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Order, Ethics and the Constitution of
International Society: Rethinking the Concept of
Jus Cogens

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A thesis submitted for the degree of
Doctor of Philosophy

at

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Durham University



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Order, Ethics and the Constitution of International Society: Rethinking the Concept of *Jus Cogens*

Dennis R. Schmidt

Abstract. This thesis develops a sociological approach to theorising the emergence and nature of international peremptory law. It argues that due to its focus on formalism and abstract notions of rights, traditional legal treatments have failed to acknowledge the socially constructed nature of higher order norms. To address this shortcoming, the thesis transfers the concept of *jus cogens* into the realm of International Relations. Drawing on insights from constructivism and English School theory, it situates law in the context of society and conceptualises *jus cogens* as a generic institutional form that demarcates the normative boundaries of international society. From here, it sketches out two modes for thinking about the construction and content of *jus cogens*. The first is a social-structural account, which focuses on the relationship between the global normative system and social order. It argues that the international society's normative boundaries are shaped by, though not always necessarily in line with, the ranking of states as superior and inferior. The second is a normative approach devised to study the foundational normative determinants from which superior norms derive their special status. Proceeding from the assumption that the content and identity of *jus cogens* depends on the normative character of international society, the thesis then assesses two possible 'normative logics' through which the peremptory status of a norm may be generated. It rejects a solidarist logic, which sees universal norms as the manifestation of cosmopolitan ideas about inalienable rights. Instead, it argues for a pluralist approach to ethics and order that depicts *jus cogens* as key to the development of international society towards a social site marked by diversity and respect for difference.

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Introduction

The state-centric narrative of international relations and international law is undergoing significant transformations. We have been told for quite some time that increases in transnational flows of people, capital, goods and ideas associated with processes of globalisation undermine the traditional image of what Hans Morgenthau once called ‘politics among nations’. Modern international society, so the narrative goes, has become a dense and complex playing field in which individual rights, cosmopolitan obligations and the political agency of human beings compete with established sovereignty norms – and its correlative concepts non-intervention, domestic jurisdiction and self-determination. Commentators typically point to the shift from notions of state to human security, the emergence of the Responsibility to Protect doctrine, the beginning of the merger between humanitarian and human right law, or the increasing fragmentation of the international legal order, to signify that the contemporary global legal and political order is in flux.

This thesis is meant as an intervention in the debate about the norms, values and principles that define the normative character of international society. In the broadest sense, it aims to examine one of the most basic puzzles of modern international order-making: in a world marked by increasing cultural interdependence, transnational interaction, multipolarity and ethical diversity, which norms and values make it all hang together? Are there any basic norms and principles that apply to all political communities? International society consists of a plethora of normative visions, and the ethical schemas that structure different political and cultural communities often seem to vary in consequentialist ways. The liberal European value system, as manifested in regional regimes and institutions such as the European Court of Human Rights, for example, promotes quite different understandings of justice and rights than China’s Confucian inspired collectivist culture or Saudi Arabia’s Sharia-based legal system. So is international relations simply based on instrumental calculations aimed at preserving the normative distinctness of sovereign political communities, or are we all bound by some set of fundamental values and principles that ground the world’s dispersed ethical schemas and cultural practices?

These are extremely difficult and complex questions and it is certainly not the (over)ambition of this thesis to take on the challenge of explicating the normative foundations of international society in general. Instead, I want to focus on a particular conundrum of the post-1945 global normative system: the emergence of higher-order norms. Although the international order lacks centralised authority and formal constitutional quality, the emergence of various legal concepts suggests that the international normative order is characterised by some form of hierarchy. The principal impulse that spurred the debate over a hierarchical order of international norms has been the incorporation of *jus cogens* into international law in the 1960s, which endows certain norms with distinct legal qualities, thereby elevating them to the ‘top’ of the international normative order.¹ These peremptory norms², and the value-laden content they carry, are considered to be so important to the international community as a whole that they are non-derogable and apply to all states, regardless of whether they have consented to them.

The concept of *jus cogens* has been exhaustively discussed by international legal theorists and practitioners. Yet, critical questions regarding both its nature and existence persist. A key cause of this problem is reflected in and can be attributed to the insufficient theoretical foundations on which the legal debate about peremptory norms rests. So far the majority of international jurisprudence has limited its analytical focus to formalism and abstract notions of validity, rights and sources when seeking to investigate higher-order norms. This practice is perhaps most visible in Kelsen’s (1945) influential theory of an autonomous, self-referential legal system. Kelsen was convinced that every legal order must be based on a kind of basic norm (*Grundnorm*) that legitimates the creation of new norms, confers legislative powers on the authors of law, and ultimately establishes the normativity of the entire legal system. As he (1945: 126) explains:

[I]n addition to the norms of the written constitution, there must exist unwritten norms of constitution, a customarily created norm according to which the general norm binding the law applying organs can be created by custom.

This, of course, throws up a number of intriguing questions: Where do those ‘unwritten norms of constitution’ come from? What are they? How do they change? Where does the authority and identity of those norms reside? Kelsen’s answers,

¹ International law does not specify which norms belong to *jus cogens*. However, rules frequently identified as peremptory norms are: the prohibition of genocide, the prohibition of slavery, the non-use of force, the principle of self-determination, and the prohibition of torture. Some authors have extended this list to include all human rights norms (Verdross 1966). Other writers argue that not all human rights norms are part of *jus cogens* (Gormley 1985). More recently, Allen (2004) suggested that free trade has emerged as a new peremptory rule.

² I will use the terms *jus cogens* rules, *jus cogens* norms and peremptory norms interchangeably throughout this thesis in order to avoid unpleasant, constant terminological repetition.

however, are rather short. The basic norm, he told us, must be self-evident, insulated from values and ethical beliefs, and legitimate without any claim to justice or morality – one simply has to presuppose its existence, function and nature. The conspicuous consequence, of course, is that the identity of the ‘basic norm’, and with it the very character of normative order, remains unknown. This is not to blame Kelsen and other jurists who have sought to locate the effectiveness and validity of legal rules in law itself, for without them we would have little insight into large parts of the positive international legal order; neither is it to suggest that all legal scholars ignore normative context. But it is to claim that law and legal analysis alone cannot ‘solve’ the problem of the nature and sources of normativity in the international realm.

From Law to Sociology

This project takes up where Kelsen leaves off in that it seeks to examine the social and normative context in which *jus cogens*, understood as a kind of international basic norm, is embedded. It transfers the concept of *jus cogens* into the realm of International Relations theory and looks to sociology, politics and ethics to get to grips with the nature, legitimacy and function of higher-order norms in international relations.

Making sense of the normative complexity of international life, and understanding how the global institutional architecture accommodates different normative visions, has become a major task for international normative theorists and those interested in sociological approaches. In particular, scholars working within the theoretical tradition of the English School have generated a wealth of literature dealing with the emergence, nature and transformation of shared norms, values and institutions. Drawing on the classical British institutionalism of Bull (1977) and Wight (1991), as well as more recent constructivist thought, these works explore the constitutional structure of international society and the way in which its rules and principles define the fundamental conditions under which global interactions take place (Reus-Smit 1997, 1999; Ralph 2007). They show that even under the condition of anarchy, international society has established constitutional-like norms and institutions that constrain the exercise of power and create expectations about what actions are permissible in global life (Clark 2005). In doing so, they not only highlight the complex interplay between law and politics (Reus-Smit 2004), but also understand international law in terms of the normative and ethical claims that shape its structure and content. What these works suggest, then, is that the nature of

peremptory norms is inherently ethical and social, requiring a more holistic treatment than international jurisprudence currently offers.

Drawing on insights from English School theory and constructivist methodology, my chief purpose is to develop a sociological approach to *jus cogens* that shows why and how international society considers certain norms as hierarchically superior. Such an approach, I wish to suggest, is necessary because many of the puzzles surrounding *jus cogens* (e.g. why are certain values more important than others? Why does a social group such as international society consider certain rules for behaviour as universal and compulsory?) lie outside the disciplinary boundaries of International Law. At a more general level, then, my project can be read as an exercise in IR theory that seeks to show how insights from English School theory can help to think through problems and puzzles from International Law.

Why, some IR scholars may ask, choose the English School as an intellectual framework for my endeavour – an approach that is often located at the margins of the discipline? They should see this choice as an analytical one. Because of its methodological ability to combine analytical theory about norms and normative theory, English School theory can help thinking about the construction and functions of higher-order norms in two important ways. The first is driven by the kind of social-structural investigations of norms and values that is strongly present in the works of Bull (1977), and even more so of Buzan (2004). Those authors offer rich conceptualisations of international structures, involving, among other things, explanations of how and why certain values are shared and internalised (coercion, calculation, belief), by which types of actors and through what kind of interaction. This thesis will argue that the analytical account of international society that emerges from those conceptualisations, and the claims about various types of normative cohesion that come with it, are instrumental in understanding the social forces that shape the normative character of peremptory law in international relations.

The second way in which the English School can improve our understanding of *jus cogens* is through its long-standing concern with the normative dimension of international life. It is, in my eyes, one of the School's virtues that its structural-analytical mode of inquiry is complemented with an interest in normative theorising and the ethical dimension of international life. Firmly grounded in rich debates from political theory and philosophy, English School theorists have sought to discern the fundamental normative principles of global political life through the identification of the nature, extent and depth of the shared norms and values from which international society derives its social order goals. This lineage of inquiry points to the foundational normative values and ethical ideals that underpin the

emergence of *jus cogens*, and it alerts us to think about how rank orders of norms are shaped by value orientations.

This way of approaching *jus cogens* should also help to establish why this thesis does not anchor in one of the most interesting contemporary debates surrounding peremptory law: those conducted under the banner of ‘global constitutionalism’ (e.g. Dunoff et. al. 2009, Krisch 2010, Wiener et. al. 2012). Whilst I do share a number of concerns and themes raised in those debates – most obviously an interest in the fundamental principles of the global normative order – my epistemological angle is a somewhat different one. Global constitutionalisation is typically seen as an attempt to control and regulate power in the international realm. As the editors of the first journal explicitly devoted to the topic note: ‘a ‘constitution’ is traditionally put into place to regulate or keep politics in check by rules that have been put into place by the *pouvoir constituant*, i.e. members of a community as its constituent power’ (Wiener et al.: 2012: 4). I do agree with their assessment that sociologists and political scientists have a lot to add to ‘global constitutional discourse’, and scholars such as Wiener (2008) and Cohen (2012) appear to be profoundly interested in the political and normative dimensions of constitutionalism. However, the general cognitive locus of the constitutional literature, on my reading, seems to lie in legal philosophy and discussions about the ‘rule of law’ in world politics. By contrast, the theoretical (English School) perspective developed in this thesis is specifically designed to move away from international law to capture the non-legal, informal social and normative aspects of constitutional structures of international society. This is not to say that the following chapters will not resonate with, and in the best case have something to add to, constitutional accounts – only that they will get at law, norms and normative structures from a different epistemological perspective.

In developing such a perspective, I join a number of constructivist scholars who have sought to bridge the disciplinary divide between law and sociology. Challenging the liberal-positivist approach to ‘legalization’ that casts law in terms of discrete, express agreements,³ they have called for a fuller appreciation of what law in international relations is and how it affects behaviour. They conceptualise international law as a social phenomenon embedded in and shaped by the practices, beliefs, ideas and traditions that constitute the society of states (e.g. Allott 1999, Finnemore and Toope 2001, Reus-Smit 2004). Philip Allott (1999: 32) nicely captures the sociological image of law that resides at the heart of those accounts:

³ This approach is best exemplified by Abbot et al. (2000), who have tried to explain the ‘legalization’ trend in international relations by assessing rules in terms of three variables: precision, delegation and obligation.

Law forms part of the self-constituting of a society. The legal self-constituting of society co-exists with other forms of social self-constituting: self-constituting in the form of ideas and self-constituting through the everyday will and acting of society-members. Law is generated, as a third thing with a *distinctive social form*, in the course of the ideal and real self-constituting of society, but law itself conditions those other forms of constituting.

Such an interdisciplinary approach to law and legal order can help to remedy the insufficient theoretical basis upon which the concept of *jus cogens* has been built. In particular, it encourages us to appreciate the complexity of legal concepts and the various spheres in which law operates. This seems to be more important than ever. Modern developments such as legal pluralism, the emergence of ‘soft law’, and the dissolution of hard boundaries between domestic legal systems have seriously undermined the traditional account of law as an autonomous and closed system of rules à la Kelsen. Hence, to make law and its multifaceted nature intelligible we need to do more than categorising and measuring rules in terms of abstract variables, as many interdisciplinary scholars have tried to do. Instead, as Friedrich Kratochwil (2014: 20) reminds us, we should direct our efforts to discern the ‘agreements on the proper use of concepts’.

By avoiding an excessive focus on *jus cogens* legal effects, function and sources, this thesis highlights the social and normative foundations upon which the concept rests. This, hopefully, will help to engage IR theorists in thinking a bit more carefully about how norms with superior normative force emerge in international society, and to help lawyers to understand the existence of peremptory norms beyond international law. While this does not automatically result in a more coherent legal theory/practice of *jus cogens*, it can perhaps provide lawyers with a more holistic understanding of the concept and the silent assumptions that underpin its ethical nature and social function.

Given its interdisciplinary character, the thesis should be of interest to a broad audience, including international lawyers, English School scholars, normative theorists, and those interested in sociological approaches to International Relations more generally. Some of the readers, in particular those coming from a legal background, may criticise me for not offering concrete solutions to the many intractable problems associated with *jus cogens*, most notably those relating to the identification and application of peremptory norms in international adjudication. I hope, however, that this is a virtue not a deficiency of a thesis that seeks to offer further correction to the idea that ‘legal’ problems can only be addressed within the disciplinary boundaries of law. In this sense, the thesis might motivate us to think a bit more carefully about the mutual constitution of law, ethics and politics at the

global level, the deep-seated value conflicts that underpin institutional structures, and the way in which we design interdisciplinary inquiries.

Before outlining the plan of this thesis and its argument(s) in more detail, one last note on the relationship between normative hierarchy and *jus cogens* seems to be in order. *Jus cogens* is typically seen as a key manifestation of normative hierarchy in international law, and the same logic also seems to run in reverse: there would be no *jus cogens* in international law if international society did not consider certain norms and values hierarchically superior in the first place. But it is important to remember that *jus cogens* and normative hierarchy are analytically distinct: normative hierarchy is a multi- rather than a bi-level phenomenon, and *jus cogens* is 'just' the tip of a very complex iceberg. While this thesis will have something to say about normative hierarchy in general, at times even oscillating between the two concepts, my overall argument does concentrate on *jus cogens*. This narrowing in focus will hopefully allow me to develop a more distinctive contribution.

Overview

The principal argument underlying this thesis is that *jus cogens* should not be treated as a formally imposed concept, as lawyers tend to do; instead, it is best understood as a social arrangement that demarcates the normative boundaries of international society. Rather than emanating from an metaphysical source or formal treaty, *jus cogens* is a manifestation of the social and normative organisation of international society and the way in which we think about its ethical content: The fact that the society of states regards certain norms such as the prohibition of genocide or the prohibition of slavery as mandatory, overriding other rules and binding all states, tells us something about the kind of international society we live in and the nature of its normative aspirations and ethical dilemmas. In order to understand the special status and superior qualities of peremptory norms and their normative character, we therefore need to turn our attention to the social processes and normative visions that underpin their emergence, maintenance and function.

Chapter 1 looks at the legal debate about peremptory norms and addresses the theoretical issues involved in the reconceptualisation of *jus cogens*. It starts with a brief review of the notion of hierarchy in international law in order to set the context, and then moves on to focus on the concept of *jus cogens*. The purpose here is to survey the major existing justificatory legal theories – positivism and natural law – and identify their strengths and weaknesses. Doing so will enable me to formulate what is, in my view, the key problem of existing accounts of *jus cogens* – the narrow focus on formalism and legal practice – and open up space for recognising the

analytical significance of the relationship between law and the wider social and normative context in which it is embedded. This reinforces the need to look for a different theoretical basis for thinking about the nature, emergence and function of peremptory norms. The second half of the chapter then introduces the English School as a viable (sociological) candidate for bringing out the social dimension of *jus cogens*. After outlining the School's basic theoretical structure, I will focus on what I see as the most systematic, and for my purposes most useful, version of English School theory: Barry Buzan's (2004) constructivist inspired approach developed in his landmark book *From International to World Society*.

In Chapter 2 I take up the task of building the methodological foundations of this thesis, and outlining a concrete research strategy for theorising about *jus cogens* is my principal aim in this chapter. Here I will utilise Buzan's approach to reduce some of the methodological complexities associated with the School's research program. The result is a macro-sociological theory that encourages utilisation of different modes of social inquiry, but one that is firmly rooted in the acceptance of constructivist ideas about the socially constructed nature of reality. The epistemological argument here is that we need both a social-structural analysis of the societal background structures that lie behind normative-order making and a normative approach that enables us to engage with the values and ethical principles inscribed in international norms and institutions.

With the methodological framework in place, Chapter 3 begins to reconceptualise *jus cogens*, looking to consider what it means to think about the concept in social terms. This discussion will engage with constructivist claims about the constitutive effects of norms and institutions and the way in which they influence patterns of social behaviour. The goal here is to explore how peremptory norms contribute to the establishment of social control outside the legal realm. I argue that *jus cogens* is a generic institutional form that provides a prospective ordering function in international relations through both regulation and constitution. Envisioning *jus cogens* as an institution improves existing (legal) theories on numerous scores. Perhaps most importantly, it takes us away from debates about the effects of peremptory norms on dispute settlement and legal practice and, instead, leads us to think about their effects on social conduct and membership in international society. Once we understand peremptory norms as social institution rather than a category of hard rules, historical context, dynamism and contestation become integral elements in thinking about what *jus cogens* is and how it affects international relations.

Chapter 4 turns to examine the role peremptory norms play within the global normative order. To do so, the first part of the chapter looks at the key concept of

English School theory, international society, and investigates how *jus cogens* fits within its institutional architecture. I will advance a functional argument that depicts peremptory norms as part of what Christian Reus-Smit (1997, 1999) has called the ‘constitutional structure of international society’, that is, those meta-structures that contain the values and principles that define the normative boundaries of international society and the criteria for membership. The second part of the chapter then moves on to ask who or what determines the nature and content of those constitutional structures. It advances a social-structural approach to argue that the nature and structure of international society’s normative order is intimately related to, but not synonymous with, the ranking of states as superior and inferior. Accordingly, it sees some merit in accounts that seek to explain the nature and content of peremptory norms through references to hegemony and social domination, but ultimately argues for a much more complex link between social hierarchy and normative order-making.

Whereas Chapter 4 provides a highly rational, social-structural analysis of *jus cogens*, Chapter 5 offers a normative assessment of the foundational values from which superior norms derive their special status. I will utilise the English School’s pluralist-solidarist debate to show that the identity and normative content of peremptory norms depend on the kind of normative conception of international society we deem plausible and ethically desirable. This discussion will help to detach claims to the normative superiority of peremptory norms from empirically removed assumptions derived from cosmopolitan/natural law approaches. Following pluralists such as John William’s (2015) and William Connolly (1991, 2008), I assume that human diversity and respect for difference ought to be the normative foundations of society and that peremptory norms are universally binding because they protect the plural nature of human life.

Chapter 6 offers a conclusion, aiming to bring together the claims developed throughout the thesis. It spells out the main features of the theoretical approach to *jus cogens* developed throughout the thesis and considers how they can help us to think about some of the substantial issues involved in the debate about the nature and identification of peremptory norms. While far from stipulating concrete methods for the identification of peremptory norms, this brief discussion should nevertheless indicate the analytical value of this project for debates about the changing constitutional character of contemporary international society.

Jus cogens: the magician needs help

The identification and analysis of *jus cogens* has been one of the key concerns in the modern discipline of International Law. The notion that there exist certain higher-order norms with special normative qualities has fascinated the legal community unlike any other idea. Human rights theorist Andrea Bianchi (2008: 494) tellingly captures the almost mythical appeal surrounding *jus cogens*: ‘international lawyers have acted as ‘magicians’, administering the rites of *jus cogens* and invoking its magical power’. Indeed, lawyers have produced a sheer infinite number of works theorising and examining the sources, content, application and impacts of peremptory norms. Even without detail as to the breadth and depth of this scholarship, the current, in many ways unsatisfactory, state of the debate is likely to be familiar to any international lawyer. Although the majority of scholars and practitioners have come to recognise the existence of norms with peremptory qualities, international jurisprudence still struggles to offer convincing theoretical accounts for thinking about their emergence, functioning and identification, while state practice and court decisions have largely been reluctant to make reference to the concept.

The aim of this chapter is to review the literature about *jus cogens* and outline the contours of a theoretical basis upon which a different understanding of its foundational features can be established. The purpose here is not only to show what is wrong with existing accounts, but also to make a case for an alternative, IR driven approach that cuts across the disciplinary boundaries that traditionally divided politics, law and ethics. The rationale for this agenda is simple: Once we accept that many of the questions associated with the normative qualities of *jus cogens* pertain to, and demand engagement with, the wider societal context in which law works, we can start to usefully re-consider some of the traditional puzzles.

The first half of the chapter surveys the debate about higher-order norms in international law, identifying *jus cogens* as the touchstone for thinking about normative hierarchy. The first section briefly looks at some terminological issues, carving out the problem this thesis seeks to address and the scholarly context in which it is embedded. Section two surveys the legal debate about *jus cogens*.

This discussion will begin with some general remarks about the structure of modern international law, and then move on, in section four, to consider the conceptual and theoretical debates about peremptory norm in more detail. This includes the identification of what I see as the main problem of the existing legal accounts: the neglect of social and normative context.

The second half of this chapter, then, considers how this problem can be reformulated. In particular, it seeks to establish why the development of a sociological perspective is important for theorising *jus cogens* and what such an approach might look like. This will be done in three steps. The first is to show how international law and social context hang together by establishing a conceptual link between law and international society. The second step then turns to the discipline of IR and identifies two interrelated sociological traditions that can help us frame an alternative approach to thinking about peremptory law. From there, the third and final step focuses one of those traditions: the English School. It offers a brief summary of its main theoretical claims and, subsequently, identifies a specific version of English School theory that will serve as an intellectual reference point for further developments.

Differentiating normative order

The discipline of IR largely asserts that world politics is characterised by anarchy. Nearly all scholars work with the presumption that the international system is inherently anarchic, lacking any common institutional authority to which sovereign nation states would be subordinate.¹ At the theoretical level, students of IR learn that it is the structural feature of anarchy that distinguishes the society of states from all other human societies, which warrants us to formulate distinct theories and concepts for political conduct at the global level. As Hedley Bull put it (1966: 79):

‘Whereas men within each state are subject to a common government, sovereign states in their mutual relations are not. This anarchy it is possible to regard as the central fact of international life and the starting point for theorizing about it’.

Indeed, even half a century after Bull’s observation, it is virtually impossible to conceive of IR as a distinct form of social inquiry without the formal description of the state system as anarchic.

¹ For works examining the assumption of anarchy in IR see Bull (1966); Milner (1991); Schmidt (1998).

Somehow paradoxically, there is also general recognition that even in a society based on sovereign equality hierarchy prevails.² 'International hierarchies are pervasive', David Lake (2009: 2) maintains, as 'both in the past and present, states subordinate themselves in whole or in part to the authority of other, dominant states'. Indeed, as an organizational form of international relations, hierarchy is omnipresent, both analytically and empirically.³ Whether we study the political dynamics of colonialism, empire, military occupation, or humanitarian intervention, one cannot help but recognise the orders of power and status that fundamentally structure the processes and outcomes of these phenomena. Unsurprisingly, hierarchy has become an integral part of IR discursive practice, conveyed by many conceptual groupings and distinctions such as superpowers, great powers and small powers; core, semi-periphery and periphery; or first and third world.

Although the meaning of 'hierarchy' seems to be intuitively clear, there are different ways in which IR scholars have approached the subject. Waltz (1979: 114-116), for example, applied the term to stipulate a structural ordering principle of a system and juxtaposed it with an anarchic self-help system. Most scholars, however, use it in a less abstract sense, seeing hierarchy as 'a condition of relational power in which a dominant polity possesses the right to make residual decisions while the other party – the subordinate member – lacks this right' (Cooley 2005: 5; see also Lake 1996: 7). In this sense, the term international hierarchy is used to denote a specific arrangement of societal order, one that is divided into successively subordinate ranks (Clark 1989).

