caused by foreign placement agencies that should be held responsible for it (CAS 2015 14 Part II: 19°20).

Business actors accentuate two aspects of the private sector and decent work. First, they represent the private sector as the engine and creator of employment. Second, they argue that the International Labour Organization, rather than businesses, should bring about decent work:

ILO must direct its efforts to supporting the role of the private sector as a principal source of economic growth and job creation by promoting an enabling environment for entrepreneurship and sustainable enterprises. (CAS: Employer members 2021 Part II: 7)

This perspective is shared in the overall ILO compliance mechanisms by the constituencies and major bodies of the International Labour Organization. They only add decent work to this assessment, and do not detail the relationship between economic growth, job creation and decent work. However, businesses also divest themselves of responsibility for decent work if there are concrete deficits that require regulation. In these cases, they call on the state to provide the conditions under which decent work can be realized:

[T]he only way to ensure that affected individuals, communities and workers are equally protected is to develop strong national institutions that can implement and enforce domestic laws covering all companies within its borders. (UNTP: BIAC et al., written contribution 2017, p. 4, similar UNTP: Sodexo (Thomas Mackall) _Presentation Panel VI 2015, p. 3)

Business actors emphasize the states' and public systems' responsibility for dealing with the costs of globalization. They highlight the danger of giving the impression that states are no longer responsible, since the entire international labour standards system is based on states' compliance with ratified conventions (CAS: Employer members 2021 Part II: 11).

States and businesses also engage in the second form, the deflection of responsibility to actors beyond governance. Criminal individuals, greedy or complicit corporations and corrupt or complicit security officials who enable illegal migration, for instance, are depicted as being responsible for deceiving or forcing individuals into abusive labour relationships (CAS: Worker member of Indonesia 2014 13 Part II: 20): 'The problem ... is not the presence of business that are in its most majority acting responsible but rather its absence' (UNTP: IOE Presentation Panel VII 2015, p. 5).

Most pertinently, the informal market is depicted as the main reason for the insufficient implementation of decent work standards. While businesses also refer to informal markets to deflect responsibility to states (which are supposed to push back informal markets), this argument more generally deflects responsibility to actors or realms seen as lying beyond governance, 'such as a high prevalence of informality, ineffective governmental inspection, a lack of governance frameworks, high levels of corruption, and ineffective judiciary systems' (UNTP: IOE Panel I 2016: 1).

¹³Unions in the United Arab Emirates are not independent and follow government positions.

In the third form, states and business actors individualize responsibility by arguing that (vulnerable) individuals lack the skills (CAS: Paraguay 2013 Part II B: 14) and capacity to either assert their existing rights in court (CAS: Zimbabwe 2016 Part II B: 118) or access employment that qualifies as decent work. The latter includes debates on the redistribution of increased productivity or higher wages. Decent wages depend on the fair distribution of generated profits (Committee of Experts on the Application of Conventions and Recommendations 2020 Report III (B)). Against this backdrop, the following arguments illustrate how businesses dismiss their responsibility – for example, by arguing that ‘not much attention is paid to ways of increasing the existing low productivity of certain groups of workers’ (CAS: Employer members 2021 Part II: 11).

The argument of lacking individual skills is made, for example, in the context of the forced labour exploitation of Indigenous people in the Chaco region in Paraguay:

Several training and professional education courses had been organized to enable participation, especially young people of working age and members of the native communities of the Chaco and the eastern region to acquire abilities and skills that would give them access to decent work. (CAS: Paraguay 2013 16 Part II: 13)

These arguments disregard how ostensibly individual responsibilities are embedded in economic policies such as the flexibilization of labour markets, restrictive migratory regimes or resource allocations. The affected communities are (often violently) deprived of their land and thus their livelihoods. This land is concentrated into large ranches owned by either powerful national landowners or foreign agro-businesses. Inhumane practices suffered by workers and their families in Chaco have been confirmed by the United Nations Permanent Forum on Indigenous Issues (see also Correia 2019; Dilger 2012). These arguments can be considered a norm-challenging deflection of responsibility that ignores the conditions for taking responsibility.

Forestalling norm-strengthening measures

A second manifestation of hidden discursive contestation occurs in the forestalling of norm-strengthening measures. Again, the decent work norm is invoked affirmatively, but at the same time activities that may help strengthen it are forestalled in one of three ways.

First, actors may simply state that they respect or acknowledge the decent work norm, but refrain from commenting on any further measures or demands being discussed in the respective deliberations.