This thesis is concerned with a distinct form of hierarchy, namely *normative* hierarchy. While, the principal concern of the IR debate about hierarchy has been the ordering of actors and the nature of their relationships, the approach developed in this thesis is focused on norms and values, and how normative systems are stratified. As it will become clear during the course of this thesis, social and normative forms of hierarchy are inextricably linked to each other. The analytical purchase of separating social and normative hierarchy, however, is that it allows for considering how different configurations of social order affect the normative organisation of international society and *vice versa*. In particular, it enables us to show that social-structures can, but need not necessarily, line up with norms, and that the nature of international society cannot be understood by mere reference to hegemonic power (see in particular Chapter 4).

² On international hierarchy, see Cooley (2005); Clark (1989); Donnelly (2006); Hobson and Sharman (2005); Keene (2002, 2007, 2013); Lake (1996, 2009).

³ In international relations hierarchical patterns are the manifestation of the decentralised nature of the political system in which its members operate. In the absence of a central institution capable of imposing a specific kind of order on its subject, the relational properties that determine specific forms of stratification are inherent in and constructed by the subjects themselves.

Thinking about hierarchy means thinking about relationships between different levels of rule and authority. In the case of *normative* hierarchy, it means recognising that norms and values are not free-floating ‘things’ that exist in isolation. Instead, as Raymond (2000: 284) put it, ‘they form a complex mosaic to form a normative order [or normative system]’. The concept of normative order is usually drawn from sociology, where it used to denote any system of rules and principles towards which members of society orientate their behaviour (e.g. Max Weber 2008). The concept is perhaps best fleshed out in Parsons’ (1937) functionalist theory, in which he developed a normative solution to the Hobbesian problem of order. Parsons grounded his account of society and order in a shared system of rules and purposes, rather than hegemonic coercion or pure self-interest. A functioning system of norms and expectations, he maintained, is sacrosanct to the very existence of society because it prevents its members from drifting into a stage of continuous social violence.

In international relations where anarchy is omnipresent this web of interlocking rules about how to appropriately behave is inherently dynamic and seldom coherent. New norms are added by different actors, through different processes and at different levels, and existing norms change or diminish entirely. The result is a global normative order whose axiology may be rooted in a number of concise beliefs about the values and goals of society, but whose concrete rules remain conflicting, contingent and contradictory. To make the matter even more complicated, normative systems are composed of different classes of norms. At the most general level, scholars have widely accepted the conceptual distinction between constitutive and regulative norms.⁴ Furthermore, most normative orders, and in particular legal orders,⁵ contain a number of meta-norms which define how new norms are produced and under which condition they are valid.

The first step in thinking about systems of norms and values in international politics is thus to recognise that the global normative order is not a one-dimensional, coherent thing, an image often obscured by the stylised Westphalian narrative of an exclusive club of sovereign states making and changing a set of rules by which the ‘game’ of international relations is played. Instead, it is better to think of the global normative order as an overarching, accommodative framework – an ‘order of orders’ – which encompasses a variety of dispersed normative sub-systems. Some of these systems may be institutionalised and codified into formal treaties, as in the

⁴ On the distinction between constitutive and regulative norms see Searle (1995); Wendt (1999).

⁵ Alongside law, religion and morality, for instance, represent distinct normative orders, each of which contains related sets of rules, injunctions and principles about how to behave. International legal theorists (e.g. Klabbers and Piiparinen 2014) have begun to explore the relationship between law and other normative orders, essentially concluding that they cannot be meaningfully ranked in terms of the influence they exert over international actors.

case of international law; but normative orders are inherently social and they function as long as there exists a basis of 'mutual belief and inexplicit norms with overlapping mutual understanding and interpretation' (MacCormick 2007: 19). Religion and morality, for example, represent distinct normative systems which impose informal injunctions and obligations that work through social compliance mechanisms.

Although this thesis has hopefully something to say about the global normative order in general, it is primarily interested in one of its key structural characteristics: the fact that its norms are connected by hierarchical relations. More specifically, it is concerned with the upper extreme of that hierarchy, that is, those norms and values that sit at the top of this order; or what Raymond (2000: 284) calls the 'set of foundational norms that defines its axiology, or value orientation'. Why focus on those norms? There is good reason to assume that much of what is at stake in the debate about global normative order centres around the question which specific norms and values will define the constitutional structure of international society as a whole. The shift from notions of state to human security, the emergence of the Responsibility to Protect doctrine, and the increasing merger between humanitarian and human rights law suggest that the kind of norms and values routinely portrayed as constitutional are in flux. Ethically progressive cosmopolitan values and human rights norms are said to challenge established principles of self-determination, territorial integrity and non-intervention for constitutional status, urging us to re-think the Westphalian sovereignty regime that long provided the basis for global order (e.g. Brown 2002, Shawki and Cox 2009, Cohen 2012). By getting to grips with questions about the nature and content of those norms and values that carry core constitutive principles – how and why they get there, and which functions they perform – this thesis seeks to contribute to understanding the complex social and normative processes through which ideas and narratives about the purpose and normative orientation of international society gain or lose prominence.

A problem from International Law

The starting point for this thesis lies in international legal theory, in particular in the debate about *jus cogens*. The analytical utility of approaching the issue from a legal perspective is that jurisprudence provides an elaborate body of literature addressing the nature, purpose, and problems associated with the ranking of international norms. While this literature does not come without significant problems, it nevertheless offers us a well-established theoretical and conceptual account with

which to engage. Given the immense scope of this literature, it is virtually impossible to review the entire legal debate about normative hierarchy.⁶ I will focus on the concept of *jus cogens* as the principal theoretical construct for the assertion of higher-order norms. To understand the significance and complexity of *jus cogens* for the nature, making and application of international law, this section begins by looking at some of the key structural dynamics in the modern international legal order. This will not only help us understand the wider intellectual contexts in which debates about superior norms are embedded, but also help us appreciate the fundamental status of these debates and the issue-areas they are involve.

The opportunities for re-ordering the global political system arising from the end of the Second World War have fundamentally altered the way in which international law, understood as a distinct institutionalised normative order, is made and applied. The emergence of ideas about human rights and the effort to establish the legal significance of the human individual have altered our traditional Westphalian image of consensual law-making among sovereign states. In addition, processes of globalisation have brought an increasing variety of non-state actors on to the international scene who participate in both the creation and application of key international norms. Supranational bodies such as the UN Security Council are engaging in legislative activities, setting normative standards that are 'subject to no geographical or temporal limitations' (Alvarez 2009: 825), while governments partner with NGOs and private firms to implement humanitarian and development programs. What is novel is not merely the proliferation of non-state actors, as Pattberg and Widerberg's (2015) discussion of trends in global environmental governance highlights, but the ability of these new actors to influence processes and change outcomes in world politics. Transnational actors perform functions traditionally associated with the nation state: they draft and promote agendas, set international rules, coordinate transnational policies and monitor compliance.⁷

Those changes are complex, non-linear and frequently cast as highly detrimental to long-established legal principles, most notably sovereignty. As a result we have an image of modern international law that is characterised by dynamism and integration, rather than uniformity and one-dimensionality. The structural dynamics that are seen to be central in the transformation of international law work in both vertical and horizontal directions. Horizontally, they describe the increasing diversification of issue areas and the admission of new constitutive members and participants. The International Law Commission paid tribute to the processes of diversification by initiating a study group on the theme of 'fragmentation of

⁶ For a good attempts see, Shelton (2006).

⁷ Domestic and transnational actors have been involved in the creation and diffusion of virtually all 'cosmopolitan' human rights and humanitarian norms, see Nadelmann,(1990).

international law'. Marti Koskenniemi (2006: 11), who finalised the landmark report, neatly summarises the horizontal disintegration of international law.

What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialized knowledge as "investment law" or "international refugee law" etc. - each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.

One example routinely used to illustrate the increasing fragmentation of international law is the proliferation of, and interaction between, what has been called 'free-standing' or 'self-contained' regimes (e.g. Young 2015, Kratochwil 2014: 93-97, Koskenniemi 2006: 65-102).⁸ As 'legalisation' has expanded into new domains, satisfying an ever-greater need for regulating interdependence among new actors and across new sectors, the number of autonomous institutions and organisations that deal with specific issue areas such as trade, environment and human rights has risen considerably. Although those regimes are in principal bound by the general rules of international law, they have their own binding dispute settlement mechanism, essentially making and applying rules according to their own procedural norms.⁹ The key problem of 'fragmentation' for international law, Kratochwil (2014: 94) astutely observes, is that 'it dissolves an even halfway integrated international legal order and stimulates – at least potentially – legal competition (...).

The vertical dynamics that have driven the structural transformation of post-1945 international law can be cast as a logical response to the proliferation of treaties and institutions and the normative conflicts that comes with it. If norms and legal institutions interact and compete with each other for normative primacy, then lawyers need some kind of organisational scheme that tells them which constellation of rules prevail in situation in which conflictual tendencies are high. Fuelled by the need to reconcile or rank dispersed, often geographically bound, customary practices and regimes, international lawyers have sought to develop a kind of hierarchical order among norms. As Shelton (2006: 293) points out, 'one obvious

⁸ For a comprehensive study of the various contemporary international regimes, see Avant, Finnemore and Sell (2010).

⁹ As Koskenniemi (2006: 68) put it, they are 'interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law'.

means of resolving a conflict is to designate one norm or subject matter as hierarchically superior to others’.

This brief summary of the structural dynamisms of modern international law is necessarily simplified and narrow, but I hope that it nevertheless helps to contextualise and ground the problem of *jus cogens*.

The concept of *jus cogens* in jurisprudence

The conversation about hierarchy in international law has revolved around a number of interrelated doctrines and concepts. In a seminal article trenchantly critical of an emerging normative differentiation of legal rules, Prosper Weil (1983) identified three ‘hierarchical’ tendencies in the international legal system: The emergence of soft-law and a corresponding legal discourse on the effects of UN General Assembly resolutions;¹⁰ the distinction between obligations owed to the international community as a whole (also referred to as obligations *erga omnes*) and obligations owed to individual states, exemplified in the International Law Commission’s (ILC) distinction between ‘normal’ internationally wrongful acts, which it called ‘delicts’, and extremely severe violations of international law, which it termed ‘crimes’ (Yearbook of the ILC 1976: 95-112);¹¹ and the formal recognition of the concept of *jus cogens* in the 1969 Vienna Convention on the Law of Treaties (VCLT). We should add a fourth indicator here, which Weil did not discuss, namely the UN Charter, which posits that its provisions prevail over ‘ordinary’ rules of international law (UN Charter Art. 103). Taken together, these legal doctrines and concepts provide the basis for the claim that there exists a differentiation of the normativity of legal norms in international relations.

This thesis focuses on the upper extreme of normative hierarchy in international law, that is, the concept *jus cogens*. Many of the conceptual and theoretical debates about a normatively differentiated international legal order converge upon the concept, and it gives rise to the most compelling, and for my purpose most relevant, arguments in support of the existence of a category of higher order norms. As far as I am aware, there is hardly any work on the structural transformation of the international legal system, whether theoretical or empirical, that does not make reference to *jus cogens*. Constituting by definition an idiosyncratic category of

¹⁰ The term ‘soft-law’ has various meanings in the legal literature. Broadly speaking, it denotes a variety of legally non-binding instruments used by states and international organizations.

¹¹ In 2001, the ILC abandoned the distinction between ‘delicts’ and ‘crimes’, instead speaking of ‘serious breach of obligation under peremptory norms of general international law’. See Part Two, Chapter III, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted on second reading by the ILC in 2001. For a discussion of the implication of these changes, see Wyler (2002).

universal, non-derogable and mandatory norms, international lawyers see the inclusion of *jus cogens* in the VCLT as the 'primary impulse' for the structural change of the international legal system from a horizontal to a vertical system of law (Bianchi 2008: 494).

A brief genealogy

The concept of *jus cogens* stipulates the existence of certain international norms from which no derogation is permitted. As Kolb (2015: 3) explains, '*jus cogens* is a legal technique which attaches to a series of norms to confer on them a particular resistance to derogation'.¹² In international law, these so-called 'peremptory norms' are considered to be universal and mandatory, binding all members of international society. The concept has been formally enshrined in positive international law in Article 53 of the 1969 VCLT:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character

Though legal theory has focused almost exclusively on *jus cogens's* existence post-1945, the idea that certain higher order norms exist beyond the will of its sovereign legal subjects is as old as international society itself. Meaningful precedents of peremptory norms can be found in the Roman law distinction between *jus strictum* and *jus dispositivum*, as well as in the thought of seventeenth and eighteenth century classical legal theorists such as Emmerich de Vattel and Hugo Grotius (e.g. Kadelbach 2006, Koskenniemi 2006: 182) Criddle and Fox Decent 2009: 334). According to Hannikainen's (1988) study of the historical development of peremptory norms, rules that fulfil the major criteria¹³ of *jus cogens* may even have existed since the birth of the Westphalian State System in 1648. It is from that point on, he argued, that a cohesive European-led international society existed that had the potential to create norms and rules obligating all members of international

¹² Kolb (2015: 2) identified, and in my eyes rightly so, 'derogability' as the key term for understanding the special normative qualities of *jus cogens*.

¹³ The criteria employed by Hannikainen (1988: 28-29) in his study of the history of *jus cogens* are as following: In order to qualify as a peremptory norm, (a) a norm would have to obligate all members of the society of states, (b) no derogation could be permitted from a norm, (c) a norm had to protect vital interests of the international community (d) the society of states was not to recognise treaty provisions, customs, titles or instruments which conflicted with alleged peremptory norms.

society and, to a limited extent, the capability to react to violations of these norms. It was, however, not until the nineteenth century that the first international legal instruments with rudimentary peremptory features occurred. Examples are the prohibition against slavery from 1807, the first Geneva Convention from 1864 and the Fourth Hague Convention on the Laws and Customs of War on Land of 1907.

Although the notion of peremptory norms appear to have meaningful precedent in international legal theory and practice, the widespread view is that the concept is a development of the post-World War II era (Criddle and Fox-Decent 2009, Ford 1994, Danilenko 1993, Whiteman 1977).¹⁴ Struck by the German Reich's efforts to formalise its aggressions and atrocities through legal instruments, international lawyers were searching for ways to incorporate moral qualifications into an international legal system which normative content depended entirely on the political will of sovereign states (Stephan 2011). In particular, the 'crimes against humanity'¹⁵, conducted by Nazi Germany between 1939-1945, led international lawyers to articulate the demand for a new category of rules, which could protect the elementary considerations of humanity (Ford 1995). Evidence for the emerging human rights movement that nurtured the formal development of *jus cogens* can be found in various multilateral conventions and tribunals of the immediate post World War II period. The tribunals for war criminals in Nuremberg and Tokyo, for example, demonstrated that the principle of state sovereignty, when used as means to protect officials accused of crimes against humanity, could be softened (Criddle and Fox-Decent 2009: 336). Expressing the same demand for a moral dimension of international obligations, the 1949 Geneva Convention on the Protection of War Victims postulated that no countries' formal renunciation of the Convention would diminish their obligations, since the parties 'remain bound to fulfil it by virtue of the principles of the law of nations, as they result from usages established among civilized peoples, from the

¹⁴ The International Law Commission (ILC), who started preparing the VCLT in 1949 and proposed the wording that became the final text of Art. 53, held conflicting views about the emergence of *jus cogens*. See Yearbook of the ILC 1963 Vol. 1 *Summary Records of the fifteenth session* 6 May – 12 July 1963 and Yearbook of the ILC 1966 Vol. 1, part 1, *Summary Records of the second part of the seventeenth session*. In its commentary, the ILC noted that the emergence of norms possessing peremptory character was a product of a current process of rapid development in international law and, therefore, a comparatively recent feature of the international legal system. Yet, a number of ILC members also expressed contrary views. Castrén (1963: 315), for instance, mentioned that the principle of the freedom of the high seas had been part of international law for over a century. By pointing out that no two states would be able reach a bilateral agreement that permits slave trade or piracy, the long standing peremptory quality of the prohibition of these practices was also emphasised by El-Barei (1963: 214), Yasseen (1966: 38), Ago 1963: 75). However, it was Tunkin (1963: 69), who expressed the majority view of the ILC by stating that *jus cogens* was a recent innovation 'brought about by historical changes and by the fact that certain aspects of relations between States — even purely bilateral ones, but first and foremost those relating to the maintenance of peace — had become of interest to all'.

¹⁵ The term was first used in 1915 in a declaration released by Britain, France and Russia condemning 'crimes against humanity and civilization' committed by the Turkish authorities against its Armenian populations (see Schwelb 1946).

laws of humanity and the dictates of the public conscience'. Collectively, these institutional developments reinforced the view that certain discrete rules are so significant that they 'trump' any conflicting norm established through agreements between the sovereign members of international society.

The introduction of *jus cogens* to positive international law has been celebrated as a major breakthrough in the institutionalisation of the interests of the international community as a whole. Typically traced back to the pre-World War I belief that a common set of universal principles should govern 'civilized nations', the concept's formal development during the second half of the twentieth century is seen as a clear and unequivocal statement in support of the existence of certain ethical considerations and moral goals shared by all members of international society (Shelton 2006: 295-297). Looking at both the conceptual development and formal establishment of peremptory norms, it becomes readily apparent that the essence of peremptory norms is a quest for safeguarding the moral integrity of international life through law.

The conceptual foundations of *jus cogens* were first comprehensively spelled out by Alfred von Verdross (1937) in his influential piece, *Forbidden Treaties in International Law*.¹⁶ Following the classical idea that certain rules cannot be contradicted by consensual agreement, Verdross (ibid.) identified peremptory norms as a distinct category of international rules preventing states to enter treaties that contemplate the moral qualities of the international community as a whole: Alfred van Verdross (1937: 572) was perfectly clear about the supreme ethical motives that drove his work:

'[Jus Cogens] consists of the general principle prohibiting states from concluding treaties *contra bonos more*. This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.

Verdross (1937: 572) was convinced that international law must recognize general principles that concern the conditions of the validity of treaties independently of the consent of the contracting parties. These conditions, he argued, arise from the imperative duty of all juridical subjects not to undertake acts that contradict the ethics of the community. Enshrined in the concept of *jus cogens* are thus certain discrete norms that possess compulsory qualities irrespective of state consent; treaties that violate rules belonging to *jus cogens* are to be regarded as null and void. Peremptory norms, Verdross (1966) specified later, can be distinguished from all

¹⁶ See also von Verdross (1966).

other rules of international law by the fact that the latter is relative, creating obligations and rights that concern only individual states *inter se*, while the former is absolute, satisfying interests of all states. Relying on this notion, the VCLT transformed, at least formally, international law into a vertically differentiated system of rules with peremptory norms at the top, and the validity of any other international rule depending upon its compliance with the hierarchically higher peremptory norm.

The superior status of certain norms becomes even more evident when related to the obligations (beyond treaty making) that belong to them. All peremptory norms are said to have *erga omnes* effects (e.g. Bassiouni 1996, Kadelblach 2006, Koskenniemi 2006: 193-206, De Wet 2013). That is, they contain obligations that are owed towards the international community as a whole, as distinct from obligations states owe towards individual members by way of treaty. This is because these rules are considered so fundamental, and the rights involved in them are so significant, that all members of the international community have a legal interest in upholding them. While the relationship between *erga omnes* and *jus cogens* is not entirely clear, the fact that peremptory norms give rise to obligation directed to the international community as a whole has been widely endorsed by states, organizations and scholars (Byers 1997).

Theory and theoretical impasse

Notwithstanding its formal recognition and vast intellectual exploration, many commentators have raised objections concerning the concept's ineffectiveness (Schwarzenberger 1965; Schwelb 1967), emptiness (Weisburd 1995) and empirical insignificance (D'Amato 1990).^v Although there is a wide agreement among scholars on the peremptory status of the prohibition against genocide, torture, aggressive war, racial discrimination and the right to self-determination, no definitive list of peremptory norms exists.

A great deal of the confusion over the rationale for *jus cogens* can be traced back to the vague theoretical basis on which the concept rests. As I will show below, both of the great jurisprudential schools – natural law and positivism – suffer major deficiencies as theoretical foundation for peremptory norms, which, in turn, has important implications for their empirical relevance.

^v For an excellent overview of the different critiques of *jus cogens*, in particular the objections to its existence, see Kolb (2015: 15-30).

The concept of *jus cogens* was developed under the strong influence of natural law¹⁸. Many legal commentators involved in the drafting process of Art. 53 of the VCLT asserted that *jus cogens* rules owe their superior normative status to their inherent moral authority. Judge Lauterpacht (1970: 90-93), for example, contended that peremptory norms derive their higher legal status from both international morality and general principles of state practice. In a similar vein, the International Law Commission's member Yasseen argued that the only meaningful criteria for distinguishing between ordinary rules drawn from custom or treaties and norms belonging to *jus cogens* was to determine whether the rules were 'deeply rooted in the international conscience' (Waldock 1963: 63). Assertions of peremptory norms being anchored in natural law are still widespread across the literature. Henkin (1981) and Sohn (1982), for example, claim that international rules such as the non-use of force and the prohibition of slavery obtain their higher authority through both their intrinsic normative weight and rational appeal. More recently, Dubois (2009) offered a natural law explanation that links the authority of *jus cogens* to the greater public good. Following his argument, the status of peremptory norms 'stems from the ability of these norms to guarantee a number of the basic goods and fulfil the demands of practical reasonableness' (Dubois 2009: 174).

Natural law explanations raise a number of well-documented difficulties. Natural-rights based accounts have been routinely criticized for conflating subjective moral norms with objective general principles of international law (Hart 2012). Indeed, even if one leaves hard questions about the nature and content of natural rights aside, it is extremely difficult to automatically deduce or verify concrete legal rules from a metaphysical source such as international morality (Chinkin and Boyle 2007). Natural law theorists are thus left with little means to specify the content and scope of peremptory norms, or the process by which a particular norm asserts peremptory status.

In order to countenance overtly subjective considerations about the innate nature of rights and values in judicial practice, scholars such as O'Connell (2012) and Tomuschat (1993) suggest to couple natural law justifications for *jus cogens* with an examination of states' normative practices and customary law, respectively. Others such as Byers (1997) have placed *jus cogens* entirely in the hands of states, understanding *jus cogens* as a form of customary international law that has rendered its peremptory status through *opinio juris* and state practice. Deriving status and content from state consent seems to circumvent one of the major problems

¹⁸ While many different strands of natural law have influenced international legal theory, in particular Western legal philosophy, its 'constant factor has been the appeal to something superior to positive law whether this superior factor was seen as a directive or as a guide to positive law' (Van Hoof 1983: 32).

associated with natural law theories; by arising from international custom, rather than metaphysical sources, peremptory norms are able to obtain legitimacy through the control states exercise over the emergence and change of peremptory norms.

Although customary accounts seem to bridge a positivist international law theory based on state sovereignty and consent with the main characteristics of peremptory rules such as non-derogability and fundamental status, using customary law to explain peremptory norms bears some difficulties. Most importantly, it is not immediately clear how any positivist conception of norms deriving its authority from the consent of sovereign states does exclude any considerations of legal exceptions made through persistent objection (Dubois 2009: 140). Indeed, a reasonably coherent positivist account of *jus cogens* would not only require a kind of 'double consent', that is, a recognition of the norm as custom *and* an acceptance that this norms possesses superior, non-derogable qualities; but also a far more widespread consent than required by ordinary norms of custom. Those requirements are certainly not impossible to achieve – it is usually the case that the majority of states consent silently by not expressively objecting – but it is questionable whether state practice alone can explain the ethical superiority typically associated with *jus cogens*. John Tasioulas (1996) thus seeks to derive the universal and non-derogable qualities of certain rules from a communitarian inspired version of customary law that downgrades the importance of general state practice in favour of *opinio juris* and value-laden social context. As I will argue later, this move is interesting for the purpose of charting a sociological account, not least because it links universal international law to shared world order values (see Chapter 5). Yet, even an approach based on a 'sliding-scale' interpretation of custom has to resort to some kind of natural law justification when explaining why certain norms retain a universal scope irrespective of non-consent and persistent objection (e.g. Tasioulas 1996: 100-104).

What are the reasons for the controversial nature of such an important concept and the lack of convincing justifications for its existence and identification? Given the complexity and extensive debate over those issues, it would be presumptuous to suggest that there is a single authoritative answer here, a kind of key we need to find in order to lift the shadow. Instead, I want to focus on what I see as the root-cause of the explanatory confusion over *jus cogens*, namely the absence of a convincing theory able to underpin and ground the concept. As Criddle and Fox-Decent (2009: 345) have tellingly argued: '*jus cogens* is a popular concept in search of a viable theory'. Indeed, as we have seen, all traditional international legal theories invoked suffer well-documented deficiencies in their own right and are rightly regarded as inadequate conceptual foundations. What ought to be central to an account of *jus cogens* – an explanation and justification of the special status of peremptory rules – is

reduced to grand and abstract claims to ethical superiority and special obligations. If we want to be able to assert, or at least understand, the primacy of certain values and rules for behaviour, this is an unsustainable situation.

This theoretical impasse, this thesis tries to show, is to a considerable degree compounded by the way in which the overall academic discussion has restricted itself to the analysis of peremptory norms as a legal phenomenon. Despite their individual differences, most justificatory theories share a common focus in that they are almost exclusively concerned with the formal character of *jus cogens*, paying little attention to its existence beyond international law. As a consequence, the theoretical debate has become limited to a seemingly unresolvable dispute about definitions and legal sources and criteria for identifying peremptory norms, cutting out other important aspects regarding the concept's relevance for normative order in international relations more widely. Petsche (2010: 237) neatly summarises the narrow character of the debate, maintaining that all 'discussions of *jus cogens* share a common approach, namely the fact that their criticism of, support for, and overall analysis of *jus cogens* invariably relate to the practical usefulness of this concept (...) as a rule of international law'. According to Shelton (2006: 292), however, *jus cogens*' impact on international dispute settlement and state practice has been marginal, with courts giving little effect to assertions of peremptory norms. In a recent survey of the literature and practice surrounding *jus cogens*, Saul (2015: 34-38) points to an upbeat in courts' willingness to engage with the concept, citing the International Court of Justice's reference to the *jus cogens* status of the prohibition against torture in *Belgium v. Senegal* as an indicator. That said, his analysis ultimately confirms that almost forty years of scholarly and judicial work had produced little progress in the doctrine of *jus cogens* identification.

Where to from here? Linking law to society

The initial principal argument I wish to advance in this thesis is that instead of focusing on the abstract content of *jus cogens* we need to understand how it actually works in the society in which it is embedded. This means shifting the perspective away from a purely legal to a sociologically driven approach that pays attention to the wider context in which law and norms are embedded. While far from stipulating concrete methods for identification, I suggest that such a shift can help to remedy the insufficient theoretical basis upon which *jus cogens* has been built. By avoiding formalism and an excessive focus on the concept's legal effects, function and sources, it leads us to highlight the social and normative foundations upon which the concept rests. In doing so, it makes room for an enquiry into the relationship

between *jus cogens* and the society in which it operates, emphasising the role peremptory norms play beyond international law.

Any system of law is invariably linked to its societal context, and international legal theorists and IR scholars alike have long acknowledged the need to relate the exposition of legal issues to the social conditions in which the law operates.¹⁹ Regardless of what type of actors a system is comprised of (collective actors such as states, clubs, economic or political organisations, or individuals), they need at least a rudimentary set of rules that structures their 'social' interaction.²⁰ This is because norms, whether legal or in any other form, are fundamental for orderly and practicable relations among societal subjects that pursue some sort of organised and peaceful co-existence. The sociological dimension of the international system, in particular its analytical consequence for the existence and working of law, have typically been cast aside in thinking about *jus cogens*. This, I want to argue, is a serious mistake. As Andreas Paulus (2009: 46) reminds us: 'Every concept of international law is based upon an understanding of the structure to which international law applies. Accordingly, every theory of international law involves, explicitly or implicitly, a concept of community or society'. In other words, the way in which we are able to understand legal doctrines such as *jus cogens* depends, among other things, on our ability to extend the analysis of law into the social domain of international relations.

As a subject of study, however, international law has not always taken centre stage in the IR literature. In the classical texts, the picture of international affairs being a violent and, therefore, inherently lawless domain has been greatly influenced by the texts of Carr (1939), Morgenthau (1948) and Waltz (1979). Generations of students have learned that international politics is a struggle for power taking place under the Hobbesian state of anarchy. The negative by-product of this narrative is that law is reduced to wishful thinking about equality, reason and justice and denied real influence on hard power politics. Of course, there lies some truth in this assessment. Violent conflict such as the great Peloponnesian War, the Thirty Year's War, Napoleon's conquest of Europe and World War II, to name only a few, have significantly shaped history and the world we live in today. Yet, that international relations, especially in its modern form, is a conflict-torn and lawless realm, which is dominated by material interests, is, of course, only one side of the coin. Even the classical realists themselves recognised the presence of morality,

¹⁹ For classic works by IR scholars on this matter see, Kaplan and Nicholas Katzenbach (1961). For classical legal works on this matter see, Huber (1928); Simma (1994).

²⁰ I insert the word 'social' here because merely physical relationships may be conducted in the absence of law. However, as will become clear later, systems that are based on purely physical relations hardly exist.

norms and law in international relations. Carr (1939: 97) discussed the role of morality in international politics at length, arguing that 'political action must be based on a coordination of morality and power. This is of practical as well as theoretical importance'. Similarly, Morgenthau (1948: 284) admitted that if there was a minimum of peace and order in the relations between sovereign states, then 'it was inevitable that certain rules of law should govern the relations'. These quotes should not disguise the fact that Carr and Morgenthau had little faith in law and morality as normative forces that could constrain the arbitrary exercise of power. But they nevertheless demonstrate that even the strongest advocates of realism were aware of the role and function of law and norms in international politics.

The nature of the relationship between law and society in the international domain is, of course, in many respects idiosyncratic. Most evidently, as James (1973: 65) notes, it is 'the lack of government, the absence of central authority and the concomitant dispersal of authority' that distinguish international from domestic society. Consequently, because the international legal system lacks institutions capable of implementing a legal order independently from the consent of its legal subjects, international law, of all law, is most closely related to and dependent on the social structure of the society in which it operates (Huber 1928). For international law to exist, states themselves have to establish an institutional architecture dense enough to carry, and to some extent enforce, legal rules and moral standards. Phrased in the classical English School terminology of Hedley Bull and Adam Watson (1984): they must leave the sphere of 'international system', in which interaction is purely mechanistic, anomic and power driven, and form an 'international society' based on a set of common institutions regulating social, rule-governed interaction.²¹

There seems to be a general agreement that the existence of law in international relations depends on a particular form of states-system, namely an international society. Although the early IR writers did not have such an analytically elaborate definition of international society at hand, they were well aware of the interdependence between law and international society. Alfred Zimmern (1938: 12), who was among the first cohort of scholars who systematically studied the subject of international relations, pointed out that international law 'can only exist in a societal

²¹ English School theorists work with a conceptual distinction between international system, international society and world society. An international system exists when two or more states have sufficient interaction that the behavior of the other 'is a necessary factor in the calculation of the others' (Bull and Watson 1984: 1). An international society 'exists when a group of states (...) has 'established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements' (Bull and Watson 1984: 1). World society is about the transcendence of national borders. Based on a notion of universal cosmopolitanism, it puts 'individuals, non-state organizations and ultimately the global population as a whole' at the centre of IR theory (Buzan 2001: 475).

framework (...). Where there is a law, there must be a society in which it is operative'. In a similar vein, E.H. Carr saw international society as a necessary condition for the presence of law in the international system. In his (Carr 1939: 228) discussion of the influence of law and morality on international politics, he asserted that international law had 'no existence except so far as there is an international community which, on the basis of a 'minimum common view', recognises it as binding'.²²

The argument that the presence of law at the international level requires some sense of shared understanding about norms and institutions among states runs in both directions. That is, the existence of law, and more specifically the fact that we can observe a general adherence to rules of international law, provides evidence for the existence of international society. James Mayall (2000: 94), for example, identifies international law as 'the bedrock institution on which the idea of international society stands and falls'. Similarly, Terry Nardin (1998: 20) holds that 'international society exists to the extent that states understand themselves to be related to one another as subjects of common rules'.²³ Besides providing evidence for its existence, law plays an important role in explaining the very nature of international societies. International legal scholars such as Salcedo (1997) have pointed out that the specific functions of international law, including its imperfections, correspond for the most part to the structural features inherent in international society.

To reiterate further, the analytical significance of international law for my approach lies in the claim that the legal system mirrors the normative content of international society's social structure. One who has made the most out of the conceptual link between law and society is Philip Bobbitt (2002). His seminal account of the evolution of the sovereign state as source of political authority is based on the fundamental claim that the history of international law and the social formation and development of a society of states are deeply interwoven – one cannot tell the story of one without paying sufficient attention to the other. What is most interesting about his thinking for my purpose is the way in which he understands the nature and structure of international law in terms of strategic and political developments associated with the constitutional structure of the society of states. It is changes in the purpose of the state and its legitimacy, often prompted by strategic and technological developments, which change our ideas about international law and the principles that guide world affairs. As Bobbitt (2002: 364) explains, 'international law and its structure arise from the constitutional order of

²² In his study of international law in IR theory, Barkley examines Carr's view on law at length, concluding that Carr saw a political society as an 'essential requirement' for the existence of international law.

²³ For a similar argument see Vincent (1986).

states; when this order changes (...) the institutions of the society composed of states inevitably change also'. Note that on this interpretation, international law is not just a closed, monolithic system of rules deliberately sustained and transformed through systematic procedures of application and creation. Instead, it is an institutionally integrated phenomenon, whose form, content and legitimacy arise from the complex interplay between social order and normative goals.

Along these routes, I wish to suggest that a sociologically driven IR approach that recognises the analytical interdependence between peremptory norms and international society ought to be key to re-thinking the concept of *jus cogens*, offering a promising opportunity to shed some light on a number of unexplored aspects regarding its existence and working beyond the international legal order. In particular, a structural approach that studies the concept within the confines of a societal framework and takes the socially constructed nature of norms and institutions seriously seems to be indispensable for understanding the nature, function and purpose of peremptory international law.

An argument for an English School perspective

What kind of theoretical framework can help us to think through the non-legal determinants of *jus cogens*? Having identified what I see as the key limitation in the debate about higher-order norms – the neglect of social and normative context – we can now move on to look for a viable candidate to fill that gap. Here, I wish to suggest, the discipline of IR can make an important contribution. Since the rise of constructivism²⁴ in the 1990s, IR mainstream scholarship has become increasingly interested in the social dimension of international life. As opposed to materialistic understanding of world politics, which emphasises the role of economic and technological resources, exponents of social approaches have begun to make sense of the power of shared ideas and norms by engaging with the identification of social constructions that are value-shaped.

There are two main theoretical orientations that couch their image and analysis of world politics in sociological terms: social constructivism and the English School. Because both theories are essentially interested in the social dimension of international politics, they share a number of theoretical assumptions and cognate research goals: the focus on the cultural bases of state identity, the rule-governed nature of state-systems, and the different forms of organising life under anarchy (Reus-Smit 2009: 58). There has been a tendency in English School theory during the

²⁴ The term was first used in IR scholarship by Nicholas Onuf (1989).

last fifteen years or so to utilise constructivist ideas, in particular those about the social nature of structure and agency (e.g. Dunne 1995, Buzan 2004, Reus-Smit 2009). According to Tim Dunne (1995), the English School is essentially a forerunner of modern IR constructivism. Dunne uses constructivist theory to elucidate the distinct ontological foundations of the School's classical figures, Bull, Manning and Wight. What emerges from this is an intersubjective reading of the international world, where socially constructed institutions such as diplomacy, international law and sovereignty constitute agents' identities and interests and 'can exist only in virtue of certain intersubjective understandings and expectations' (Dunne 1995: 378).

The general methodological orientation of this thesis is in many ways a continuation of this merger between constructivism and English School theory. Given their mutual concern for the social aspects of international life, I understand them to be complementary in the sense that there should be a constant exchange of knowledge at the conceptual and methodological levels. That said there are also important differences between the two approaches that are not always entirely clear in the discourse about convergence, but which profoundly shape the way in which we frame research. Constructivism is strictly speaking not a theory of international relations *per se*. As Finnemore (2001: 393) points out: 'It is a social theory that makes claims about the nature of social life and social change. Constructivism does, not, however, make any particular claims about the content of social structures or the nature of agents at work in social life'.

There is another crucial difference between the two kinds of theories that has to do with their cognitive orientations and the direction from which they have typically approached world politics. Whereas constructivists, perhaps with the notable exceptions of Wendt (1999) and Reus-Smit (1999), have focused on the location, function and transformation of specific norms, the English School, is largely concerned with 'the way in which things fit together' (Hurrell 2001: 489). Laust Schouenbourg (2011: 40-41) recently worked out this difference in an interesting fashion, calling constructivism a 'bottom-up' and the English School a 'top-down' approach. As he explains:

They [constructivists] have been concerned with the basic building block of the social world in the form of norms, identities and institutions, and have explored (...) these through a great number of rewarding case studies. (...) The English School sociological perspective, on the other hand, takes the social whole (international society) as its point of departure. It then proceeds to break it down into its constituent part, but only to put it back together.

These short comparisons are helpful in establishing a little bit more carefully why this thesis chooses the English School as a theoretical lens. First of all, English School

theory School provides a substantive analytical framework for studying institutional arrangements: international society. The idea that states form a society based on certain shared norms, rules and institutions has been the intellectual centrepiece of English School theory and it is one which allows us to plot the social whole in which *jus cogens* is embedded. By organising the building block of international order within a societal scheme that links the emergence and maintenance of a social form of interstate relations to the existence of international law, it offers a critical pathway into assessing the place and function of law beyond the legal system.

The second argument for an English School perspective stems from its long-standing substantive interest in international law; or what Andrew Hurrell (2001: 492) calls 'the continued relevance of English School perspectives for understanding the role of international law and the continued importance of intellectual dialogue between law and politics'. Coming from a sociological angle, many of the School's writers have sought to infer arguments about the nature of international society through the analysis of the structure, content and development of international law. As Peter Wilson (2008) recently observed, English School scholars have spent time and effort to show that international law always reflects the society from which it emanates, and that we can only make sense of international law by contemplating the distinct character of international society. Hedley Bull's (1966) notion of a rationalist international society as a middle way between Hobbesian realism and Kantian revolutionism perhaps stands as the clearest example of this engagement. Bull was heavily indebted to the legal theory of Hugo Grotius, which enabled him to develop claims about individual legal agency and the permissibility of certain state practices in relation to war and violence.²⁸ What is crucial in English School discussions about law for this thesis is the way in which they are typically situated within a wider social and normative milieu. Instead of simply seeing international law as a rationalist system of rules, they understand it as an 'integrated, historically-evolving institutions and as an interconnected normative system' (Hurrell 2001: 493). This view adds a distinctive and important perspective to the narrative about law and social control at the international level and it provides the kind of analytical push beyond formalism and contractualism I am aiming for.

Finally, what is distinctive about the English School as an intellectual apparatus, and what makes it such a fertile approach for thinking about peremptory law, is its explicit concern with normative questions. What is the moral scope of action in an anarchic self-help system? What is seen as appropriate and desirable state practice? What normative guidelines on how foreign policy decision makers ought to act in

²⁸ For a more recent, critical assessment of the significance of Grotius for English School thinking, see Kingsbury (1997) and Keene (2002).

certain situations can scholars offer? How much normative progress is possible in international relations and what kind of norms, value and principles does such progress implicate? Although not all English School writers have engaged these kinds of questions with equal intensity or rigour, Reus-Smit (2009: 69) is right to stress that the School's, 'systematic reflection on the nature of international society and political life' is something other mainstream IR approaches have shied away from; including constructivist research which is more focused on explicating norms and social conduct rather than evaluating or assessing its underlying normative claims and potentials. Traditional legal accounts, I wish to suggest, need to engage far more thoroughly with the value and ethical principles that are said to be constitutive of peremptoriness and how it is that norms become normatively superior. Given the centrality of claims to natural law, ethical standards and human dignity for the development of and justification for the *jus cogens* doctrine, the ability to systematically explicate its foundational claims ought to be key to re-thinking its theoretical basis. I will use the English School's potential for normative reflection to press the core focus on *jus cogens* beyond constructivist analysis of 'social facts' to inquiry about deeper-seated normative visions and ethical schemas. As we will see, normative reasoning has a somewhat peculiar standing within the English School's methodological framework in the sense that some writers see it as an inescapable part of its research agenda (e.g. Little 2000, Williams 2011), whilst others insist on the strict separation of analytical and normative modes of theorising (e.g. Buzan 2004). It will be one purpose of this thesis to lay explicit emphasis on the analytical relevance of normative English School theory and to show that it has its own integrity and logic which needs to be appreciated when thinking about value-laden puzzles (see Chapter 2).

Having established the nature of the problem and suggested the intellectual orientation which should help us to think through it, the rest of this chapter moves on to identifying in more detail the kind of (English School) theory that will frame the rest of this thesis.

The English School: a brief review

The English School approach to the study of IR can be conceived as a kind of sociological-institutionalism that focuses on the social-structural and normative environment in which actors are embedded. Although the classical English School thinkers largely refrained from explicating their methodological orientations, there was an implicit consensus that their enterprise was essentially sociological – both in

terms of its style of inquiry and in terms of its cognitive goals.²⁸ In contrast to their American counterparts, who sought to cast political systems in terms of interacting variables and logical connections between units, British international theorists turned to law, philosophy and history for explanations. Rather than trying to model abstract regularities and mechanisms, they were interested in the way social behaviour leads to international order and, above all, in the question whether states can form a political society.

Instead of being a theory with clearly defined intellectual borders, the English School is best understood as a 'tradition of conversation' which has generated an expansive theoretical and empirical body of research (Buzan and Little 2001: 943, see also Buzan 2004). It originated in the late 1950s from The British Committee on the Theory of International Politics and centres around a number of interrelated dispositions concerning the fundamental principles of international politics. What broadly unifies these dispositions is the core belief that international relations are not merely about power politics and conflicting national interests, but also about identities and common values, and the shared norms, rules and institutions that order international life.

In English School theory, sociological orientation is usually accompanied by a twofold rejection of the 'domestic analogy'. In the first instance, it is presumed that stable patterns of interaction and expectations can (and did) evolve in the absence of state-like central institutions and enforcement mechanisms. As Suganami (2003: 257) puts it:

[D]espite the formally anarchical, or decentralized, structure, the modern world of states has evolved rules and practices that govern their interrelation, and therefore, substantively, the interaction of states exhibit a remarkable degree of order'.

This is the central substantive claim of the English School advanced by Butterfield (1966:147), Bull and Wight (1977) and Bull (1977), and it has been endorsed and reproduced by generations of English School scholars. Crucially, on this view, states do not only manage to establish some kind of stable social order among them, but it is sustained by legal and political principles different from the ones that structure domestic systems. Here, the English School literature is the main one making a serious and sustained effort to explore the distinct nature of *global* order principles, their historical emergence, and the way in which they interact in the construction and transformation of international systems.

²⁸ Among the early figures, this view was perhaps most clearly articulate by Manning's thinking, who suggested that the entire discipline of International Relations is, in fact, a branch of sociology (e.g. Linklater and Suganami 2006: 100).

The English School has always been a broad theoretical church. There is no schema, no blueprint for social inquiry which scholars can draw on when designing their research. Instead, its writers have more or less intuitively chosen a range of perspectives and techniques to study their subject matter. It is not surprising that the School is usually conceived as being composed of a number of interrelated works, rather than a coherent paradigm (Buzan 2004). According to Tim Dunne (1995), its core domain is defined by the acceptance of 'three preliminary articles': (a) a specific tradition of inquiry; (b) a pronounced interest in normative questions and international ethics; and (c) a broadly interpretive approach to the study of international relations. It has been noted that Dunne's approach is perhaps too demanding, likely to produce some kind of false insider-outsider dichotomy (Buzan 2001: 474). Yet, we need some kind of understanding about what English School theory is, what it entails, and what not.²⁷

One way of carving out the School's intellectual terrain is to begin with its central concepts – international system, international society and world society – and see how they have been deployed (I will say more about the methodological distinctions between those three concepts in Chapter 2, so a brief summary should suffice here) International system is concerned with the material side of international politics. Being in close proximity to Waltz's Neorealism, it places the role of power, self-interest and security competition at the heart of IR theory, and stresses restraining force of anarchy and material structures. International Society adds a social dimension to the merely power/material driven rationale that underpins the concept of international system. Its analytical focus lies on the development, nature and depth of shared values, norms and institutions. English School scholars claim that IR should neither be understood exclusively in mechanistic terms, nor does the emergence of a social interaction between states at the international society level completely eliminate structural-material constraints (ibid.). Instead, international society should be conceived as a 'superstructure, consciously put in place to modify the mechanical workings of the system' (Watson 1992: 311). To capture the transcendent values that underpin the international community, the School turns its attention to the level of world society. There seems to be a consensus that individuals and transnational groups replace sovereign states as the main actors, but there exists no systematic account that coherently organises the concept's elements.

²⁷ On the different ways in which English School scholars have located themselves in the field of IR, see Linklater and Suganami (2006: 13-15).



Figure 1. The International Relations universe as depicted by the classical English School's classical 'Three Traditions' model (figure taken from Buzan 2001: 475).

Despite persistent reference to the complementary nature of these three concepts (see figure 1), the bulk of literature is concerned with the development of international society, and it is here where the School has made its most important contribution to IR theory (Dunne 1995: 126). In fact, one can even go so far as to say that it is the idea that states form a society which unites members of the English School and distinguishes their intellectual endeavours from other IR approaches (Wilson 1989: 55). It separates the English School from Realist and Neorealist thinking by merging the constraining forces of anarchy with a rationalist logic of cooperation in order to show how a socially constructed order can develop; and it distinguishes the School from the more liberal Regime theory in that international society is supposed to have constitutive effects, rather than merely instrumental implications (Buzan 2001: 475). The idea that international society is an admixture of realism and rationalism is neatly captured in Bull and Watson's famous definition of the concept (1984: 1).

[A] group of states (or, more generally, a group of independent political communities) which not merely form a system, in the sense that the behaviour of each is a necessary factor in the calculation for the others, but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements.

The most influential English School debate has revolved around the type and depth of shared norms, rules and institutions. Pluralists such as Jackson (2000) and Bull (1977) hold that the institutional framework of international society is instrumental, geared towards the maintenance of international order. Such accounts lean towards the international system side since the main concern of international

society is about peaceful co-existence under the Hobbesian conditions of anarchy. To maintain order, mutual recognition of state sovereignty and non-intervention are sacrosanct, and the main task of international society is to establish rules and norms maintaining the separate existence of its members. In such a conception states do not pursue common substantive goals and values; however, they are committed to upholding common norms that allow them to peacefully coexist (Dunne 1998: 100). The works of Vincent (1978, 1986), Linklater (1998) and Wheeler (2000) draw on a different conception of international society. In contrast to their pluralist counterparts, they argue that states do share a more extensive set of norms, which carry a normative content deeper than the one inscribed in instrumental cooperation norms. Broadly speaking, the idea of a solidarist international society is defined by the enforcement of international rules including the upholding of the society's moral purposes such as the collective protection of human rights. In this view, individuals may not be the primary actors but certainly the ultimate members of international society, being legitimate subjects and not just mere objects of it.

This already fairly convoluted picture becomes even more complex once we acknowledge the English School's theoretical indeterminacy. While there seems to be a general agreement on the definitions of the key concepts, far less consensus exists about the way in which they are deployed. Buzan (2004: 12-15), for example, identifies three basic images of theory present in the literature, each of them loosely connected to a different logic of inquiry:

- (1) a set of ideas to be found in the minds of diplomats and statesman.
- (2) a set of ideas to be found in the minds of political theorists.
- (3) a set of analytical concepts that developed in order to capture the social and material structures of states systems.