Second, actors may acknowledge the decent work norm, but use it to contest concrete measures that are related to norm strengthening. One of the most prevalent examples in the UN Treaty Process is the question of supply chain regulation. Opponents of such regulation invoke the decent work norm to contest further measures to strengthen the norm, arguing that global supply chains are conducive to decent work:

[T]he overall impact of global trade and investment is good and it is for this reason that governments and states are trying to attract investments and to bring their countries into global value chains. Trade and investment are not seen as a danger or a challenge, but as a chance for development, decent jobs and inclusive and sustainable growth. (UNTP: IOE Panel I 2016, p. 1)

Third, actors may invoke measures that already are in place, thereby affirming the decent work norm but not addressing the ineffectiveness of the measures discussed:

Finally, let me underline that having heard many of the interventions I have the impression that most of the main concerns ... have to do with a systematic violation of these rights from International corporations. Let me finally and humbly remind you how wrong this thinking is ... I will just call your attention on the transformation that investment and trade has brought to mitigate situation of poverty, misery and injustice in many countries. I will just refer to the upgrade of working conditions, skills and competences, innovation, wealth and prosperity that they have brought directly or indirectly to millions of individuals. (UNTP: IOE Presentation Panel VII 2015, p. 5)

All three forms of deflecting responsibility acknowledge the norm's validity, but further norm-strengthening measures are forestalled by silencing questions related to the norm's facticity, such as the conditions for its implementation. To identify such statements as hidden discursive contestation, the context is decisive. If the context requires further action to strengthen the norm (such as drafting a binding instrument for business and human rights, debating sanctions for norm violators or implementing other steps related to norms realization), and if a related speech act refrains from contributing to such discussions other than stating respect for the norm or contests concrete measures, this constitutes hidden discursive contestation by forestalling norm-strengthening measures.

Norms as functional means to an end

Decent work is codified as a desirable norm in international labour and human rights law. Its validity is therefore ethically justified and does not depend on functional considerations of economic growth or other feasibility arguments. We therefore identify a third manifestation of hidden discursive contestation when actors reduce the decent work norm from being an ethical end to being a functional *means* to an end. Decent work is then mainly considered a contribution to other aims such as economic growth and increased competitiveness. This affects the norm's level of justification.

Throughout the Conference Committee on the Application of Standards compliance procedure, actors emphasize that international labour standards are desirable since they stimulate economic growth or because they prevent economic crisis, labour insecurity and inequality (e.g. CAS: General discussion, e.g. worker member of China 2009 16 Part II: 123). This hidden discursive contestation translates into a decrease in the norm's facticity. It also advances further instances of hidden discursive contestations of the ethical justifications – and hence the validity – of decent work.

This process unfolds as follows. Where international labour standards are not considered beneficial to economic growth or gains in productivity, public and private expenses to promote decent work are framed as spending rather than an investment. This abets government arguments about necessary restrictions on international labour standards to tackle budget deficits (e.g. CAS: Worker members about the Government of Guatemala 2015 14 Part II: 63). As a result, the austerity policies are not challenged in terms of their (possibly detrimental) effects on realizing decent work. They are assessed solely on the basis of their (possibly weakening) effects on economic growth (CAS: Worker member of Argentina about the Government of Brazil 2018 9B Part II: 101).

Yet this is only a manifestation of *hidden* discursive contestation, when the reduction of a means to an end entails a shift from an ethical to a functional justification. When actors in the UN Treaty Process invoke the decent work norm to assess human rights norms, a number of other factors come into play, such as how these norms can interact, reinforce or undermine each other. These do not represent instances of hidden discursive contestation, because here the ethical (rather than functional) justification of decent work prevails. By contrast, the CAS discussions no longer invoke decent work as an ethically justified norm providing a normative yardstick of critique. Still, its validity is not openly contested; rather, it is silently diminished by changing its justification. This provides room for justifying decreased engagement in giving effect to the norm by considering profitability, revenue and economic development (lack of facticity). Functional arguments even justify prohibiting the worst forms of child labour:

The continued existence of child labour perpetuated inequality and the exclusion of large sectors of the population, jeopardized sustained growth in the region and threatened the productivity of future adults by restricting their opportunities to obtain decent work. As a result, the region had promoted a series of initiatives with the aim of reducing child labour faster. (CAS: Paraguay 2018 Part II B: 150)

In this case, hidden discursive contestation can decrease a norm's validity. At the same time, facticity can be strengthened when governments perceive the implementation of decent work as conducive to economic development.

Upgrading or downgrading of norm elements

The fourth manifestation of hidden discursive contestation occurs when single norm elements are downgraded or upgraded against each other. The decent work deliberations are characterized by a hierarchization of specific components of the norm – namely employment creation and the realization of international labour standards. In this regard, social dialogue is often referred to as ‘a management tool which would help to ... create the conditions conducive to investment with a view to generating employment’ (CAS: The Employer member of Mexico 2016 Part II B: 150). This position assumes that creating jobs eventually leads to the realization of decent work. While workers' representatives argue that these investments do not create employment that is necessarily decent work, business actors and governments do not mention this problem (CAS: Brazil 2018 9B Part II: 93; CAS: observer representing the IOE 2018 9B Part II: 145).