The first image is particularly present in the early English School works that emerged from the British Committee on the Theory of International Politics. For members of the Committee such as Manning (1962), international society was just an idea present in the official discourse about international politics (Buzan 2004: 13). Hence, in order to theorise about international life, authors of the Committee frequently looked at the practical experience of diplomats and other practitioners to theorize international life (Viguzzi 2005: 126). Among contemporary scholars, Robert Jackson's (2009) work exemplifies this understanding of theory. For Jackson (2009: 21-39), the purpose of the English School enterprise is to examine the practice of statesman in order to identify the normative ideas they hold about international society. To discern these ideas, Jackson and other members of the English School have extensively studied

primary sources and participated in the meetings of international institutions, engaging with diplomats and observing the work of civil servants. What underpins all these efforts, Navari (2009: 12) explains, is the notion of 'practice', which frequently 'point[s] researchers in the direction of the practitioner'.

The second image was articulated most clearly by Hedley Bull in his essay *International Theory: The Case for a Classical Approach* (1966). For Bull (1966: 361), the study of international politics should be based on an 'approach to theorizing that derives from philosophy, history and law'. Hence, inquiring into international relations leads one to study the texts of the classical philosophers and legal theorists such as Thomas Hobbes, Immanuel Kant and Hugo Grotius. The political theory perspective is neatly reflected in Wight's three traditions of international theory in which he sought to capture the strands of belief that can be used to understand the different spheres of world politics, i.e. Realism, Rationalism and Revolutionism. The English School works conducted in the political theory fashion show strong inclinations towards normative theory. They promote certain values such as justice and other ethical and moral standards (e.g. Bull 1977, 1984), and advocate universal principles, most notably human rights (e.g. Vincent 1986, Linklater 1998) and humanitarian intervention (e.g. Wheeler 2000).

The third image portrays international system, international society and world society as a set of analytical concepts designed to identify the material and social structures of state-systems (Buzan 2004, Buzan and Little 2000). Parts of Bull's (1977) seminal book *The Anarchical Society*, Holsti's (2004) work on international institutions and James's (1986) study of sovereignty and statehood pertain to this category of English School thinking. It bears a strong resemblance to Waltz's (1979) Neorealist IR theory in that it focuses on structural configurations at the system level, and draws heavily on Wendt's (1999) constructivist account of international politics. It is sceptical as to the analytical purchase of normative theorising and moral philosophy and, instead, privileges a purely analytical scheme that allows identifying the different structural configurations present in international systems.

The different logics of inquiry identified should not to be read as being mutually exclusive. What distinguishes the English School *inter alia* from other IR theories is its self-conscious practice of theoretical and methodological pluralism. Stemming from the observation that international events and processes are extremely complex, multifaceted and often hard to grasp, English School theorists have long rejected incommensurability (the claim that there is only one way of acquiring knowledge about the subject matter) (e.g. Navari 2009a, Buzan 2004, Little 1995).

Conclusions: taking forward Buzan's social-structural project

It is certainly the case that there are many, most likely inexhaustible amounts of stories to tell about the nature and working of world politics. These stories are not mutually exclusive, alternative interpretations of the world, but interrelated, each revealing a different aspect of reality. Settling on a specific type of theoretical inquiry that is supposed to fit all our puzzles seems to be a futile idea. From a theory building perspective, however, the English School's multiple levels of analysis, research agendas and methodological orientations in play are unsatisfactory – we need to be more explicit about the way in which we produce and combine different stories and research practices. This, in turn, means narrowing down considerably the kind of approach we wish to deploy.²⁸

Perhaps the clearest and most articulate version of English School theory, certainly in terms of scope and analytical rigour, was developed by Barry Buzan (2004). Animated by the indeterminacy surrounding the idea of 'world society', Buzan set out to revise and restore the concept's place within the English School canon. His efforts accumulated in a number of works, most notably his landmark book *From International to World Society?*. It is widely acknowledged that the text offers much more than just a study of the social structures that underpin transnational processes of globalisation (e.g. Williams 2011, Adler 2005, Dunne 2005); in fact, he radically reinterpreted the whole English School, thereby reorganising large parts of its theoretical structure. As a result, Adler (2005: 171) lauded, 'the book offers a grand theory of international politics of the kind we thought was no longer possible'. In the sense that Buzan elaborates a social approach to the study of international structures, he stands square in the English School tradition. The sociological nature of his project is manifested both its cognitive goals and its deeper-seated ontological premises. Buzan himself is keen to tell us that although his theory differs in many respects from traditional English School thinking, 'it remains linked to the classical texts, the focus on international social structure and the methodological pluralism'. So what is distinct about Buzan's thinking? And, even more importantly, how exactly does it matter to this project?

Buzan engages in a broad range of tasks, but the principal theme of his redefined English School is the separation of social-structural and normative theory. He explicitly confines himself to the former, and, in doing so, seeks to abandon the normative dimension from theorising norms and institutions. As a result, the 'redefined' English School is a theory about norms, rather than a normative theory.

²⁸ Such an endeavour necessarily involves drawing some (artificial) lines of difference between different versions of English School theorising. Like all boundaries, of course, these are not fixed and immutable, and they can and most likely will be contested.

This move is radical, having enormous impacts on how future English School scholars approach the study of international relations – if they choose to work with his account. As noted above, the normative dimension has been an essential feature of classical English School theory on which basis a great deal of its conceptual understandings rests. Buzan (2004: 228-229) is certainly aware of the important role normative thinking has played:

I do not intend that this structural re-writing of English school theory should replace or override the normative version of English School theory (...) We need both the normative and structural version of English school theory standing side by side complementing and questioning each other (emphasis in original).

Whilst I do not support the exclusion of normative theory as a viable tool for studying international relations, I nevertheless wish to suggest that Buzan's move does open up interesting avenues for thinking about English School inquiry. Above all, it urges us to think a bit more carefully about the kind of normative engagement we deem plausible and possible. According to his (2004: 42-43) argument, a normative motivation potentially reduces our contribution to the development of a more analytical IR theory, because of the way in which it inherently renders some constellations, most notably those deriving from liberal ideas about natural rights, normatively more desirable than others. The relentless focus of the solidarist-pluralist debate on human rights issues, Buzan (2004: 46) tells us, 'has kept the whole theory discussion in a much narrower frame than the general logic of the topic would allow'. This normative scepticism, however, appears to be based on a very limited understanding of what normative analysis is, how it can be conducted and, perhaps most importantly, where it can lead us. John Williams (2011, 2015) has developed a philosophically sophisticated alternative to the kind of normative project Buzan sees as detrimental to analytical knowledge. Williams insists on the link between the analytical and the normative and offers a pluralist agenda that seeks to meet the flexibility demanded by Buzan. It will be one of the thesis' key purposes to engage with Williams' pluralist account in order to see how we can yield persuasive claims that can sit alongside structural analysis – claims that do not presuppose a link between *jus cogens* and fixed notions about what is good, right or desirable.

Buzan's distinction between normative analytical analysis also encourages us to think more systematically about the way in which we structure our research when confronted with value-laden phenomena. Rather than mixing analytical analysis of social-structural constellations and normative discussions rooted in political theory, this thesis will try to establish some tentative boundaries between the two. This will

hopefully bring out more clearly the complexity and distinctive dimensions involved in the formation of peremptory law.

This is not the place to explore methodological potential of Buzan's account, this is picked up in the next chapter, but it does point to a two-fold research agenda, one that analytically separates *jus cogens'* normative and structural dimension. The distinction between relative normativity as a vertical system of norms and peremptory norms as a discrete type of international rules, this thesis argues, allows us to produce a more nuanced understanding of what normative hierarchy in international society entails and how we can make it intelligible. If we want to understand how the international normative framework transforms from a horizontal into a vertical system of rules, the focus shifts to the social-structural forces that shape the normative structure of international society; here, the question is not so much about the content of rules, but about the social (hierarchical) relationships among members of international society and the processes by which they share and internalize norms and values. On the other hand, if we think of *jus cogens* as a discrete category of international rules, our subjects of study are the foundational moral and ethical determinants from which peremptory norms derive their special status. In the end, of course, the normative and the structural dimension are inseparable – they are two sides of the same coin. At the meta-theoretical level, however, the idea that we are dealing with two distinct aspects of a phenomenon helps us to develop richer, more differentiated accounts of the processes by which higher-order norms are constructed.

Before we can begin to re-formulate the concept of *jus cogens* along those two dimensions, there is some interesting and important work to be done in developing the concrete methodological foundations of this thesis. How can we use English School theory to structure our research? What fundamental assumptions does a sociological approach imply? The next task is thus to explore in more detail the complex, and at times confusing, meta-theoretical structure of the English School and see how Buzan's account can help us to arrive at a clear methodology and research strategy for this project.

Theorising the ‘social’ in International Relations: an English School approach

As this is a thesis firmly rooted in the English School thinking and seeks to make a contribution to its application and development, theory and methodology will play an important role throughout the project. We need to be clear, as English School theorists, about the kind of knowledge we are interested in, what it takes to produce it, and where we should look for it. The purpose of this chapter is to re-examine the School’s methodological foundations and try to establish a plausible, and philosophically grounded approach to studying law, norms and institutions. In doing so, I hope to show what exactly is ‘social’ about English School theory, and how it can help us to re-think the notion of normative hierarchy. This will see me exploring and further developing the sociological turn that English School scholarship has taken during the last fifteen years or so. One key aim here will be to look a little bit more carefully at the distinction between structural and normative elements of theorising and try to see whether we can connect them in a meaningful way. If I am successful, the result of these moves will not only be an English School framework that is in touch with philosophical claims about (international) social reality, but also a more concrete roadmap for studying value-laden social phenomena, in our case *jus cogens*.

Whoever is familiar with the English School’s methodological landscape knows that these are (over)ambitious aims. Methodology is a tricky terrain and has always been the School’s weak spot. A little over three decades ago, Roy Jones (1981) issued an (in)famous call to close the entire research programme precisely because of its fragile status as a ‘theory, its underspecified purposes of inquiry, and its shaky methodological foundations. Jones’ argument for closure has evidently not been successful – and the English School appears to be more alive than ever: A new cohort of young scholars is beginning to engage with and expand the School’s research agenda; new introductory volumes have been published by its leading figures (Buzan 2014, Navari and Green 2014); and a vibrant, increasingly organised research community under the banner of the fields largest academic association has emerged. These developments have revived and strengthened English School

thinking considerably, in particular in some of the most pressing issue-areas in contemporary IR, including global governance, globalisation, and regionalism. Its lack of methodological sophistication, however, has largely gone unchallenged.

One notable exception is Cornelia Navari's (2009a) volume *Theorising International Society*, which explicitly takes on the task to explicate the School's complex methodological environment. As an overarching theme Navari stresses the centrality of social practice for understanding international society and an epistemological approach that relies on interpretivism and, in terms of methods, on historical and comparative analysis. Although the collected works are diverse, ranging from historical to legal approaches, they broadly reflect two main trends in English School theorising: a classical Bullian (1966) approach indebted to history, law and philosophy; and the more recent turn to constructivist ideas about intersubjective structures, norms and values (Buzan 2004, Dunne 1995, Reus-Smit 2009) and the co-constitution of structure and agency (Spandler 2015). In brief, Navari's volume stands as an important contribution to a long neglected aspect of English School scholarship, documenting, perhaps for the first time, the full scope of the its methodological diversity. I am sceptical, however, whether it manages to 'systemize the methodological (dispersed) pluralism of the School into a coherent toolkit', as Costa-Buranelli (2015: 2) maintains. Rather than an attempt to systematically identify, assess, correct and develop some methodological positions or strands of inquiry, the essays offer a somewhat loose collection of different views and approaches. There are three problems with the methodological narrative Navari (2009b) seeks to tell.

The first stems from Navari's cognitive concern for actor's self-understandings and her focus on agency. 'In the degree to which English School approaches are concerned with rules of conduct', she maintains, 'they must focus on agents' (Navari 2009b: 8). This leads her to exclude structurally driven accounts such as Buzan's (2004) analytical version, which understands order and society through the types of structures by which they are held in place. The second problem is a marginalisation of normative theory. Although Navari recognises that normative concerns are 'definitional' of English School scholarship, she is surprisingly quiet when it comes to showing how we can engage with the normative standing of notions such as war, law, institutions or social groups, including international society. Williams (2015) has pointed to this 'downplaying' of the normative potential of English School theory and charted a possible response that will help us to restore some of that potential. The last problem is a result of terminological indeterminacy. Her framing chapter oscillates between 'methods', 'methodology', 'ontology', 'epistemology' and 'issue areas', but never tells us what either of them means or how they hang

together. Apart from a few references to the way in which others have understood and deployed the terms (Navari 2009b: 1-2), any definitional attempt is wanting. Being clear about these things, however, is crucial, for without such clarity it is difficult to build a systematic approach to research design and social inquiry.

In order to avoid such confusions the chapter begins by setting out some key terms and the way in which they will be deployed, before looking at the methodological foundations that have underpinned English School research in the past. I will then use Buzan's thinking developed in *FIWS* to reduce some of the complexities of the School's classical methodological cluster, focusing on ontology and the relationship between social-structural and normative modes of theorising. Lastly, I will engage with critical realist philosophy to stipulate both the main methodological assumptions of my theoretical framework and a method for answering my research question(s). Here, I will explicate the underlying set of reasons and philosophical positions that underpin my understanding of a sociological approach to the study of normative hierarchy. This, in turn, will hopefully help to clarify my overall research process, add legitimacy to the way in which analytical concepts and categories are deployed in the subsequent chapters, and clarify the relationship between my final arguments and propositions. The chapter concludes by setting out a two-step research strategy for the rest of this project.

Definitional issues

It is perhaps not surprising that issues concerning meta-theory¹ and philosophy of social science in IR (first-order questions) often appear to be quite removed from substantive and issue-specific debates about world politics (second-order questions).² Detached from their empirically researching counterparts, questions about philosophy of social science in IR are almost exclusively discussed within small academic circles, and more often than not IR scholars and practitioners alike seem to struggle to see the value of these rather intangible debates. Some commentators even go further and explicitly argue against the development of a distinct meta-theoretical discourse in IR, claiming that such efforts would lead the IR community to neglect (more important) second order questions (Skocpol 1987,

¹ There exists a general consensus across different disciplines that *meta-theory* can be defined as 'theory about theory' (see for example Kurki and Wight 2007, Bunge 1998, Bunge 1996). However, because this definition is heavily contingent upon a particular notion of theory, I understand meta-theory to be a set of interrelated propositions derived from a systematic engagement with social theory and philosophy that underlie a theory. This definition is more flexible and does not rely on a particular conception of theory.

² The distinction between first and second-order questions is drawn from Wendt (1999).

Schmidt 1997, Gunnell 1998). I do agree with some aspects of their critique in that parts of the works on meta-theory as so abstract, formulated in such alien language, that it has the potential divert the disciplinary discourse from the actual substance it is supposed to deal with. However, if conducted in an intelligible fashion that is embedded in and related to assumptions about first-order questions, an engagement with meta-theoretical issues can play a constructive role in the study of international norms and institutions.

At the most general level, I wish to suggest, such an engagement is important because of the strong, though admittedly not always obvious, links between theory and practice. Smith (1996: 13) nicely sums up this link:

International theory underpins and informs international practice, even if there is a lengthy lag between the high-point of theories and their gradual absorption into political debates. Once established as common sense, theories become incredibly powerful since they delineate not simply what can be known but also what is sensible to talk about or suggest. (...) Theories do not simply explain or predict, they tell us what possibilities exist for human action and intervention; they define not merely our explanatory possibilities but also our ethical and practical horizons.

Against this background meta-theoretical discourse becomes an almost integral part of IR. It does not only provide the wider philosophical and social scientific context in which debates and inquiries take place, but also specifies the terms in which these debates and inquiries are couched. One example of the important role meta-theoretical issues play in the field is Robert Keohane's (1989: 173) famous Presidential Address to the International Studies Association almost three decades ago, in which he put forward the demand to evaluate new research programs in terms of their 'testable theories'. Keohane's demand was essentially meta-theoretical in nature, in that he challenged the epistemological positions of the emerging IR theories – the manner in which these theories produce knowledge. In fact, a lot of claims, critics and attacks in IR theory are issued, though somewhat implicitly, on ontological and epistemological grounds. The so-called 'great debates' between idealism and realism and traditional and scientific approaches, respectively, have been significantly shaped by arguments relating to the philosophy of social science.³ We can also find more issue-specific examples that relate to meta-theoretical questions – I can think of the level-of-analysis problem, the agent-structure debate and whether we seek to 'understand' or 'explain' the social world. All these interrelated debates pertain to questions of social theory and philosophy of social science and ultimately concern pre-theoretical choices. To be sure, I do not want to

³ Heikki Patomäki and Colin Wight (2002) even argued that meta-theory was tacitly involved in the very formation of the field.

overstate the role meta-theory plays in the study of international politics, and we need to be careful not to lose sight of the substantive issues IR is supposed to deal with. The point here is, however, that meta-theory has the potential to considerably structure the questions we ask about international affairs and the approaches we use to answer them.

With respect to this thesis, I use meta-theory in order to develop my methodological framework. Part of the problem of dealing with methodology is that the term as typically used lacks precision and is defined and employed in various ways across the literature. As Little (1995: 14) tellingly notes, methodology is a 'blanket term which is not amenable to any simple or straightforward definition'. However, because methodology essentially determines our 'logic of inquiry' (Kaplan 1964:24), it is important to be clear about how we employ it in our research. I understand methodology as a pre-theoretical commitment that involves a number of interrelated propositions about the researcher's connection to the world (philosophical ontology), the entities and processes that make up this world (scientific ontology), and the way in which we can acquire knowledge about them (epistemology). In this sense, meta-theory is somewhat subservient to methodology, helping us to question, contextualise and develop the basic ontological and epistemological parameters of our theoretical approaches. Positivism, for instance, is not a methodology *per se*, as the majority of textbooks seem to suggest, but a philosophy with distinct meta-theoretical positions commonly used to explicate claims about the independent existence of the natural world and the corresponding empiricist research practices (Joseph 2007: 348). These meta-theoretical claims are then translated into our theories. Positivism's assumption of an independent natural reality, for instance, finds its ontological corollary in the realist focus on the material distribution of capabilities and the argument that states respond to systemic pressure. Similarly, constructivist claims about the intersubjective construction of social reality find its epistemological consequence in the English School's endeavour to understand the meaning of international diplomatic practice through interpretive efforts.

Another important terminological distinction often confused in the literature is between research methods and methodology. Broadly speaking, the former contains specific tools of inquiry, while the latter encompasses basic research assumptions about the world that are prior to the concrete techniques for inquiry (Fierke 2004, Pouliot 2010). Because my project is of theoretical nature, method, as understood in this thesis, refers to the procedures of reasoning and the cognitive operations I will undertake in the course of the following chapters. Although I formally distinguish between methodology and methods, both belong to what Pouliot (2010: 53) calls

'style of reasoning' and must therefore be logically aligned with the pre-theoretical assumptions.

English School methodology: an overview

The main focus of English School research has centred on the norms, rules and institutions of state-systems, and it seems no exaggeration to say that the School offers the most extensive body of work dealing with social macro-structures of international relations to date. But for all its inquiry into the social dimension of world politics, the English School still lacks a clear typology that organises the many approaches its writers have adopted. Because the School's pluralist approach to theory permits researchers to ask different questions about the nature, functioning, evolution and purpose of large-scale social phenomena, the range of issues and problems addressed by its proponents is extremely wide; and so too has been the range of approaches. Suganami (2003: 257), for example, marks out three interrelated intellectual orientations in the English School literature: The first type aims at discerning the institutional structure of contemporary international society (Manning's *The Nature of International Society*, James' *Sovereign Statehood* and parts of Bull's *Anarchical Society*); the second extends the structural study of institutions by adding functional and/or ethical questions about international order (Vincent's *Nonintervention and International Order*, Wheeler's *Saving Strangers*, parts of Bull's *Anarchical Society* and Jackson's *Global Covenant*); and the third type examines the historical evolution of international norms and institutions (Wight's *System of States*, Bull and Watson's *The Expansion of International Society* and Watson's *The Evolution of International Society*).

In contrast to other IR theories such as Neorealism and Neoliberalism, which both involve essentially ahistorical, one-dimensional conceptions of international systems, members of the English School have sought to construct a more comprehensive and historically sensitive theory. The reason for the ambition to embrace a wide and flexible theoretical lens is simple: Because international relations are notoriously complex, capturing the multiple facets of international life means studying it from different perspectives (Little 2009: 78-80). It is precisely for its multidimensional approach that the English School presents such a powerful resource for theorising about international relations. According to one of its contemporary leading figures, Tim Dunne (2007: 128), scholars draw on the English School because it permits synthesis of different theoretical perspectives and

concepts, offering 'an account of International Relations which combines theory *and* history, morality *and* power, agency *and* structure'.

The English School's great analytical potential comes at a cost since cashing out an eclectic approach to theory means working in a methodologically fragmented environment. The multi-dimensional theoretical perspective fosters engagement with ontologically different conceptions of state-systems, thereby drawing on different epistemologies and methods. While other mainstream IR theories are more or less tied together by their meta-theoretical positions – Neorealism and Neoliberalism broadly rest on a positivist taxonomy, and constructivism already entered the discipline of IR as an interpretive ontology and a post-positivist epistemology – the English School lacks a unified pre-theoretical framework. Instead, it involves arguably the most complex methodology that we can identify at this time in the discipline of IR.

The matter is further complicated by the fact that English School scholars have not provided a 'reconstructed logic' of their inquiries. Although many of their works tacitly draw on thoughts derived from philosophy, including sociology and jurisprudence, they have made almost no self-conscious effort to systematically explicate them or to comprehensively engage with methodological questions (Little 2009, 1995). We are frequently reminded that the School's defining figures, Hedely Bull and Martin Wight, 'held methodology at arms length' (Navari 2009a: 2); that members of the English School have 'not themselves been very explicit about the epistemological nature of their contentions' (Linklater and Suganami 2006: 6); and that its research programme is characterised by a 'methodological quietism' Spegele (2005: 97). This is not to say that English School researchers, including the classical theorists, entirely disdained methodology and methods, or that they did not systematically think about how to achieve the cognitive goals set out by their research agenda, as Navari (2009a) shows. It only means that their ontologies, epistemologies and methods are not explicated in formal terms and, thus, have to be hermeneutically distilled from their texts.

To throw light on the English School's methodological pluralism, Richard Little's (2009: 92-93) work provides a good starting point, because of the way in which he captures the different and often convoluted elements in play:

'It [the English School] presupposes a relationship between empirical and normative thinking. This is alongside a presumption that an empirical investigation of international relations requires us to operate on divergent levels of analysis and that

⁴ The term is drawn from Abraham Kaplan (1964) who distinguished between 'logic-in-use' and 'reconstructed logic'. While the former refers to the actual methods deployed in the research process, the latter describes the effort made by social theorists and philosophers to uncover, clarify and formalize these methods.

we need to approach these various levels using different epistemological as well as ontological assumptions. The issue is further complicated by the fact that the English School also assumes that there are links between these different levels of analysis (...).'

First, Little identifies a relationship between normative and empirical modes of inquiry. The combination of normative theorising and empirically-inclined analysis may be considered as the oldest and most distinguishing methodological feature of the School. It originated from the discussion of the British Committee on the Theory of International Politics and was most clearly expressed in Hedley Bull's essay *International Theory: The Case for a Classical Approach*. Bull (1966: 361) defined the classical approach as 'the approach to theorising that derives form philosophy, history and law'. In contrast to the scientific theories of IR, whose theoretical propositions are either based upon rigorous empirical procedures of verification or statistical analysis, Bull (ibid.) argued that theorising international relations requires one to study the texts of the classical philosophers and legal theorists such as Thomas Hobbes, Immanuel Kant and Hugo Grotius. Although the approach is concerned with uncovering the empirical realities that pattern international life,⁵ Bull recognised that such an endeavour involves at least in part some moral questions, which require an 'explicit reliance upon the exercise of judgement' (Bull 1966: 361). The English School's synthesis of empirical and normative modes of inquiry is neatly exemplified in Bull's foundational book *The Anarchical Society*, in which he merges his identification of the institutional structures of international society with a normative perspective on justice and ethical values.

The classical approach differs in many respects from the materialistic and individualistic methodology employed by many American IR scholars. One of the most important epistemological differences between other mainstream theories (with the exception of constructivism) and the English School is the latter's ambition to discern and understand the subjective as well as intersubjective meanings attached to the objects and processes that make up states-systems. Bull and Watson (1984: 9) hint at this methodological feature when advocating the study of history:

[O]ur subject can be understood only in historical perspective, and that without an awareness of the past that generated it, the universal international society of the present can have no meaning.

Because 'meaning' is important if one wants to understand the nature and workings

⁵ The members of the Committee stated explicitly and frequently that the central purpose of their endeavors is to identify and study the 'fundamentals' which underpin and guide international affairs, referring more or less explicitly to institutional structures or social and economic realities (Vigezzi 2005: 128).

of international society, English School writers have relied more or less explicitly on Max Weber's analytical method of understanding (*Verstehen*) to uncover the social meanings international actors attach to their behaviour.⁷ It is against this background that we should understand the endeavours of the classical English School figures such as Manning (1962) to find evidence for the existence of an international society in the self-understandings of international actors. Here, the School finds itself in close proximity to social constructivism in that it presumes that some facts exist only because we attach certain meanings to them, a claim prominently elaborated by John Searle (1995).

Second, the School is characterised by an ontological and epistemological instability that runs through different levels of analysis. The methodological instability can be seen as a direct consequence of the School's central contention that international life is complex and needs to be examined from different perspectives. To capture processes and actors at different levels of analysis, the School developed a tripartite division amongst international system, international society and world society, each of them devised to study a different dimension of international relations.

The international system level is described in mechanistic terms and the mode of explanation here is exclusively structural (Little 1995: 16). Here, the English School is almost identical with Waltz's version of Neorealism, referring to the same methodological individualism and structural assumptions that characterise his theory of IR. At the system level, international anarchy causes structural pressure which, in turn, forces states to build up material resources as means to ensure their survival (Waltz 1979). Hence, it is the structure of the international system, in particular the distribution of material capabilities, which pushes states to behave in certain ways. Faced with a constant security threat, states will respond in a rational manner to the structural pressure. In terms of ontology, states are the main actors and the structure that determines their behaviour is material, not social.

While the Neorealist understanding limits itself to the material-systemic level, the English School expands its theoretical lens to capture the social dimension of world politics. In contrast to the international system, the international society level is characterised by the social interaction between states, which results in the production of shared norms rules and institutions. International society is often seen as the School's defining element (Dunne 1998, Buzan 2001), and it is here where

⁶ Understanding, according to Weber, 'refers to the interpretive grasp of the meaning or pattern of meanings which are either (a) really intended in a particular case (as is normal in historical inquiry) or (b) intended by the average agent to some degree of approximation' (Weber 1978: 12). Also Navari (2009b: 42-43) observed that in terms of method, the ENGLISH SCHOOL implies an 'empathetic understanding of social phenomena'.

⁷ See also Jackson (2000:9).

Bull's classical approach seems to be best situated. Because international society emphasises the social dimension of interstate relations, we can see strong links to strong IR constructivism – both privilege a statist perspective on world politics and both are concerned with uncovering the meaning of international social systems through interrogating its constitutive intersubjective practices (Dunne 1995: 384).^s Like international system, international society is a systemic theory, for as the dependent variable takes as its objects of explanation patterns at the aggregate level. That said, agents nevertheless play an important role at this level, since international society is not simply ontologically given, but produced and reproduced through social interaction among its members. In other words, structure and agency are mutually constitutive. English School scholars are keen to emphasise that world politics should neither be understood exclusively in mechanistic terms, nor does the emergence of a social interaction between states at the international society level completely eliminate structural-material constraints (Little 1995: 16). Instead, international society should be conceived as a 'superstructure, consciously put in place to modify the mechanical workings of the system' (Watson 1992: 311). While both levels depict the sovereign nation state as the main actor in the international arena, they do, however, have ontological differences. Whereas the system level only recognises the material nature of structure, the international society perspective also recognises social facts, most notably in the form of shared norms, law and institutions.

For an international society to exist, Bull argued, there must be a 'sense of common interest and values, on the basis of which common rules and institutions may be built' (Bull 1977: 269). These socio-spatial transcendent interest and values originate from the 'human society as a whole' and are morally prior to the statist realm of international society (Bull 1977: 22). To capture the cosmopolitan tendencies that drive our contemporary global political system, the School moves beyond a framework of sovereign states by turning its attention to the level of world society. This level of analysis is the least well developed and its methodological approach remains relatively unspecified. It seems clear that world society shifts from a state-centric ontology to individuals and transnational actors, and ultimately takes the entire global population as the object under study (Buzan 2001: 475). The actors are bound together by some form of universal cultural practices which establish links between transnational groups and individuals (Little 1995: 16). Hence, operating at the level of world society requires one to place the community of human kind, either

^s For a detailed overview and assessment of the relationship between constructivism and the English School, see Reus-Smit (2009).

as a whole or certain constitutive parts of it, at the centre of inquiry, invoking some form of moral and/or institutional cosmopolitanism.

The relatively poor analytical standing of world society within the English School canon, resulting from decades of scholarly preoccupation with the framework of international society, has recently been challenged by a revived interest in globalisation. In light of the undeniable empirical significance of the social and material forces globalisation exercises on world politics, English School theorists have recently started to (re)engage with the concept of world society, seeking to restore its proper place in the School's research agenda. Andrew Hurrell's (2007) *On Global Order* represents an important step in this direction, showing how globalisation and the rise of non-state actors and transnational values challenges, forges and transforms the society of sovereign states. Coming from a more theoretical angle, Buzan's (2004) *FITWS* opens up the English School to the complex social and political interplay among sovereign states, transnational actors and human individuals in important ways. His consideration of various forms of non-state actors and processes, even ethically undesirable ones such as globally operating criminal organisations, is a useful reminder that modern global governance goes beyond solving cooperation and co-existence problems among states. To what extent a state-based international society is in empirical decline is of course subject to debate, and the ontological weight we grant to the different actors and processes of globalisation depends, not least, on the aspect of world politics we are interested in. It seems, however, that in the face of globalisation, accounts of international order must be analytically attentive to the different kinds of non-state entities and processes and the way in which they interact with and impact on international society.

The significance of world society for this project stems from its ability to analytically accommodate the normative dimension of normative hierarchy. Although *jus cogens* is an inter-state principal that ascribes legal obligations to sovereign states, the source of values that give rise to these obligations has been, to a great extent, located in the non-state domain. The prohibition of genocide and the prohibition of slavery are borne out of ethical motivation to protect the dignity and physical integrity of human individuals and human life, not nation states. If we want to properly understand the normative aspects of peremptory norms, in particular their claims to non-derogability and universality, we thus need to move beyond the framework of a society of nation states and consider human communities as a source of values. In this sense, relative normativity is an excellent (analytical) example of the way in which values and ethical principles at the level of

world society transmit, affect and transgress (normative) order in international society.

Concept	Wight's Tradition of Thought	Epistemology	Ontology
International System	Realism	Positivism	States
International Society	Rationalism	Hermeneutics and Interpretivism	States
World Society	Revolutionism	Critical Theory	Individuals and Non-State Actors

Table 1: The English School's three concepts and its methodological pluralism. The arrows signify the co-existence and continuous interplay between the concepts.

While it is widely acknowledged that there exist significant methodological differences between the three concepts, it is far from clear on which grounds these distinctions are drawn (see figure 1). We could do so in one of three ways: If one employs a Wightian understanding (1991), the concepts line up with 'three traditions of international theory': Realism, which emphasises power politics, national self-interest and the structural constraints of international anarchy; Rationalism, which focuses on the social dimension of rule governed cooperation; and Revolutionism, which embraces a strong normative position and concentrates on the cultural and ethical unity that links human individuals in international life. If one pursues a more methodological reading, the three concepts appear to cover the entire epistemological spectrum that can be invoked in order to study the different aspects of international reality. Little (2000), for example, has sought to establish links between English School research programme and different methodological traditions, pairing international system with positivism, international society with

hermeneutics and interpretivism, and world society with critical theory. Lastly, on a wider, more analytical, understanding of IR, the three elements can be demarcated in ontological terms, focusing on the types of actors that constitute the respective element (Buzan 2004). The discussions about distinctions and boundaries within the English School framework, and the way in which they are seen as manifestations of different theoretical/methodological traditions is something that has been prominent in English School writings in the 1990s (Buzan 1993, James 1993, Shaw 1992, Little 1995). Whether those discussions are really about important conceptual and definitional issues or just self-referential and confusing debates about terminology and perspective is not always clear. My intuition, however, is that the ambiguity with which the concepts have been presented and deployed has hampered the opening of the English School to new audiences, in particular within the American IR community.

If one had to extract a unifying thread from these discussions, it would be the way in which all English Scholars are wedded to the assumption that the three components are somewhat entangled and cannot be isolated from each other. Watson (1992: 260) urged his readers to view Wight's three traditions as 'streams, with eddies and cross current, sometimes interlacing and never for long confined to their own river bed'. Using more analytical terms, Buzan (2001: 476) explains that the three elements 'are in continuous coexistence and interplay, the question being how strong they are in relation to each other'. The continuous interrelationship between international system, international society and world society has traditionally been important to English School theory, because it signifies the kind of complexity, plurality and contextuality that sits at the heart of their understanding of international affairs as a historically contingent, evolving sphere of interaction. Translating this line of thinking into research is difficult though and scholars in the past have confined themselves to the societal element. Indeed, given the epistemological and ontological instabilities, it is hard to imagine how one coherently applies all levels of analysis simultaneously. In the end, it appears that research context will inevitably determine the theoretical position from which we approach our subject.

Reducing methodological complexities

Given the methodological incoherence, it is not surprising that most English School scholarship has offered no discussion of its research methods and methodological foundations. There even seems to be an implicit inclination to follow James Mayall

(2009: 209) and proclaim that the School 'serves its method when it wears it lightly'. Although *prima facie* an appealing position in face of a theoretical framework which implicitly suggests that in terms of methodology *and* methods almost everything goes, it cannot be a sustainable one if we want to produce research that can answer some basic evidentiary questions such as: how do I arrive at my propositions? How do I know that my findings are plausible? And how would I know if they were not? According to Martha Finnemore (2001), it is precisely because of the absence of robust rules of evidence caused by the lack of methodological discussion that American IR scholars have found it difficult to incorporate the English School into their debates. Does this mean that in order to build a more 'scientific' theory, the School must transform itself into positivist styled theory, which strictly explains phenomena by producing testable hypotheses based on causal laws? I do not think so. Post-positivist ontology has become much more accepted within the IR community, as the growing strength of constructivism on both sides of the Atlantic indicates. And as far as epistemology is concerned, there is no good reason to suggest that historical or normative approaches cannot develop guidelines for knowledge production and evaluation in their own right.

Whichever methodological strand one wants to pursue, it is clear that the typical differentiations between international system, international society and world society are neither clear nor deep enough in order to serve as a basis from which to develop a research design. I therefore seek to re-work some of the School's methodological assumptions before deriving a method for studying the nature of *jus cogens*. My primary aim here is to try to reduce some of the complexities and confusions associated with the English School, and to present a coherent theoretical framework that can be used to study social issues in International Relations. In what follows, I will perform four moves, all of them driven by, but not necessarily in line with, Buzan's version of English School theory outlined in the previous chapter: Eliminating the international system category; introducing criteria for ontological differentiation; clarifying the concept of social structure and reconciling structural and normative strands of English School theory.

Performing these steps will move the School away from its conventional image as a body of thought that derives its distinctiveness from the intellectual enterprises of its central figures. Instead, I will understand the English School as an international (macro-)sociological theory that is concerned with the normative constitution of international politics. It should perhaps be noted that although I believe that my methodological framework can be utilised by other researchers who are interested in the sociological study of the institutional structures of state-systems, it should not be

read as a general attempt to establish any kind of definitive account of the Schools' methodological foundations – it should remain a place for methodological debate.

Eliminating the system category

The first move towards a more comprehensible methodological framework involves abandoning the 'international system' category. There are two main reasons that drive this move. First, despite adding important analytical value, one could argue that the international system level never possessed much methodological significance for the English School theory. The analytical purchase of the system category stems from the function it provides for clarifying the concept of international society. Using the logic of Waltz's realism, for instance, Buzan (1993) was able to show more clearly how international society emerges as a 'natural product' of the structural forces of international anarchy. It also reminds English School researchers of the constraints that the absence of central governments and conflictual national interests place on the development and influence of common institutions and transnational values and principles. That said, there exists, to my knowledge, no work associated with the School that rests on a materialist ontology and a purely mechanistic understanding of interaction. The reason for this is not hard to see, for such an analysis would run in stark contrast to the School's central argument: states can and do break the logic of anarchy by establishing shared norms, rules and institutions.

Secondly, methodologically speaking, one can cover much of the ground allegedly occupied by Neorealism from within a social-structural theory - this is Buzan's (2004: 98-107) main reason for collapsing international system into international and world society. He argues that it is virtually impossible for states to interact without establishing some kind of social ties. Even automatic processes rooted in the distribution of material capabilities such as the balance of power require some rudimentary understanding of the nature of security, certain social agreements relating to the costs of war and codes of alliance formation. By claiming that 'all human interaction is in some sense social and rule bound', Buzan (2004: 100) implicitly accepts what Kratochwil (2008: 447) identifies as the core proposition of any sociological approach: *all* actions of agents, even the ones that are motivated by material considerations, are meaningfully orientated towards each other. Consequently, only through the existence of some intersubjectively shared norms and institutions does the coordination of actions and the emergence and

maintenance of international order become possible – material structure alone cannot explain the existence of stable patterns of interaction.

A brief look at the history of the development of the society of states seems to further vindicate the idea that international structures have always involved a social dimension. Philip Bobbitt's magisterial historical account of the evolution of the state and its constitutional orders, for example, nicely captures the way in which formation of international society in Europe involved material-strategic as well as social interactions. His description of the transition from the rule of princes to a new society of princely states in the fifteenth century is particularly instructive here (Bobbitt: 2002: 82):

The Italian peninsula was a perfect laboratory for such a new society [of princely states]: the principal political actors spoke a common language; they were physically proximate; none was so powerful as to make diplomacy irrelevant; repeated invasions by French, Spanish and Imperial forces, throughout the period of transition, were unable to establish an hegemony that could overcome a careful balance of opposing powers, which necessitated complex negotiations and intercourse (...).

It is worth pointing out that Bobbitt sees a clear link between the expansion of a rule-governed international society and the balance of power. The creation of an international society beyond Italy, he argues (Bobbitt 2002: 90), came about by 'bringing with it notions of law among states, owing to the need to maintain a balance of power (...)'. In placing the balance of power side by side with social concepts such as law, diplomacy and language, Bobbitt essentially adds force to what has emerged as one of the key theoretical insights of Bull's (1977) work: that even the most basic phenomena such as war or the balance of power requires an analysis of the institutionalised understandings of its meaning and application (see also Buzan 2004: 100, Hurrell 2002: ix).

While *FIWS* makes a theoretical claim for the combination of material and social approaches to understanding world politics, Buzan's (2004a) study of twenty-first century great power relations illustrates its analytical consequences. To show that normative elements matter in explaining structure, he asks us to consider what difference to the post-World War II international system it would have made if the two principal actors, the US and the Soviet Union, had both shared the same liberal ideology (2004a: 1). Though the answer seems rather obvious, Buzan's thought experiment serves to highlight how the incorporation of a socially constructed variables alters the neorealist logic of polarity and structure through which many of us have come to understand political relationships at the system level. Once identity, culture and political ideology are brought into play, the traditional framing of great

power relations and interstate conflicts in terms of strategic rivalries becomes problematic. The dispute between Ukraine and Russia over the Crimea region, to pick just one recent example, is not simply a situation of structural threat arising from territorial disputes, but also a ideational conflict which has thrown up historical and cultural narratives about space and community that rest on very different bases. A similar point could be made about contemporary great power relations. The ostensible structural scenario in which a declining West competes with, and will eventually be overtaken by, an affluent, rising Global South led by China is not just a shift in the balance of power. Moreover, as Qin (2010) points out, it is a 'conflict of identity', a scenario that will be defined by the way in which the Western dominated normative framework of international society will accommodate, alter and/or reject distinctly Chinese concepts, practices and identities, and *vice versa*.

If we accept the proposition that stable patterns of interaction always carry some sort of social content, then the central question for IR theorists is not about the distinction between material and social spheres of interaction, as the system/society distinction would suggest, but about the type of social-structure that underpins international political systems. What neorealists tend to view as mechanistic processes become 'the behavioural characteristics of particular type of social structure' (Buzan 2004: 100-101).

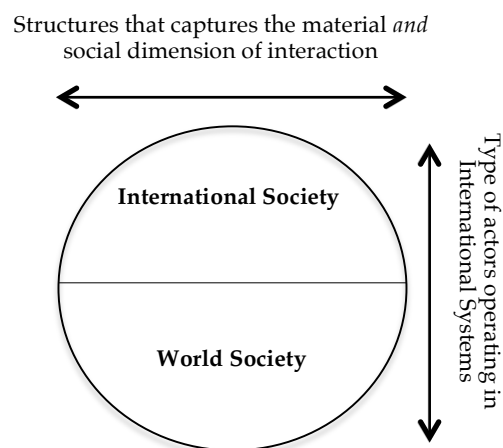


Figure 2. The English School universe after merging material and social types of structure.

Notes: The international/world society distinction is based on the type of actor. While international society consists of states, world society involves individual and transnational actors. This is not Buzan's final picture of the English School, as he also separates inter-human and transnational societies at a later stage of his project.

Eliminating the system category has a number of important corollaries for a theoretical approach to normative order. First, if we embrace the sociological intuitionist view and presuppose that norms and institutions are key to the coordination of interaction and the reproduction of international order, then we have concentrate on the constitutive effects of *jus cogens* rather than on enforcement in order to explain how the concept works in world politics. This shift in focus away from legal enforcement to the social constitutive dimension of norms and institutions represents an important difference as to how international law has traditionally approached the subject. Second, because any sociological approach inherently privileges the logic of appropriateness over the logic of expected consequences, the claims generated in this thesis presupposes that the nature and emergence of a hierarchy of norms is rooted in and propelled by shared ideas, values and intersubjective cultural principles rather than in the subjective interest of states.* Indeed, realist or liberal theories would run into difficulties accounting for *jus cogens*, since they assume that actors are differently situated, pursuing different (national) interests. Conceptually, this clashes with the idea of universal values and community interests that drives traditional accounts of peremptory norms.

I am keen to stress that my theoretical take on social structures also seeks to preserve analytical space for thinking through normatively undesirable explanations for the emergence of normative orders in world politics. International relations are, of course, not norms all the way down, and we have to be careful to not rule out the possibility of anomic interaction, the threat or exercise of brute force, or other normatively undesirable explanations when dispensing with the system category. Tim Dunne (2005: 169) rightly reminds us there have always been situations in which a particular state was indifferent to the norms and understandings of other members of international society.

International society and world society as ontology

Having removed the system category, we now need to clarify the differentiation between the remaining two concepts international and world society and how they will be used throughout this study. As noted above, the literature has invoked different criteria for separating the three elements. There exists, in my view, an

* All social system are characterised by two logics of actions, what March and Olsen (1998) have termed 'logic of appropriateness' and 'logic of expected consequences'. The latter understands actions and outcomes, in our case relative normativity, as the result of rational strategic behaviour aimed to maximise a set of exogenously given preferences. Logics of appropriateness, on the other hand, view action as a product of norms and identities that prescribe behaviour in a given situation.

implicit tendency to defend the distinction between international and world society on normative grounds. In Wight's (1991) three traditions of political philosophy the 'normative shift' is constituted by the degree of cultural and moral unity among the units that make-up international relations. Here, there is an inherent claim that world society is a more just and peaceful form of international life in which liberal (individual) rights prevail over coercion and conflicting interests. Something similar holds true for Little's methodological criteria for differentiation. Although Little (2000) does not make a judgement about the normative content of the two elements, pairing international society with hermeneutics and world society with critical theory nevertheless suggests that studying world society requires one to take a critical, and ultimately normative, stance towards institutional arrangements, whereas the meanings of these arrangements in international society can be objectively recovered.

The key problem with those normatively driven understandings of concepts and boundaries is the restriction and limitations it places on social inquiry. Regardless whether one follows Wight's or Little's criteria, both commit themselves to certain theoretical or methodological frameworks. Such a move can be highly detrimental to the production of knowledge claims, because it almost inevitably rules out, on *a priori* grounds, potentially worthy paths of inquiry. As Colin Wight (2007: 385; see also Wendt 1991: 191) argues persuasively, 'the attempt to specify epistemological and/or methodological criteria for science in advance of ontological commitments is an act of unnecessary closure'.

If one pursues Buzan's structural reading of the English School framework, the central question is not about the normative content or mode of analysis, but rather about what entities and factors constitute international reality. In other words, it becomes an ontological question. According to Buzan (2004: 128-139), all international systems consist of three types of second-order societies, which can be distinguished according to the type of actors that constitute them: inter-state, inter-human, and transnational societies. Defining international and world society in ontological terms has a number of advantages. Most importantly, it helps to preserve the analytical potential of English School theory, for it does not require one to make epistemological choices in advance of any ontological assessment of the subject matter. It also enables one to treat Wight's traditions of Realism, Rationalism and Revolutionism as types of social structures – rather than progressive stages of a normative spectrum – that constitute interests and identities of international actors. This, in turn, gives analytical room to consider multiple, including non-liberal, conceptions of world society (Adler 2005: 173).

Coming from an ontological perspective also helps to establish some more or less hard boundaries between international and world society, as the two concepts become more clearly defined in terms of different types of actors. Buzan (2004) even goes so far as to completely replace the English School's classical concepts with his structural second-order society triology. However, I'm not sure whether the costs of this terminological overhaul are too high. The ideas of 'international society' and 'world society' have been painstakingly established and developed throughout the last decades, and abandoning them would seriously undermine some of the School's distinctive arguments and theoretical insights. The English School's main claim that states, even in the absence of a central authority, establish orderly relations through shared norms, rules and institutions is invariably bound up with the concept of international society. Moreover, it is precisely for the claim that international relations are societal that the English School has been recognised as an idiosyncratic, analytically powerful approach for theorising about world politics.¹⁰ I will therefore continue to work with the 'classical' terminologies and simply associate international society with the inter-state and world society with the inter-human and transnational domain.

This brings us back to the complementary nature of the concepts in play and the question of how to navigate between them. If understood through structural lenses, the question whether one proceeds with the international or world society framework is primarily an analytical choice, not a normative one. For a number of reasons it makes sense to begin my inquiry into normative hierarchy with an ontology of states and an account of international society's normative framework in which international agents are embedded, respectively. First, although non-state actors play an increasingly important role in world politics, they remain largely embedded inside the boundaries of territorial nation states. Even in our globalised world, transnational interactions take place within an international legal order that is based on sovereign states (Dunne 2005: 165). Second, *jus cogens* is first and foremost an inter-state principle created by and for sovereign states, which legal effects are restricted to treaty domain. However, given that the normative content of peremptory rules such as the prohibition of genocide or the prohibition of slavery is intrinsically related to ideas about individual rights, notions of justice and other ethical considerations about human dignity and bodily harm, I will expand the sociological frame to incorporate non-state actors. This will then allow me to engage with questions about how ethical principles and individual rights rooted in the

¹⁰ Despite diverse views about what exactly the English School is, or who belongs to it, there seems to exist a widespread agreement among IR commentators that the School's main contribution centers around the society perspective on world politics. See, for instance, Buzan (1993) Linklater and Suganami (2006, ch. 1), Little (2000), Wilson (1989).

domain of world society impact, transgress and interact with international society and its sovereign based legal order.