This omission builds the context in which the above statement can be considered a hidden discursive contestation. These implicit arguments also engender non-discursive contestation of decent work:

When a country had high levels of unemployment and poverty, job creation tended to be prioritized over decent work. However, decent work was a means of overcoming poverty. (CAS: Worker members 2018 Part II B: 13)

Hence, job creation is considered a prerequisite for decent work. Yet international labour standards are only considered (functionally) desirable if they contribute to further economic investments. Both interpretations contradict the International Labour Organization's mandate on employment creation and decent work. This implicit emphasis on

the economic aspects that are considered imperative constitutes a hidden discursive contestation of the international labour standards as goals in their own right:

Balances have always had to be found between economic imperatives and social needs. And let us not forget to put environmental issues, the third pillar of a sustainable society, on the same footing. (CAS: Employer member Belgium 2021 6B Part II: 20)

This is a strong example of the hidden nature of the contestation. While claiming that economic, social and environmental considerations must be ‘put on the same footing’, the actual communicative action differs. The formulation ‘economic imperatives’ trumps phrases such as ‘social needs’ or ‘environmental issues’. Imperatives are non-elective, obligatory and all important, whereas needs in the strongest sense are necessary requirements for a person’s wellbeing and in the weakest sense refer to wants. The argument made here implicitly questions the equal importance, especially by continuing that

it is of course necessary to guarantee the quality of these jobs. But the overall stakes warrant reflection, particularly if together we wish to guarantee the financing of our social protection system based on social contributions and therefore on a sufficient number of productive jobs, and from there to increase employability. (CAS: Employer member Belgium 2021 6B Part II: 21)

These overall stakes include the movement of jobs abroad, which eventually leads to losses in revenue and decreased capacities to provide the framework conditions for decent work, such as through social protection. This argument also advocates ‘favourable macroeconomic framework[s] which [stimulate] the economy and innovation, [as] key factors in sustainable economic growth and decent work’ (CAS: Switzerland 2021 6B Part II: 28). Hence, the topic of economic growth enters the discussion through the hierarchization of employment creation. Such discussions directly refer to SDG 8 (see also CAS: EU, Cameroon, Algeria 2021 6B Part II: 13; 20, 24) and address it paradigmatically:

it is worth recalling that the entire international community, including the ILO, has channelled all its efforts into its commitment to eradicate poverty by 2030 under the Sustainable Development Goals, principally Goal 8: ‘Promote inclusive and sustainable economic growth, employment and decent work for all’. It is the responsibility of the ILO to implement this goal vis-à-vis the international community. (CAS: Argentina 2021 6B Part II: 488)

While SDG 8 links economic growth to decent work, it does not detail the relationship. However, states and business actors implicitly create causal relationships with economic growth as a prerequisite for job creation, (sustainable) employment and eventually decent work, leading to wealth creation and social justice. Thus, these hidden discursive contestations (hierarchizations) serve as an entrance point for outside norms, like economic growth as a counter-norm to the decent work norm.

This justifies even the open contestation of decent work norm components. These include infringements of the freedom of association through rigidly regulating unions’ registration. Governments and business actors argue that keeping the number of unions below a certain threshold is necessary since too many unions and federations would stifle economic growth (e.g. CAS: Employer member Bangladesh 14 Part II: 45). This

rearrangement of decent work as a goal related to economic growth in SDG 8 can thus undermine the embedded human rights perspective and omit norm components like social dialogue (Frey and MacNaughton 2016a, 2016b).

V. Conclusion

This article has investigated the contradictory trend of certain global norms in crisis and not in crisis at the same time. We assessed cases in which a norm's validity is high, but its facticity is low. This perspective expands studies on a norm's facticity and validity equally decreasing or increasing to determine its robustness.

To explain the contradictory trends in what we call the double diagnosis of a norm's robustness, we suggested conceptualizing norm contestation as forming one of four types based on whether contestation is open or hidden, and whether it is discursive or non-discursive. This article has elaborated the hitherto under-studied concept of hidden discursive contestation, and showed how this concept can explain the double diagnosis of crisis/no crisis. It proposed a conceptual and empirical assessment of hidden discursive contestation.

Drawing on two case studies of the decent work norm, we identified four manifestations in which hidden discursive contestation occurs: the deflection of responsibility onto other actors; the forestalling of potentially norm-strengthening measures; displaying a norm as a functional means to an end; and downgrading or upgrading single norm elements.

While analytically distinct, the different forms of open or hidden, discursive or non-discursive contestation may overlap, reinforce each other or blend into each other. This is most visible with the fourth manifestation of upgrading or downgrading single norm elements. This creates an entry point for external norms that can then again be invoked as counter-norms, constituting a case of open contestation.

For future research, we have identified two aspects that are crucial for further distinguishing hidden discursive contestation and its effects on norms: context variables and contestation effects. First, as context is pivotal in identifying hidden discursive contestation, further research is needed to systematically compare cases and arrive at a more precise definition that identifies necessary and sufficient conditions for hidden discursive contestation.

The second aspect concerns the effects of hidden discursive contestation on norm robustness. As with any form of norm contestation, its effects on norm robustness can go either way. For example, deflecting responsibility might render a responsibility gap visible and therefore may also lead to improved ascriptions of responsibility. Future studies may connect hidden discursive contestation and its various manifestations with the resulting robustness of norms in order to identify their specific effects.

In sum, the concept of hidden discursive contestation helps to explain the double diagnosis of norms simultaneously being and not being in crisis, thereby contributing to research on the robustness of global norms.

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