Clarifying the concept of social structure

There is a second ontological issue that needs to be addressed, which Buzan seems to ignore in his reconstructive surgeries. It is, in my eyes, *FITWS'* biggest methodological shortcoming that it does not offer an explicit conception of structure. This is all the more surprising given that he made the ability to engage with different configurations of social structures across different geographical and political sectors the book's key theoretical innovation. The central ambition of *FITWS*, Buzan (2004: 14) tells us in the first pages, is to develop the English School framework 'as a set of analytical concepts designed to capture the material and social structures of the international system'. But instead of providing us with a definition of what social structure is, what it involves, and how it can be differentiated from other notions of structure, he leaves us with brief references to the works of Bull and James and the structural approaches of Waltz and Wendt (Buzan 2004: 14). The problem is that these authors, despite the fact that they all seek explanations for international relations at the aggregate level, understand structure in very different terms. How they exactly hang together in Buzan's account is simply not clear.

There is a second problem related to Buzan's use of structure. Although he claims that social-structural theory can accommodate the analytical logic of the system category, his conceptualisation of social structure offers no account of material power. Ontologically speaking, there is of course only one international structure consisting of both material and ideational components (Wendt 1999: 190). Yet, it does not matter how much recognition we give to norms, values and principles in our thinking; structure in international relations cannot be adequately explained without some kind of reference to the economic resources, military power and other material factors that determine actors' abilities to influence events and outcomes. Only through the integration of material conditions into conceptualisations of social-structure, can an English School account of *jus cogens* generate holistic assumption about the emergence and maintenance of higher-order norms. Does the emergence and upholding of normative order depend on particular distribution of power among the members of international society? Must the normative content of *jus cogens* norms coincide with the identities and beliefs of the major powers? In order to answer those questions, we must be able to consider the interplay between the distribution of power among states, different social ranking-orders and moral

principles to understand why certain international norms have a higher status than others.

How, then, do we accord analytical space to the *interaction* between material factors and the content of norms, law and values?¹¹ Following Giddens (1986: 24), I assume that 'the most important aspects of [social] structure are rules and resources recursively involved in institutions'. Rules are necessary for material capabilities to be identified as such for social purposes, but rules cannot produce social order unless they are related to material conditions. As Onuf (1989: 64) explains, material conditions 'are nothing until mobilized through rules, rules are nothing until matched to resources to effectuate rule'. Put simply, material considerations must figure into every social theory of international politics for the simple reason that all actors, regardless of their ontological status, draw on rules *and* resources when they produce, reproduce and transform social structures.

Power will figure into my theoretical framework not only in the form of material variables, but also, and most importantly, in the form of social resources that help to shape and institutionalise specific forms of normative orders. The social dimension of power, and the way in which power is seen as the manifestation of actors' identities, social roles and cultural narratives is something that has driven the 'constructivist' turn in IR, led by writers such as Barnett and Duvall (2005), Guzzini (2005) and Finnemore and Goldstein (2013). Key amongst those works is arguably Barnett and Duvall's influential re-conceptualization of power in world politics. By arguing that power produces structural effects 'in and through social relations', they stress that the nature and mechanisms of power vary considerably and are not always reducible to one form (Barnett and Duvall 2005: 45). This helps to establish the significance of both the sorts of relationships through which an actor's ability to shape the fate of others is affected and the specificity of those relationships, that is, whether power is exercised directly or through social diffusion (Barnett and Duvall 2005: 45). Recognising the myriad ways in which power is distributed globally is necessary if we want to make sense of how symbolic and value-laden sources of power compel actors to change their behaviour. For example, without taking into

¹¹ I emphasise the term 'interaction' here because it signifies that material resources and social rules are ontologically autonomous and therefore need to be analytically differentiated. As Wendt (1999: 109-110) pointed out:

Material forces are not constituted solely by social meanings, and social meanings are not immune to material effects. On the other hand, it is only because of their interaction with ideas that material forces have the effect they do. (...) So the relationship between material forces and ideas works both ways, but we can only properly theorize this relationship if we recognize that at some level they are constituted as different kinds of independently existing stuff.

account the normative and rational-legal authority of international organisations, it would be difficult to explain the International Criminal Court's or the United Nations Security Council's ability to compel states to subsume parts of their sovereignty. I will say more about the relationship between structure, power and order in Chapter 4. For now, and with respect to methodology, it seems sufficient to recognise that incorporating social kinds of relational power into my framework is relatively straightforward, since they represent socially constructed variables that fit neatly within a sociological understanding of structure.

Bridging the structural/normative divide

The last step in sharpening the English School's methodological contours involves a discussion of the relationship between analytical and normative theory²². For Buzan (2004: 11-14, 16-17), many English School writers have been too occupied with normative questions about universal rights, just configurations of international order and the moral responsibilities of states. This, he argues, has impeded the development of English School theory in that it has closed down the possibility of exploring certain pathways that seem to be normatively undesirable such as non-liberal conceptions of world-society or the coercive internalisation of universal values. This, in conjunction with the ambition to develop an analytical social-structural interpretation of English School theory, leads him to consciously sets aside the normative dimension that has been an essential feature of the 'classical approach' that has influenced so many English School writings.

Cultivating an antagonistic opposition that subordinates normative theory to theory about norms is the overarching theme of Buzan's reconstructive surgeries, allowing him to deploy categories and concepts with greater analytical rigour. That opposition, however does not come without problems. His dichotomous understanding of social-structural theory that is an analytical theory about norms and normative theory is derived from and resonates with the conventional fact/value distinction adopted by many social scientists. This long-standing, almost dogmatic, distinction between what *is* (fact) and what *ought* to be (value) originated from David Hume and Immanuel Kant's metaphysical dualism and was foundational for empiricism and its twentieth-century version logical positivism. Based on the Humean doctrine that 'one cannot infer an 'ought' from an 'is'' (also referred to as Hume's Law), generations of researchers have insisted that statements which make claims about facts must be sharply distinguished from ethical

²² For a good discussion of the different, often misunderstood, meanings of 'normative theory' see, Chris Brown (1992: 1-4).

judgements and evaluative claims. Consequently, empirically-inclined analytical studies and normative theory are seen as distinct and irreconcilable versions of social inquiry. As Charles Beitz (1999: 270, quoted in Hurrell 2002: 139) pointed out: 'The analytical and the normative, although related, are different domains, and it is a virtue, not a shortcoming to observe the distinction'.

Upholding a hard line between the two styles of theorising has proven to be rather difficult though. Even if one leaves aside the vigorous challenges issued by postpositivists, the relationship between normative and analytical theory is far more complex than the fact/value distinction seems to suggest (Hurrell 2002a: 139). The most influential general sociological theories, for example, exhibit not only explanatory elements, but also a critical component. For Marx, critique of existing socio-economic structures was part of the very nature of scientific inquiry, while Weber, despite his sharp distinction between existential and normative claims, made it quite clear that getting to grips with world-historical situations requires more than just a descriptive account.¹³ As Michael Doyle (1997) has argued, the distinction between 'idealist' and 'realist' is neither an accurate nor a useful way to categorise theory. His (Doyle 1997: 27-28) analysis of the classical theorists seeks, among other things, to show that "ideal' presuppositions accounted for differing types of realism, while at the same time 'idealists' grounded their accounts of politics and society on 'very realistic portrayals of social conflict'.

Similarly, the most prominent English School works involve both analytical investigations and normative elements, indicating that the traditional structural/normative divide demands greater engagement than *FITWS* seems to suggest. Buzan (2004: 228-229) himself eventually admits that 'we need both the normative and structural version of English school theory standing side by side complementing and questioning each other'. There is, indeed, only so much an analytical version of English School theory can uncover before one needs to turn attention to the normative propositions that underpin the values of the social structures we have identified. As William Bain (2007: 562) puts it: 'A genuine normative approach is one which can describe and explain the normative framework of the society of states as well as account for the sources of value from which this framework derives its moral character'.

A structural approach to international society that produces analytically rigorous and value-free categories and concepts of norms and institutions can thus only be a 'theoretical first cut'; it is the meta-values of international society we need to get at in order to identify the range of possibilities for the actors and, ultimately, the distinct

¹³ For an assessment of the significance of critical/normative analysis in classical sociological theory, see (Fararo 2001: 9-11).

character of international society (Dunne 2005: 167). Accepting that a genuine approach to relative normativity needs both an account of the specific social structures that lie behind normative order-making and an examination of the ethical propositions that give *jus cogens*' norms their status, the question is how to bridge the structural/normative divide Buzan has left us with?

If understood strictly in meta-theoretical terms, then there does exist a considerable gap between the classical normative approach that has been so prominent in the English School and Buzan's social structural analytical theory. Normative theory, in the form he sees it, is embedded in political theory and philosophy. Wight's three traditions of political theory as well as the traditional codifications of Hobbes, Grotius and Kant are indicative of the close ties between political theory and the normative approach developed by many English School scholars (Williams 2011: 1237). The key problem is that a methodology which commits itself to certain notions of rights, order and justice cannot sit alongside the kind of analytical theory Buzan advocates, because of the way in which it presupposes a fundamentally different relationship between the researcher and the world. Normative theory is the product of the researcher's experience, and the propositions and concepts generated through it are ultimately grounded in the values that circle in his or her surrounding world. The intersubjective relationship between the theorist and the world under study simply cannot produce the 'set of externally imposed concepts that define the material and social structures of the international system' Buzan (2004: 12) seeks to deploy. Wheeler's argument in favour of humanitarian intervention or Vincent's conceptions of the good state, for example, are partly reflections of internal values and societal contexts and are necessarily interwoven with the author's cultural and ethical commitments. The analytical restrictions Buzan associates with normative theory are, for good or ill, the direct consequence of these commitments.

There exists an agreement in the responses to Buzan's analytical reformulations that the costs of abandoning the normative dimension are too high (Dunne 2005), and even implausible (Adler (2005: 181) – 'once we bring in norms, normative arguments follow uninvited'. With the exception of John Williams (2011), however, none of the writers who have criticised Buzan for separating structural and normative modes of theorising have offered a viable way to reconcile the two. It is useful to consider Williams' argument in a little more detail, because it indicates what kind of normative theory a structural agenda could yield.

Williams' reading of *FITWS* suggests that the distinction between the structural and the normative domain is sustainable only up to a point and cannot be understood as a hard line between distinct intellectual enterprises: The sociological

nature of Buzan's structural analytical project and its focus on norms inherently leads us to engage with values. Williams (2011: 1243-1244) argues that despite Buzan's explicit normative reservations, a social structural analytical version of English School theory can accommodate normative investigations, albeit rather different ones. The room social structural analytical theory can give to normative questions is limited, and the kind of normative arguments that can be developed within its meta-theoretical confines are distinct from the normative modes of analysis that has characterised classical English School theory. Analytical theory simply cannot accommodate, for the methodological reasons outlined above, historical and contemporary constellations of social and material structures, actors, modes of operation and geographical layers as well as political theory and rich philosophical investigations (Williams 2011: 1242).

The normative mode of analysis that social structural theory permits is, therefore, not of the natural law/natural rights type which produces the normative universalism that features strongly in the works of Vincent, Linklater and Wheeler. Instead Buzan's reformulations steer normative theorists in the direction of pluralism in that it urges them to consider competing and even contradictory foundational claims that coexist among different social groups and types of actors (Williams 2011: 1243-1247). We have to recognise that the value-based social structures of international society is most likely a product of different foundational normative claims and not, as solidarist suggest, rooted in universal ideas about rights, justice and the good state. As I will show in Chapter 5, ethical diversity does not *per se* limit the normative consensus of international society to peaceful coexistence and the maintenance of order. Williams (2011: 1246) makes this perfectly clear in his pluralist response:

'Pluralist ethics do not have to be about lowest common denominator *moda vivendi* focused on coexistence as pluralists tend to suggest. The diversity of 'source stories' about the moral agency of human beings and their various collectives and structures has the potential to generate powerful universal prohibitions, such as in the universal condemnation of slavery and genocide, without requiring a resolution of those competing source stories.'

Buzan's focus on the complex relationship between social structure and values coupled with his normative foundational pluralism opens up interesting avenues for ethical inquiry. It allows us to consider the possibility that values and institutions of different sectors and different levels do not line up, but can nevertheless be accommodated within the social framework of an international society. His painstaking interrogation of social structure allows us to reconcile the structural/normative divide in an interesting way, as his structural *schema* shows us

how different types of structural *and* ethical dynamics can exist in inter-state, inter-human and transnational domains. This is a potentially powerful insight for English School theorists interested in the non-universal normative foundations of international society, because of the way in which it encourages us to investigate the interplay between potentially contradictory notions of normative principles and how they play out at the intersection of international/world society.

Social inquiry and the invisible world

Having outlined the main features of the kind of English School theory that will frame my analysis, we can now turn our attention to the concrete research method of this project and elucidate the process of theory development, that is, the steps I will take in order to answer the main research question(s) of this project. As we have suggested, macro-sociological English School theory revolves around the concept of social-structure. It is the notion of structure that analytically links the building blocks of social life (shared norms, rules, values and institutions), thereby allowing us to identify, characterise and explore coherent and distinct international systems. One logical corollary of this claim is that any effort to explain the institutional texture of international life and the rules, norms and processes that pattern world politics must begin with the social-structure that produces the distinct features of specific international systems. The research focus of this thesis is thus on the generative nature of the social structure of international society and its relationship with international law. As it will become clear in the following paragraphs, I am not only suggesting explaining normative order in terms of social-structure, but I am also committed to accepting that these social-structures actually exist.

So how, then, do we develop macro-sociological explanations for normative order-making? As we have seen, English School theorists are rather ill equipped when it comes to methodology and research methods, and Buzan is no exception here. Despite significantly expanding the analytical potential of English School theory and providing us with a rich conceptualisation of international systems, he does not touch upon the methodological premises of his structural agenda. That said *FITWS* does open the door for grounding a macro-sociological English School theory in the philosophy of science. The key for building such a meta-theoretical basis, I wish to suggest, lies in Buzan's (2004: 14-15, 24-26) understanding of theory as an externally imposed construct with which to describe what goes on in the world as well as his analytical centrepiece, the ontological classification of inter-state, inter-human and transnational societies. Taxonomic logic suggests that this

understanding of structure and ontology is in fact consistent with the main premises of what has been called critical realism.⁴⁴ The rest of this section is an attempt to establish some initial links between English School theory and the meta-theory of critical realism and tease out the contours of a social-structural approach to normative-order making in international relations.

The idea of critical realism was developed by Roy Bhaskar in the 1960s and 1970s and is comprehensively spelled out in his book *A Realist Theory of Science*. As with any meta-theoretical idea, critical realism is a complex intellectual construct involving claims about the nature of the world and modes of knowledge production that require philosophical context in order to be depicted adequately. Typically, texts on critical realism begin with Hume's notion of causation and Kant's phenomenal/noumenal world distinction, eventually focusing on Bashkar's idea of unobservable. The IR literature has produced a number of excellent introductions to critical realist thinking (Joseph 2007, Patomäki and Wight 2000, Wight 2007) focusing in particular on its innovative reconfiguration of causal mechanisms and its potential contribution to the scientific study of structure and process at the global level. Although potentially very interesting, this is not the place to paint a detailed image of its philosophical underpinnings, and I will limit myself to looking at the core critical realist claims and its implications for the nature of social structure, causation, and the role of values in scientific inquiry. The aim here is to explore these arguments in relation to the key elements of the English School framework, thereby showing how they can be utilised for the study of relative normativity in international relations.

Since critical realism does not make assumptions about the substance of structures and dynamics of world politics, it is strictly speaking not an IR theory in its own right. Instead, critical realism is first and foremost a philosophical approach that generates meta-theoretical claims. Let us grant, as many commentators suggest (Brown 2007, Joseph 2007, Patomäki 2002), that those claims can help us to examine, criticise and improve the way in which we depict and produce knowledge about norms and institutions and other building blocks of international social order. How do we begin to formulate concepts and arguments about the social world and the norms, values and institutions it implicates? Perhaps it helps to start with methodological commitments a critical realist perspective involves. Patrick Jackson (2011: 72-111), who developed an impressively sober assessment of the complex

⁴⁴ The terms 'critical realism' and 'scientific realism' are often used interchangeably in the literature. However, following Jackson (2011: 76), I understand critical realism as a subset of a broader set of arguments referred to as 'scientific realism'. Most importantly, critical realism focuses on explicating scientific realist claims with reference to study of the social world.

meta-theoretical landscape that has emerged in IR,¹⁵ depicts the critical realist position in terms of its 'philosophical ontology'¹⁶, and more specifically in terms of two meta-theoretical commitments. The first is a commitment to what he calls *mind-world dualism* (the independent existence of reality), which critical realism shares with the kind of philosophical assumption that typically underpins (neo)realist and neoliberal IR theory. However, in contrast to the latter, which ground their assumptions about international affairs in the belief that reality can be empirically observed, critical realism moves beyond experience and posits the existence of unobservable structures and deeper generative mechanisms that give rise to events. The second commitment, which Jackson calls *transfactualism*, thus involves a rejection of the neopositivist notion that reality can only be captured through empirical observation. The idea that the units, structures and processes that shape our reality can also be unobservable is arguably the central critical realist contribution to thinking about social inquiry in IR. It not only allows those of us who are interested in social order question to ground our theories, concepts and arguments in a rich philosophical tradition, but also helps us to make sense of the ontological nature of entities and structures that lie beyond immediate patterns of order.

Bridging critical realism and social structural English School theory is intuitively plausible, and transfactualism provides the necessary link for this move. Buzan's typologies of social structures are precisely the kind of material that animated critical realists to move beyond empirical observation. According to Jackson (2011: 90) the existence of social structures is in fact the most commonly invoked example to justify transfactualism in IR, since without such a position it would be impossible to claim that norms, rules and institutions can influence world politics. They are unobservables capable of generating observable entities and processes that shape the international socio-political environment and define the possibility of actions. Buzan's conceptualisation of interstate societies and the types of value-based social structures that make up the pluralist-solidarist spectrum are, of course, not detectable through sensory impressions. Yet, he treats them as being capable of generating distinct patterns of order and institutions which have real effects on the empirical content of norms and the kind of institutions that have patterned state systems. 'Convergence', for example, one of Buzan's (2004: 160) types of social structure, is said to capture similar political, legal and economic forms with respect

¹⁵ For a more political perspective on Jackson's philosophical schema, see Suganami 2013.

¹⁶ Philosophical ontology denotes the philosophical fundament which scholars use in order to produce their knowledge; it constitutes the 'hook-up' to the world they study. Philosophical ontology is logically and conceptually prior to scientific ontology, as we first have to identify the basis on which we issue claims before we can produce scientific claims about what we believe exists.

to the recognition of property rights, human rights and the relationship between citizens and governments. It is one major theme of this thesis to establish that there are no causal relationships between social structures and specific patterns our outcomes. That said, what type of social structure is at work and how it is held in place can tell us a great deal about normative systems and the kind of international society we live in.

It seems reasonable to say that without an implicit transfactual commitment it would be impossible for English School theorists to construct theoretical claims, if they wish to do so, that involve an image of international society as an autonomous ontological entity. It is precisely for the explanatory role played by the English School's analytical categories and concepts that legitimise talk about social structures as if they were real objects. As Wendt (1999: 62) illustrates through his electron-analogy, the crucial question when talking about unobservables is whether it is *'reasonable* to infer the existence of electrons as the cause of certain observable effects, given that electron theory is our best satisfactory explanation for those effects (...). With respect to English School theory the answer is, most likely, 'Yes': We currently do not have a better macro-sociological theory of IR at hand to make sense of the various form of international order that have emerged throughout history and the different webs of norms, institutions and values that go along with them.

Transfactualism paves the way for English School theorists to establish more rigorous conceptions of social structures, but the prospect of a fruitful partnership between critical realism and a macro-sociological theory becomes even more apparent when considering the critical realist shift away from epistemology to ontology. Instead of beginning social inquiry by specifying criteria for science – a dominant procedure deeply embedded within IR theory and something practiced by empiricists – critical realism takes the object under study itself as the starting point. Wendt's (1999) work has been instrumental in implementing this position because of the way in which it has been driving IR theory away from questions about the correct conduct of scientific knowledge production and towards questions about the nature of things that exist in the world. In order to construct a 'via-media' between idealism and positivism, he separated ontology from epistemology and, subsequently, prioritised the former over the latter, arguing that 'epistemology will take care of itself in the hurly-burly of scientific debate' (Wendt 1999: 373). The underlying rationale for proceeding in this way is simple: Since what exists in the world is not only a function of what can be known through observation, it is 'the nature of objects [which] determines their cognitive possibilities' (Patomäki 2002: 99).

The idea that English School theory should begin with a hypothesis about the existence of things, rather than an epistemological commitment, is key to expanding the analytical scope of its research programme. In line with Buzan, I have argued that the epistemological focus of the classical English School theorists - reflected in the labelling schemes of Hobbesian/realism, Grotian/Interprativism and Kantian/critical Theory – have led English School writers in the past to eliminate, on *a priori* grounds, potentially fruitful avenues of inquiry. To reiterate, there is no need to preclude potentially worthy lines of inquiry in advance of any detailed knowledge about the phenomenon we wish to study. By defining international and world society in ontological terms, a macro sociological English School theory avoids such an *a priori* commitment to a particular style of investigation. If we come from an ontologically orientated perspective – and here critical realism kicks in – the nature of the object under investigation warrants the way in which we design our epistemological criteria and corresponding research strategy, not *vice versa*. Whether we choose a strictly analytical or a normative style English School framework for our research, or as in my case a combination of the two, ultimately depends on the phenomenon we want to study and its ontological characteristics. In this sense, critical realism offers a path around incommensurability, because it allows the English School to remain a place - though a more strictly defined one - for the practice of a methodologically eclectic approach to thinking about international relations.

Conclusions: a research strategy

Although critical realism is not a methodology *per se*, it has the potential to fill the English School's methodological vacuum, in particular the absence of clearly stated procedures for knowledge production and evaluation. By equipping the English School with a philosophical position that offers an established body of thought about the nature and effects of social structures, English School scholars have a resource at hand to engage with one of their central problems: what sense do we make of our conceptual and analytical categories referring to unobservables such as pluralist and solidarist international societies, and even more importantly, how do we know whether our theoretical constructs are accurate? Critical realism, as I will show below, has a number of methodological corollaries which English School theorists can exploit to shed light on these questions.

How should we approach social-structure as an explanatory tool? In order to explicate a strategy for structural-normative inquiry, it helps to begin by considering what exactly counts as an adequate structural explanation. Structural analysis seeks

to answer particular kinds of questions, namely 'how-questions' (Wendt 1987: 361). Rather than explaining *why* action A was performed or outcome B occurred, structural analysis aims to reveal *how* it was possible that A or B could take place. By asking what must exist for A or B to happen, structural explanations shed light on the conditions that establish certain social forms, not for their causes (Wendt 1987: 361).

How, then, does one answer questions about the settings for law, norms and institutions? In their seminal work on social inquiry, King, Keohane and Verba (1994: 8), for example, state that the goal of scientific research is to 'infer beyond the immediate data to something broader that is not directly observed'. The standard disciplinary narrative of explanation and research methods, in particular within the US academic community, has revolved around the study of observable regularities, and the mode for detecting them has been the classical search for causal relationships.¹⁷ Traditionally this has been done through two processes of reasoning: induction (moving from specific instances to general claims) and deduction (moving from general claims to specific instances). This, however, gets us only little way in terms of dealing with socially constructed facts such as law and institutions. Because the events, dynamics and entities we associate with them are generated by a meta-set of unobservable but nevertheless *real* entities and processes, we need a strategy that can account for the existence and ontological nature of these unobservable entities and processes, not only for their effects. The critical realist ontological focus thus calls for a different strategy for inferring explanations. As Jackson (2011: 83) argues:

'(...) the whole of our observations are taken to be explained, not by some general law of which they are a specific case, and not by some general systems that they suggest, but by a whole conception of the world that includes our observations *along with* the posited explanatory factor(s)'.

In many ways my inquiry into the structure and nature of international society's normative order will be consistent with the critical realist understanding of causal analysis. The potential of a critical realist re-thinking of the way causes and causal analysis work in international life comes from reflection on the complexity of (invisible) structures and the recognition that ideas, social ranks, discourses and reasons can have real effects on social practice. Key here has been Milja Kurki's work (2007, 2008), which offers a comprehensive, philosophically grounded reconceptualisation of causation. It is impossible to do full justice to her thinking here, but she adds both crucial depth and complexity to the notion of cause,

¹⁷ For a critical perspective on this, see Mearsheimer and Walt (2013).

reminding us how the (neo)positivist orthodoxy of causal analysis has been narrowed down and simplified to guide empirical research and discover observable regularities. For Kurki, however, causal analysis is not about uncovering general laws *a la* 'when event A occurs, B must follow'. Instead, she rejects the natural science analogy and recognises that ontologically the type of causes we find in the social world are qualitatively distinct from the causal forces that natural scientist observe (Kurki 2007: 366). What causal analysis seeks to do, Kurki (2007: 365) thus concludes, is not to describe observed patterns, but to give an account of the underlying causal powers that explain why the patterns of facts we observe exist.

I take away from Kurki the insight that an inquiry into the nature and emergence of norms and institutional arrangements involves explicating the *constitutive* relations and properties that give rise to them. Only through an ontologically holistic account of the complex social and normative environment in which normative hierarchy is situated can we shed some light on the processes and factors that shape them. This chimes well with the English School understanding of causation, which typically focuses on theorising the settings for social practice, either through the idea of order or, more specifically, through concepts such as 'society' and 'system'. For English School theorists, 'theorizing causes demands theorizing context' (Navari 2009b: 10).

The central epistemological argument that underlies my endeavour to establish a meaningful and intelligible sociological basis for thinking about peremptory norms is a direct function of the ontological character of *jus cogens*. As demonstrated in chapter 1, the concept of *jus cogens* manifests itself in the form of two interrelated, though analytically distinct, empirical realities. The first is relative normativity as a structural configuration: *Jus cogens* is a concept that envisions a specific structural configuration of legal norms in international society, namely hierarchy. Here, *jus cogens* is seen as a concept that envisions a specific constellation of the international legal system and a social order that derives from it. Secondly, relative normativity involves a classification of norms. That is, norms associated with *jus cogens* gain their unique legal authority through their normative content. In other words, they have a superior status in the international normative order because they carry a normative weight and/or function that is heavier than those of ordinary norms. Here, *jus cogens* is viewed a category of norms, and the focus is on the moral and ethical values and ultimately the normative dimension of the concept. Although both understandings are interrelated, I will analytically separate them for the purpose of producing a more differentiated account of what normative hierarchy is, how it works in international society and how it is held in place. While the first understanding (*jus cogens* as a structural configuration) pertains to questions of

social-structure and necessitates an analytical theory about norms, the second understanding (*jus cogens* as a category of norms) pertains to questions of normative theory. Because the concept of *jus cogens* encapsulates two different ontological dimensions, it demands a two-step theorising process.

The first cut: Structural explanations

In the first step, an analytical-structural analysis will be conducted, aiming to generate structural explanations that can account for the existence of relative normativity in international society. Here, Buzan's sophisticated schema of the social structure of state systems can help us to adduce explanations for the existence and nature of relative normativity in IR. His different types of social structures and the processes by which they are internalised and maintained provide us with a conjectural conception of the complex social environment that could have generated a hierarchical order of legal norms, thereby limiting the number of plausible claims and mechanisms worth evaluating. The task of this research project is thus to adduce an explanation for the existence and nature of relative normativity by identifying which distinct type or configuration of social structure is most likely to generate an hierarchical order of norms in international relations. I say 'most likely' here since adduction only produces conjectural explanations (Chernoff 2005: 82, Jackson 2011: 83-83). If we want to move beyond the conjectural statement about the generative relationship between social structures and relative normativity established in this thesis, we need to find further evidence 'that are independent of the particular observation [relative normativity] from which the structure was adduced' (Wendt 1987: 358). In practice, this means relating a wider range of historical and contemporary legal and political structures types of normative-order making to see whether a consistent scheme emerges that supports the conjectures developed here. Needless to say that doing so lies outside the scope of this project and my aims are much more modest, restricted to elaborating theoretical arguments about the relationship between social structure, the international legal system and its normative content.

The second cut: Normative explanations

In the second step, a normative inquiry into ethical content of *jus cogens* will be performed. Here, the goal is to shed light on the distinct nature of peremptory norms by interrogating the values that give rise to the authoritative and universal

character of peremptory norms. As the concept of *jus cogens* indicates, the issue of normative hierarchy in international law is intimately connected to the values and moral character of international society. In order to throw light on the normative ontological dimension of *jus cogens* in international society, Chapter 5 will be concerned with the values and ethical obligations encapsulated in peremptory norms. As indicated already, the normative mode of analysis I will offer is not of philosophical nature. That is, the aim is not to legitimise, on moral grounds, the normative superiority or universal status of particular international norms and the values that are enshrined in them; or legitimise, through political theory, the practice of relative normativity in our international legal system. To be sure, these tasks are certainly important and the pursuit of answering questions such as why *should* peremptory norms exist and how can we intellectually justify the ethical superiority of certain norms would greatly enrich and strengthen our understanding of a hierarchy of norms in international relations. Instead, normative theorising, as understood in this thesis, means an endeavour to examine and understand the moral dimension of international life, in particular its moral dilemmas – not to suggest, set or prescribe ethical standards.

As such the normative approach of this project begins with the norms *and* values that exist within international society, thereby grounding normative theorising in the existing normative practice of *jus cogens*. Based on the assumption that normative principles are the product of historical and cultural contexts, my approach seeks to uncover and critically assess the context specific ethical content of peremptory norms. Thus the normative analysis conducted in this project is of descriptive rather than prescriptive nature in that it seeks to reveal how values and social structures have interacted in forming a particular constellation of international law, namely hierarchy. The core activity of this kind of normative theorising is to identify the reasons why certain norms are regarded as *jus cogens*, thereby exposing the values and obligations that form the underlying basis of relative normativity in contemporary international society as well as showing how these values and obligations interact with particular constellations of social structures.

This kind of normative analysis is different from philosophically, primarily natural law, driven endeavours that seek to develop foundations of normative arguments - it does not make normative judgements, it tries to understand them. As Hurrell (2002: 140) puts it, '[s]howing that certain values are widely accepted in social practices is not the same as providing valid arguments as to why they are justified'. So normative English School theorising is not limited to making judgements about social and political arrangements. We do not have to follow, for example, Wheeler or Jackson and argue for a specific solution to normative

dilemmas such as human rights vs. state sovereignty. Instead, it can also involve studying the ethical judgements and moral practices of particular communities and the considerations that underscore them (Nardin 1992: 4-5). Williams' reading of *FITWS* suggests that despite Buzan's explicit normative reservations, a social structural version of English School theory can accommodate this type of normative investigation.

Reimagining *jus cogens* as an institutional form

Chapter 2 established a sociological outlook on world politics, assuming that international life is socially constructed and rule governed, and that norms, values and institutions matter. Norms and institutions may often lack the force envisioned, especially in situations in which power conflicts and ideological division is high. But it seems fair to say that contemporary international relations does no longer fit the old fashioned picture of an anarchical society exclusively dominated by material power, self-interest and security competition. Instead, modern states have developed various instruments to establish and maintain international order, to cooperate and to resolve their disputes peacefully. One of the oldest means to govern society through a common system of social control is law. International law undoubtedly occupies a central position within the normative architecture of contemporary international society. Today there are over 150000 UN registered international treaties and related subsequent actions, and the major fundamental principles that define the character of modern international relations are enshrined in various conventions such as the UN Charter, the Universal Declaration of Human Rights, the Helsinki Final Act and the Organisation of Security and Cooperation in Europe.

Of course, international law is not the only means by which states manage their relations. In a society lacking a central law-making authority and enforcement mechanisms, there must be something going on beyond law that leads to stable patterns of interaction, and that enables and shapes the creation of rules, norms and institutions in the first place. It is here where the English School enters the picture. The Schools' endeavour to understand the global normative framework has gone well beyond the focus on formalised rules, stressing both the depth and variety of social, political and normative arrangements. On this account, international society consists of a complex web of informal processes and institutions that not only guide, shape and restrain, but also constitute the behaviour of its members. Bull (1977: 64-68), animated by the task of finding out what it is that sustains the goals of societal life, identified three 'complexes of rules': fundamental or constitutional principles; rules of co-existence; and rules concerned with regulating co-operation.

Bull was well aware that this list may not be exhaustive and that there was a significant degree of complexity within and overlap between his categories. Most importantly for our purposes though, he (Bull: 1977: 64) reminded us that many of these rules 'are worked out without formal agreement or even without verbal communication'.

The purpose of this chapter is to begin shifting the focus from immediate legal rules to the informal, deeper-seated structures, processes and values that constitute the normative conditions in which norms and rules are deployed, and which determine the effectiveness and application of law. If one accepts the methodological argument from Chapter 2 that ideas and structures generate the normative possibilities, constraints and boundaries that international actors face when managing international society, then key to understanding the nature and content of normative systems is to make those underlying social structures and ideas explicit. Before we can start to do so, however, we need to take one step back and ask what it is that we are trying to explain. What is *jus cogens*? What happens to 'norms' and 'institutions' once we take them beyond traditional legal framing? To answer this question, this chapter re-thinks some of the conceptual foundations upon which *jus cogens* has traditionally rested. The purpose of this exercise is to unpack the basic features of international order and see how and on which levels *jus cogens* exercises normative influence. This will see me developing the idea of *jus cogens* as a generic institutional form that not only regulates social interaction but also constitutes the setting in which those interactions take place.

The first section of this chapter examines the role played by law in the construction of international order. Here, I want to tease out some of the limits of international law in terms of deploying normative significance in international society, and to highlight that *jus cogens* not only affects the international legal system, but also has significant effects on the social organisation of international society. In order to make sense of the social nature of *jus cogens*, the second and third section introduce a new, social conception of *jus cogens*. Here, I show how English School scholars have understood norms and, subsequently, develop *jus cogens* as a generic international institutional form. As it will become apparent, this new understanding blurs the lines between law and other forms of normativity. To regain some analytical clarity about the different normative categories at work, the last section turns to international legal theory and asks how we can distinguish between legal rules and other norms. By the end of this chapter, we are hopefully one step closer to understanding what it means to think in sociological terms about normative hierarchy.

Ordering international society: the limits of law

When seeking to expound the nature and elements of the international normative framework, the challenges to establishing and maintaining international order offers a useful starting point. Following Bull (1977: 8), I understand international order as 'a pattern of activity that sustains the elementary goals of the society of states, or international society'. Social theorists generally identify two problems agents face in the pursuit of order (Elster 1989: 1-2, Wendt 1999: 251, Wrong 1994: 10-12). The first is closely associated with Hobbesian image of omnipresent fear and constant physical assault in the state of nature and deals with the questions: How do we avoid a war, chaos and violence? This is often referred to as the 'cooperation problem', since the main challenge is to get the members of a society to work together toward mutually beneficial ends (Wendt 1999: 251). In international relations, where anarchy persists, the problem of security – and economic cooperation – has been at the heart of IR scholarship. The second problem is 'social' rather than 'political' in that it has to do with regularities and patterns of stable behaviour. The question here is not about whether relationships between individual units are cooperative *or* conflictual, but how the members of international society are arranged in a non-random way so as to ensure predictability (Wrong 1994: 11). To deal with these problems, international society has developed shared norms, rules and institutions.

The two conceptions of international order have translated into two different, though inherently interrelated, discourses about the normative structure of international society.¹ One is concerned with the *procedural norms* of international society and revolves around the morality of state sovereignty and the principles of coexistence and non-intervention. These norms are procedural in that they set out the fundamental ways and means of achieving and sustaining the security and survival of states and their related whole, international society (Jackson 2000: 17). In modern international relations, the main pillars of these procedural arrangements are enshrined in the UN Charter provisions, in particular those articles that define sovereign equality and the norms regulating the use of force. While respect for state sovereignty and non-intervention undoubtedly remain the cornerstones of these arrangements, Jackson (2000: 17) concedes that human rights norms have become part of the procedural framework of the post 1945 society of states. This indicates that the traditional 'order problem' of avoiding violence and providing security in international life is beginning to shift from the state to the individual level – a move

¹ The concept of procedural and prudential norms in international relations is eloquently discussed by Robert Jackson (2000: 16-22)

perhaps best reflected in the rise of the concept of human security and the emergence of Responsibility to Protect doctrine.

There is, of course, only so much normative ground procedural ethics can cover before states enter the playing field. How to behave in a particular situation is more often than not determined by circumstances, and decisions are contingent on the actions of others agents and the normative significance of the different choices one is presented with – this is particularly important in the international realm, where no ‘categorical imperatives exist’ (Jackson 2000: 18). In other words, international politics and foreign policy making is rarely straightforward. State leaders and foreign ministries are usually confronted with an inescapable reality of conflicting goals, mixed motives and hard choices, which demand careful considerations of situational factors and the curtailing of future political choices. This is particularly true in instances where the consequences of political action are severe and the reality of selectivity among ethical choices is high. For example, whether a state uses force or not, and whether this action is considered legitimate or rightful, depends heavily on context. In the last decade of the twentieth century states violated the principle of sovereignty and deployed military force to respond to mass atrocities and severe human rights violations. Many of these interventions have been considered legitimate in some sense, even the ones that have been deemed unlawful, as in the case of Kosovo in the 1999. This, one can argue, is because they were in line with the prudential norms of modern international society and are justifiable on moral rather than on legal grounds. *Prudential norms* are thus about the ethics of state behaviour and what is considered to be a morally appropriate action in a given situation.

The international legal system, however, has been largely discussed in *procedural* rather than prudential terms. This is because international law is primarily about coordination, geared towards protecting coexistence, rather than accommodating the dynamic and complex value system of the society in which it operates (Mergret 2012: 67). As a form of normative order, the international legal project still privileges rational adjustments of interests negotiated by states over the evolving normative consensus within international society and the shared values and moralities that shape its members conduct.² With respect to *jus cogens*, it is precisely for international law’s struggle to reconcile the more dynamic normative character of normative consensus with the static, more rigid norms of the global procedural

² As Cassese (2001: 18) neatly put it, there is an inherent tension between the Grotian paradigm of international relations, which is based co-operation and regulated intercourse among sovereign equals, and the Kantian model, which is focuses on transnational solidarity and common substantive goals – with the contemporary legal system still leaning towards the Grotian framework.

arrangements that has prevented it from developing a functioning theory of normative hierarchy.

International law's focus on the procedural dimension of world politics is, certainly from a sociological standpoint, unsatisfactory: social behaviour and the stable patterns of interactions that international actors establish among themselves are normatively significant in their own right; and to understand the normative problems of world politics exclusively in terms of procedural ethics – or rational adjustments of interests – is to exclude oneself from large parts of the normative dimension of social reality of international life.³ Normativity in social life is constantly enacted, established and transformed, and changes in political practices often occur beyond the procedural rules that frame them. In its efforts to combat terrorism, for instance, the Obama administration has spent time and effort to reinterpret the norm of 'imminence', allowing it to carry out preventive drone strikes against alleged terrorist groups and individuals. While this process of re-definition has taken place outside the domain of treaty law or any formalised institutional context, it seems that international society has nevertheless gradually adjusted to America's new understanding of imminence (Schmidt and Trenta 2015). None of these normative developments can be sufficiently captured through procedural vocabulary. Yet they throw up important questions about international society's attitude towards the appropriateness of military action outside war zones, the preventive use of lethal force and the rights of individuals.

Clearly, customary international law, as opposed to treaty law, displays more sensitivity towards the normative dynamics that shape state behaviour. Customary law derives legal obligations from the legitimate expectations that emerge from day-to-day relationships. As Danilenko (1993: 75) explains, custom emerges from the conduct of the members of international society, 'which constantly 'negotiate' with each other by means of actual deeds, statements and other acts'. It is thus better equipped to capture the shared beliefs, expectations and normative understandings of international social practices. Coming from a constructivist perspective, Finnemore and Toope (2001: 752) have insisted that much of contemporary international law is in fact not intelligible without reference to customary law elements. For example, any endeavour to assess international law's impact in areas such as the use of force cannot afford to ignore the customary rules of self-defence and the way in which they influence the position of states on the legitimacy of military action. Similarly, customary law is typically seen as

³ This does not in any way suggest that prudential ethics are by definition normatively superior to procedural accounts. Eric Posner (2003), for instance, argues that the prudential reasons states have to bring their behaviour in line with rules of international law are not of moral nature. Instead, they arise purely from the expectations of other states to act in a law-conforming way.

indispensable to the understanding the very development of international humanitarian law; and it continues to influence human rights debates within UN organs and arguments of counsel before international tribunals (Steiner, Alston and Goodman 2007: 69-73).

Yet, even customary accounts have difficulties to accommodate sufficiently the vertical differentiation of the international normative order. Above all, I find it hard to imagine how any international practice that rubs up against fundamental procedural norms such as state sovereignty and non-intervention can emerge as a rule of international law as long as states do not explicitly and, most importantly, consensually agree to it. Any international legal norm that fundamentally limits the states exercise of control over its domestic territory arguably will not find its way into the international procedural law through universal state practice. Secondly, as legal theory stipulates, international practice is not enough, in itself, to create a norm of international law. In addition to established, widespread and consistent state practice, a belief that this practice is carried out because it is rendered obligatory under existing international law is required (*opinion juris*).⁴ The problem resulting from this paradoxical combination has been discussed exhaustively by international legal scholars. Thirlway (2006: 122) neatly captures the essence of this problem by asking, 'how can a practice develop into a customary rule if states have to believe the rule already exists [...]?'. Overall, it is extremely difficult to couch a logically coherent account of normative relativity into customary international law theory.

In light of the limited space traditional accounts of normative hierarchy give to social practice and context, we might want to broaden the perspective and look beyond the formalised framework in which *jus cogens* is usually cast. To do so, we need to appreciate normative hierarchy as a broad social phenomenon deeply embedded in the normative practice, values and traditions of international society, and defined and forged by the interactions among its members. As Finnemore and Toope (2001: 742) pointedly remark, juxtaposing law with obligations and obligations with reliable commitments blinds out much of what law does in international society. Under a broader view of normative hierarchy, then, we need to recognise that the obligations and interdictions enshrouded in *jus cogens* do not have to be formalised in legal terms in order to be socially or normatively significant. Indeed, the mechanisms that render norms powerful and institutions effective often operate outside international law, and more 'law' does not mean better mechanisms for global governance, an argument recently elaborated at length by Friedrich Kratochwil (2014). In the absence of some kind of overarching political

⁴This is also referred to as the 'two-element' theory of customary international law.

structure, 'in which policy can be determined, trade-offs can be agreed upon, and broad powers can be delegated', he argues, legalisation and dispute settlement mechanisms can only play a limited role (Kratochwil 2014: 101). Moreover, since legalisation without political integration promotes rather than counters the fragmentation of the global normative order, the 'the proliferation of legal norms and dispute resolution is part of the problem, not of its solution' (Kratochwil 2014: 101).

This verdict seems to be further reinforced by the legalisation literature, which has demonstrated that increased legalisation of norms and institutions does not automatically translate into more efficacy. Looking at formal trade agreements, Goldstein and Martin (2000), for example, observe an inverse relationship between precision and perceived obligation to comply with regime rules. This is, they argue, because greater precision usually encourages the use of escape clauses and mobilised interest groups for noncompliance (Goldstein and Martin 2000). Something similar seems to hold true for the area of human rights law. Analysing the relationship between compliance and the degree of legalisation in the cases of disappearance, democratic governance and torture in Latin America, Lutz and Sikkink (2000) find that the least compliance is in the most formalised domain, namely torture.

That non-formalised international norms and institutions can be effective has been widely accepted in the English School. The balance of power, for example, which has been one of the bedrock institutions of the modern state system and key to providing global order, shapes foreign policies, yields expectations and creates stable patterns of interaction in the absence of legal obligations. Something similar may hold true for normative relativity, which can affect state behaviour through a multitude of obligations and compliance mechanisms. Such an informal institutional construct can still produce clear normative authority structures and guidelines for how states should act in given situations. Put simply, it can have an effect upon international order.

One might argue that a sociological treatment of *jus cogens* represents what Sartori (1970) called 'concept stretching' (stretching a term to describe a phenomenon distinct from the one previously referred to). However, moving beyond the traditional theories of relative normativity does not replace the accounts developed by international lawyers, neither does it question the way in which the concept of *jus cogens* has been set up or how peremptory norms are conceptualised (non-derogability and universal applicability). Instead, it seeks to augment the existing accounts. A fuller appreciation of what *jus cogens* is and how it influences state behaviour makes room for thinking more systematically about the role

normative hierarchy plays in international order. This, in turn, might engender a concept of *jus cogens* that is more robust intellectually and more helpful for international legal scholars and political scientists alike to understand the normative processes that shape contemporary international society.

The English School account I seek to establish finds its genesis in *jus cogens*' significance for both the integrity of the international normative system and the wider international order. The argument that peremptory norms represent the foundation of international law and fundamentally define the normative boundaries beyond which interactions and events may not stray sits at the heart of the idea of *jus cogens*. All writers, regardless of their theoretical commitments, seem to recognise this fundamental quality of normative relativity in some way or another. The argument is deployed perhaps most clearly in public order theories, which establish a link between *jus cogens* and the shared interest of international society to maintain a particular kind of social order. For international lawyers such as Christenson (1987-1988), Orakhelashvili (2006) and Rozakis (1976), it appears that peremptory norms are not only key to the functioning of the international legal system, but the existence of international order in general. They claim *jus cogens* is key to the functioning of international law because it safeguards the moral integrity of the international legal system by protecting the 'overriding and predominant interests and values' of the international community as a whole, as distinct from the interests of individual states (Orakhelashvili 2006: 46).

The public order argument has a long history in legal scholarship, and its argumentative relevance for the existence of peremptory norms is undeniable – I will consider this in more detail later in the thesis (see Chapter 5). For now it is sufficient to note that in every legal system a limited number of fundamental norms and principles are supposed to exist which the subjects of law are not permitted to violate by their contractual agreements. Indeed, it is difficult to envision any civilised society – whether comprised of states or individuals – which does not limit the freedom of contract between its members in order to protect the higher public interest from being violated by private transactions (McNair 1961: 213-214). Of course, the level of normative consensus in international relations is considerably lower than in domestic societies. Yet some form of hierarchy among international norms has existed long before the emergence of the concept of *jus cogens* in the second half of the twentieth century. As we have seen already, the earliest approaches to jurisprudence, Divine and natural law, which dominated the philosophy of law until the rise of positivism in 19th century, are built around the very premise that some higher principles of morality exist against which actions

and laws must be evaluated. As Ford (1994-1995) argued, *jus cogens* is simply 'a modern, secular reincarnation of natural law theories [...]'.¹

The significance of normative relativity thus reaches far beyond the international legal system into the domain of social order. The question of which actions and outcomes in world politics are ethically permitted pertains to the very nature of international society, and it fundamentally sets out the way in which states rationally and morally coexist under anarchy. Given the early stages of my endeavour, I do not offer a complete theory that explains the nature of normative relativity and how it works beyond international law. Yet, following the methodological distinction between social-structural and normative theory established in the previous chapter, we might want to briefly recall the distinction between the structural and the normative dimension of *jus cogens* and consider how they relate to order in international society.

Social-structural dimension. Normative relativity organises social relationships by establishing certain baseline rules that apply to all members of international society. As Rozakis (1976: ix) explains:

[T]he concept of *jus cogens* came into life as a result of a need felt by states (old and new) which realized that in such a vast, diversified, sometimes chaotic society as ours is, certain strict rules of law should exist to check individual interest and short-run ends; and to, thereby, build a coherent basis of peaceful relations and cooperation which alone can assure the furtherance of all specific trends and goals.

In this sense, normative hierarchy can be understood as a mechanism put in place for the purpose of limiting the exercise of state power so as to ensure peaceful co-existence among the member of international society. However, every form of hierarchy, whether social, material or normative, also invites strategic speculations about power, domination and the wider social organisation of a society. On this view, *jus cogens* bears the question to what extent peremptory norms are simply a tool for liberal Western societies to promote liberal values through the language of universalism, as Koskeniemi (2005) suggests, or whether normative hierarchy in fact protects smaller powers from Western dominance and Euro-centric rules by emphasising the fundamental status of self-determination and non-aggression. In any case, normative hierarchy is deeply intertwined with the social structural organisation of international society, and it is both reflective of and constitutive to the way in which states are arranged in relation to each other.

Normative dimension. The international legal literature demonstrates in an ample manner that *jus cogens* reflects the very nature of international society. Residing at the heart of the constitutional structure of the modern international legal order,

peremptory norms are expressive of the fundamental values from which international society derives its normative character. By establishing which practices are fundamentally permitted, *jus cogens* is a clear manifestation of the overriding values and beliefs that circle within international society. Essentially, as most works on *jus cogens* seem to suggest, the contemporary differentiation of normativity, and its success or failure, is bound to the human capacity to agree on some universal norms and ethical standards to reduce human suffering and preserve human dignity. The prohibition of genocide, slavery and torture can all be read as calls to protect the most vulnerable of the human race through institutionalised rules that bind all members of international society. Here, *jus cogens* loosely connects to a Kantian tradition of thought with its progressive faith in human nature and its ability generate universal norms which pave the way for the transition of international society dominated by power and self-interest to an international polity governed by transcultural dialogue and consent. Of course, normative relativity does not necessarily embody transformative force, though it is often invoked as an indication of the constitutionalisation of international law (e.g. De Wet 2006).

Of course, such an (social) understanding of normative hierarchy runs against the mainstream of international legal theory, and it demands qualification as to what exactly such a conception of *jus cogens* is and how it manifests itself beyond international law. In order to do this, I will start by sketching out how English School scholars conceive norms. While legal writers tend to focus on codification, formal compliance mechanisms, standardised procedures and implementation, members of the English School usually emphasise the social processes that underpin norm following behaviour. This, in turn, should shed a different light on the workings of peremptory rules in international relations and why actors adhere to them.

What is so 'social' about norms?

In the IR literature, a general agreement exists that a norm can be defined as a standard of appropriate behaviour for an actor with a given identity (Katzenstein 1996a, Klotz 1995a, Finnemore 1996, Finnemore and Sikkink 1998). As the terms 'standard' and 'appropriate' indicate, norms combine regularity of behaviour with a sense of obligation that it ought to be followed. Consequently, in normative analysis we find the concept of 'norms' to be deployed in two different ways. The first focuses on the standard-setting function of norms. Based on a behavioural definition, authors such as Goldstein (1994) and Axelrod (1986) see norms simply as

the uniformities in behaviour: Norms exist to the extent that states typically act in a certain way. On this view, there is a sense of normality about norms that stems from the assertion that they express the expectations held by states about what is considered to be common behaviour in world politics (Goldstein 1994).

While behavioural definitions point to expectations and normality, they downplay the normative and socially shared elements of norms. Firstly, as most sociological writers would agree, constant repetition of an act is not sufficient to produce a norm. Moreover, there needs to be some sort of obligation on behalf of the agent, whether legal, moral or otherwise, that leads her or him to follow the norm in a given social setting. Secondly, norms cannot be held privately like ideas, beliefs or intentions; they are inherently shared, social and thus intersubjective (Finnemore 1996: 22). Based on these assumptions sociological norm analysis, including constructivist and English School scholarship, work with a reflexive concept of norms. That is, they associate them with the 'shared understandings of standards of behaviour' that govern social action by signifying what is regarded as appropriate and what not (Klotz 1995: 14). As Raymond (1997: 218) further explains:

[N]orms entail a collective evaluation of behaviour in terms of what ought to be done, a collective expectation as to what will be done, and particular reactions to compliant versus noncompliant behaviour.

What is important to note, then, is that non-compliance does not invalidate a norm. Because norms are more than mere behavioural regularities, their existence is not solely dependent on actors following them argue (Raymond 1997: 218, Schwelinius 2009: 127-128).⁵ The normative injunction about how states ought to behave and the shared expectations that underpin a specific norm operate regardless of whether it has been broken in a particular instance. Considering the example of torture again, although the practice of torture has been widespread, the prohibition of torture has retained its status of an international humanitarian norm. As Rosemary Foot (2006) has shown, even the Bush administration, which resurrected torture as a course of action in the context of its counter-terrorism strategy, was not able to cast aside the moral obligation not to inflict unnecessary harm or suffering to human beings that sits at the heart of the international norm of torture.

Torture is a special case since its peremptory status renders it non-derogable and universally binding. Somewhat paradoxically though, international lawyers, including Foot (2006), argue that despite frequent violations, the prohibition of torture remains part of *jus cogens*. This logical contradiction might yet be another

⁵ In a similar vein, Kratochwil (1989) and Ruggie (1998) argued that norms cannot be sufficient causes of behaviour for they are counterfactually valid.

indicator for the need to move away from a stylised and narrow conceptualisation of normative hierarchy so as to better understand the empirical reality of *jus cogens* in the practice of international relations.

IR scholars typically distinguish norms from rationality and self-interest. Unlike, rational behaviour, which is conditional, outcome orientated and concerned with the efficient means for achieving a predetermined goal, norms are unconditional and concerned with the nature and desirability of the means and aims themselves (Elster 1989: 97-99, see also Goertz and Diehl 1992: 637) has described the underlying logic of social norms more formally: While rational actions take the form 'Do X get Y', social norms take a different form. Often they are quite simple, saying 'Do X' or 'Don't do Y', or 'If you do X, then I do Y'. The complexity of these injunctions can vary, but the crucial point is that they are all not outcome orientated or dependent on a hypothetical future scenario.

At first glance, constructivists and contemporary English School accounts privilege moral appropriateness and the 'social-pull' of norms over instrumental rationality, cost/benefit analysis and individualism when theorising the normative order of international society. The cosmopolitan appeals to the idea of a common humanity that figure so prominently in many recent English School works all seem to stress the moral dimension of institutionalised behaviour. However, notwithstanding the upsurge of solidarism, it is important to keep in mind that rationality, consequentialist mechanisms and self-interest have their place in international society, especially in its pluralist version. Bull (1977) left no doubt that international order may emerge from rationally driven efforts to ensure survival under anarchy. In fact, his entire conception of international society is essentially a rational model, based on a kind of instrumental logic that establishes order and security through rules and mutually respected procedures. At the core of Bull's (1977: 4) theory of society are foundational conditions for order which all social groups have to embrace when developing stable and peaceful relationships: limits to violence, sanctity of agreements and the establishment of territorial property rights. The norms that are built to secure these conditions – typically Westphalian rules surrounding sovereignty and consensual law making – are merely instruments that prevent states from drifting into chaos and war. This has nothing to do with the normative expectations and shared moral assessment attached to social norms; and it is far away from the kind of international society Hurrell (2007), Linklater (2011) and Wheeler (2000) sketch out.

It seems then that the English School's implicit theoretical reply to the 'norms/rationality' dualism has been to associate norms with solidarism and rationality, and self-interest with pluralism. However, given the density of

interactions and the level of institutionalisation in contemporary world politics, characterising international society by one behavioural logic *or* the other seriously oversimplifies the complexity of the international normative structure. In other words, solidarism and pluralism are by no means adequate categories to distinguish between behaviour emerging from norms and regularities resulting from rational actions. Even the most rationally constructed pluralist societies are likely to contain some norms that are unconditional and not outcome orientated. In turn, economic rationality that drives the creation of international trade regimes is certainly part of the liberal normative framework envisioned by solidarists.

General patterns of behaviour are thus neither constructed exclusively through rationality or norms. Moreover, both behavioural logics more often than not coincide in what Elster (1989: 106) coined 'a parallelogram of forces that jointly determines behaviour'. Consider, for example, the norms of commitments to alliance and neutrality in warfare. Both norms are usually understood as a result of the balance of power and strategic calculations about security, resources and threat assessment (e.g. Walt 1987). Yet, upholding obligations that result from alliance pacts or abstaining from participating in inter-state warfare also involve moral considerations about the observance of promises (*patca sunt servanda*) and the ethical appropriateness of the use of force, respectively. Goertz and Diehl (1992) rightly point out that the interplay between rationality and norms pose a major methodological challenge for normative analysis, because we have to control for self-interest and instrumental rationality when assessing how global institutionalised practices occur. In the end, it seems that only an in-depth, context sensitive qualitative analysis can reveal the behavioural logic that drives a particular action. It is beyond the scope of this thesis to plumb the depth of this important methodological question; and it is sufficient to have a conceptual distinction between norms and rationality.

What has hopefully become clear by now is that the English School, coming from a sociological IR perspective, is getting at something about norms that is not covered by (traditional) legal approaches. It suggests that there is a lot more to norms than legal obligations, formal validity and institutionally designed enforcement mechanisms. While English School theory does not ignore the crucial role law plays in shaping behaviour and expectations, it extends its reach to include the deeper seated, normative processes through which norms and social structures forge stable patterns of interaction. This perspective, and its accompanying constructivist inspired assumptions about the ontological quality of norms and institutions, presents a fruitful ground from which to theorise about the social-structural nature and function of *jus cogens* in international society.

From regulation to constitution

The legal literature on normative hierarchy has suffered from an inadequate theoretical understanding of normative hierarchy in part because it has failed to take into account the ontological nature of norms. During the last couple of decades a broad swathe of work in IR has emerged, mostly from the constructivist camp, which engages thoroughly with the ontological quality of norms and social structures. Besides from demonstrating that norms matter in international relations, this research has grappled extensively with the nature of normativity and the mechanisms and processes by which norms occur and how they change. While far from offering definitive explanations, it is in constructivism where we can find some important clues about the nature of *jus cogens* beyond treaty-based law and how it actually works in world politics. I am spared the need to provide a comprehensive discussion of constructivism in IR, since the literature offers plenty of compelling overviews (e.g. Adler 1997, Guzzini 2000, Finnemore 2001). For present purposes, it is sufficient to focus on its main claims and their relevance for understanding norms and social structures.

Coined by Nicholas Onuf (1989) in the late 1980s, IR 'constructivism' is rooted in the sociology of Durkheim and Weber and remains heavily indebted to Wittgenstein's work on language and Giddens' theory of structuration.⁶ Despite their different intellectual endeavours, these thinkers are firmly united in their fundamental belief in the concept of social facts and the relevance of social ideas and beliefs for making sense of the world. Part of the reason for turning to classical sociologists for inspiration was dissatisfaction with the previously dominant theories and the way in which they dealt with normativity in the international realm. Before the rise of constructivism, IR scholars either sought to eschew normative explanations completely by rendering norms and other social phenomena to nothing more than by-products to material power and self-interest (Neo-Realism), or treated them as consciously designed problem solving devices emerging from rationally driven efforts to cooperate (Neo-liberalism).⁷ To be sure, constructivists do not consider norms and institutions to cause behaviour directly. Moreover, they view them as constraints on actors, influencing subjective ideas and interests or working implicitly through processes of social learning and

⁶ For the influence of Giddens and Wittgenstein see Onuf, especially Chapter 1. On the influence of Durkheim and Weber, see Ruggie (1998: 857-862).

⁷ Neo-Realism and Neo-Liberalism both premise explanations of behaviour in an ontology of neoutilitarianism. Consequently, 'ideational factors, when they are examined at all, are rendered in strictly instrumental terms, useful or not to self-regarding individuals (units) in the pursuit of typically material interests, including efficiency concerns' (Ruggie 1998: 855).

internalisation (Ruggie 1998: 869, Checkel 2001, Schwelbnus 2009: 127).

The key constructivist commitments are to the intersubjective construction of reality *and* knowledge,⁸ to the centrality of non-material phenomena for understanding behaviour, to the mutual constitution of structure and agency and to the significance of shared understandings in shaping the identity and interests of actors. This shift away from individualism, materialism and rational choice assumptions to intersubjectivity, identity and shared ideas has generated powerful theoretical and empirical insights into issues such as the nature of and life under the condition of anarchy (Wendt 1992), humanitarian intervention (Crawford 2002), development (Lumsdaine 1993), and norms and institutions more generally. I believe that in a similar fashion, constructivism and its focus on social interaction and shared meanings can help us to shed some fresh light on the concept of *jus cogens* and how it influences social interaction in international society. Most importantly, it opens up room for thinking about normativity beyond codified rules and obligations stemming from treaty based law. In what follows, I will utilise two elements of constructivist theory – the notion of institutions and the dynamic nature of social constructs.

The concept of institutions is central to the English School, in particular in the form of what has been dubbed ‘primary or fundamental institutions’; they are the principal means through which normativity is deployed in international relations. I will engage with the role of these institutions – what they are, how they work and how they relate to other institutions – later in this thesis (see Chapter 4), since I argue that they are crucial for understanding the basic normative character and purpose of *jus cogens* and its wider role in international society. For now, however, a general constructivist definition of institutions that is consistent with the way in which the English School deploys the term will do:

An institution is a relatively stable set or ‘structure’ of identities and interests. Such structures are often codified in formal rules and norms, but these have motivational force only in virtue of actors’ socialization to and participants in collective knowledge. Institutions are fundamentally cognitive entities that do not exist apart from actors’ ideas about how the world works (Wendt 1992: 399).

I would point out two assumptions that are implicit in this definition. First, institutions are a connected set of norms, which infuse structure with social meaning. Second, institutions do not have to be codified into formal rules and

⁸ The claim that the social world is constructed through intersubjective meanings was famously worked out by Berger and Luckmann (1966: 23), who contended that there exists ‘an ongoing correspondence between *my* meanings and *their* meanings in this [social] world, that we share a common sense about its reality’.

norms. They can be understood either in specific terms as formal regimes and international organisations or as more general fundamental practices in a society. In fact, most definitions accommodate both meanings, and as long we are clear about which we deploy in our research, there seems no need to exclude one or the other from our definitions.⁶ It seems fair to say that constructivists and English School theorists privilege historically evolved, fundamental practices embedded in social structures over formal organisations designed for explicit purposes, thereby emphasising the fact that international institutions often work through informal practices. Following these approaches, I want to argue that *jus cogens* can be conceptualised as:

An institution that is embedded in structures of meanings that govern and legitimise social practices and interactions pertaining to identities and interests associated with the relationship between international norms. It does so by establishing some international norms and their value-laden behavioural prescriptions as normatively superior in relation to ordinary norms by according them non-derogable and universal status.

As a generic institutional form, *jus cogens* not only orders relations among international norms on the basis of certain fundamental values and beliefs about the nature and moral purpose of international society, but also grants certain higher-order norms their social meaning and empirical significance. While the nature, place and purpose of *jus cogens* in international society will become clearer as the upcoming chapters unfold, let me begin by making this conceptualisation intelligible in terms of the functions institutions perform.

The literature highlights two features that are important for understanding the role institutions play in the construction and maintenance of international order: constitution and regulation. Constructivists and liberals alike tended to draw a clear line between institutions' regulative and constitutive effects when explicating their workings (Searle 1995: 27-29). While this distinction has analytical merit, I am sceptical as to how it can function as criteria for depicting different types of institutions. As Onuf (1989: 50-52) convincingly argued, in the end all institutions engage in regulation *and* constitution, because all normative arrangements regulate behaviour in one way or another, thereby constituting the social arrangement within which they operate. Institutions are thus better seen as a transmission belt between constitution and regulation.

Following Wendt and Duvall (1989, see also Ruggie 1998b: 22), I assume that all international institutions generate background conditions of possibility for states to

⁶ See Buzan (2004: 164-167), who offers an excellent discussion of the two meanings of institutions.

act by establishing a social setting in which interaction can take place – they ‘define[s] the set of practices that make up any particular consciously organised social activity [and] specify *what counts as* that activity’. The constitutive dimension of *jus cogens* has been completely overlooked in the international legal literature: It is the ability to socially empower states and non-state actors to engage in collective actions to secure the fundamental values of international society. That is, *jus cogens* makes possible the efforts of states to uphold certain values and common interests by classifying the norms that embody them as superior, non-derogable and universal. For example, it empowers states and non-state actors to come together and engage in measures to prevent or stop severe human rights violations through public pressure, sanctions, and the use of military force. In a similar way, it empowered international society to develop the concept of human security and the Responsibility to Protect and to re-think the concept of sovereignty. To be sure, this is not to say that all those practices are exclusively constituted by normative hierarchy. Neither does it imply that every member of international society engages in them in the same way, for a state’s interests and powers depends on its participation and position in that institution (Duvall and Wendt 1989: 60-61). However, all of these practices and developments would not have been possible without an institution that somehow structures the international normative order, prioritises some normative claims and ethical schemas over others, and empowers international actors to engage in collective actions, efforts and processes to realise and maintain this order. Thus, as a generic institutional form, *jus cogens* shapes international practice by generating a normative agenda and corresponding interests, therefore making possible certain practical dispositions.

Table 2. *Jus cogens and its institutional dimensions*

		Source	Function
<i>Institutional Dimension</i>	Legal (Formal)	Treaty	Regulation
	Social (Informal)	Normative structures of meaning-in-use	Constitution

In addition to its constitutive effects, institutions generate particular practices by defining the environment of choice agents face (Duvall and Wendt 1989: 62). In other words, they define the constraints and possibilities international actors face in given situations. The regulative function is relatively obvious in the case of *jus cogens*. It shapes the environment of choice for states by forbidding treaties that

would contradict the overriding values and interests of international society. The regulative dimension of normative relativity thus organises the interactions of states by privileging certain normative injunctions over others and eliminating particular practices from among the actions that are in principle possible. Clearly, the organising function of *jus cogens* extends beyond the treaty domain, for the obligation not to engage in practices that violate certain baseline values are normatively significant in every social setting. As part of *jus cogens*, the prohibition of slavery does not only invalidate any bilateral treaty to trade human individuals or exercise ownership over certain groups, but also signifies that no state is permitted to engage in the practice of slavery within its own territory. The actual practices that are institutionally selected and enacted are also important for the existence and nature of the institution itself. As Duvall and Wendt (1989: 62) put it, ‘practices that are institutionally organized and selected [...] constitute the medium through which the social structural or constitutive side of international institutions is reproduced and/or transformed.’¹⁰

Accounting for contestation and change

In addition to helping conceptualise normative hierarchy as an international institution, constructivism opens up space for thinking about *jus cogens* as a dynamic social phenomenon. It is clear that the content of peremptory norms changes over time, for it is bound up with and derived from the normative character of international society; change is thus inherent in the very idea of normative relativity.¹¹ However, while international lawyers admit that *jus cogens* is in principle a dynamic element of law, they fail to offer a convincing account of why such change might occur, how it takes place, and what the processes are that drive it.

It seems that most changes in *jus cogens* concern the extension of its normative content or the reinterpretation of existing peremptory norms, rather than their vanishing or replacement. Indeed, it is difficult, though analytically not impossible, to envision how the normative character of international society could evolve in a way that would deprive norms such as the prohibition of genocide, the right to self-determination or the non-use of force of their peremptory status. Thus changes in the normative content of *jus cogens* will most likely be gradual than transformative. In order to get to grips with the more subtle normative dynamics of *jus cogens*, and

¹⁰ Duvall and Wendt (1989: 62)

¹¹ Article 53 of the VLCT explicitly points to the possibility of changes in *jus cogens*, stating that a peremptory norm can be modified by a norm of the same quality.

to better understand the processes that underpin them, we need a concept that is sensitive towards the normative practice of international actors. Again, I suggest that constructivism might be of help here.

The possibility of change is deeply rooted in constructivist ontology. As the circular relationship between institutional practice and the constitutional dimension of institutions indicates, social structures and norms are not immutable. Stemming from the idea that the social world is constructed through intersubjective meaning, norms and institutions are dynamic, inherently contested phenomena. Social structures are established through the interaction of agents and constantly re-enacted through their behaviour. Consequently, norms and institutions might achieve stability over large periods of time, allowing us to bracket their construction for analytical purposes, but they remain mutable by nature.

This holds also true for legal norms. As constructivist writers such as Wiener and Puetter (2009, see also Wiener 2009) recently showed, even legal norms depend heavily on social recognition and coherent interpretation; this becomes particularly apparent in the international domain, characterised by the absence of formal government and weaker shared cultural background information which could promote the general acceptance of norms. As Wiener (2009: 179) maintains:

Legal norms [...] require social institutions to enhance understanding and identify meaning that is normative practice. The documented language about norms indicates no more than the formal validity of a norm, while its social recognition stands to be constructed by social process. In other words, understanding does not follow from reference to 'objective reality [...] rather it is inherently constructed and sustained by social process.'

Hence, contrary to the common assumption that the formalisation of norms through treaties and other international agreements enhances their common understanding, legal norms remain dependent on social recognition and interpretation. Indeed, it lies in the very nature of norms that they are ambiguous rather than clearly shaped, thereby allowing for a variety of interpretations. Of course codification might help to achieve greater precision and clarity regarding the meaning of a norm and the character of obligation attached to it. Yet shared practice is likely to be critical to norm acceptance, since the degree of coherent interpretation is largely shaped by the discursive practices actors share. In this sense, shared practice teaches actors to understand and read the social and cultural background against which specific legal rules are interpreted. The institutional point is well made by Hurrell (2002a: 144), who emphasises the organising, rather than norm setting, function of international law: '[T]he integrity of law sets limits to the range and influence of eligible principles, and to the range of legitimate interpretations'.

This has an important implication for the way in which we conceive the empirical significance of *jus cogens* and its impact on international order. Because *jus cogens* only has meaning for states in virtue of the shared social and normative recognition that is attached to it, the relevance of normative hierarchy can be assessed independently of its status as a legal concept. This, in turn, adds further weight to the argument that *jus cogens* in international relations is perhaps best viewed as an institution of international society, for such an understanding allows one to look beyond formal validity and to bring its social significance to the fore. Furthermore, once we accept the constructivist notion that the validity and effectiveness of norms and institutions ultimately depends on social recognition, and that both evolve through social interaction, normative hierarchy becomes a malleable construct. I suspect that there are at least two ways in which *jus cogens* can change.

The first is a fundamental structural change in both the normative ends international actors pursue and the different means by which they pursue them. The result of this is an international society with a different normative character and moral purpose, and maybe even an international system that is constituted by different entities all together. This kind of fundamental change in the international normative order is the main concern of English School theory, and the principal tool for tracing these developments has been the distinction between international system, solidarist and pluralist models of international society and world society. Outside the English School, political theorists, legal theorists and historians have endeavoured to theorise the major transformative processes of the international order. Held and Archibugi (1995, see also Held 1995), for example, sketched out a cosmopolitan democracy as a post-Westphalian international system, whilst Bobbit (2002) has traced the functional evolution of the state in order to show how its changing nature reflects distinct periods in international history.

Fundamental shifts in the social structure of international systems are rare, though certainly crucial in their consequences. Historically, there have been few momentous changes in the international normative order. They were often triggered by major wars and humanitarian catastrophes, which led states to re-build the institutional structure of the international system for the purpose of avoiding similar events in the future. But conscious institutional development is, of course, not the only means by which normative change in world politics is brought about. Consider for example the changes in the social purposes of the use of force. Finnemore's (2004) study of the changing purposes of intervention, for example, neatly illustrates how it is that states now intervene for reasons that were inconceivable two centuries ago.

Typically, changes unfolded gradually and were driven by a wide array of mechanisms (functional, cognitive, normative) operating at different levels of analysis (individual, collective), which cumulated in an observable, large-scale change in the way in which IR theorists and practitioners think about the ethics, laws and political purposes regarding the use of force. There is 'something going on' in everyday political practice that contributes to and is constitutive of the reproduction and transformation of the normative character of international life. Thus, another way of looking at normative change is to consider how social structures are altered and transformed through a continuous, non-linear social process. The assumption here is that with every action, agents either endorse existing values and normative assumptions, or challenge their legitimacy and meaning through contestation, which in turn either reproduces or transforms existing normative structures. This is essentially the Wendtian (1999: 313-370) logic of structural change – actors' identities and interests are in process when they interact, and so is the social structure they constitute.

In order to get to grips with the idea that international practice shapes, defines and alters normativity, constructivists have begun to develop and explore the notion of norm contestation – strategic behaviour that aims to undermine or replace intersubjective meanings-in-use through formulating competing interpretations of a norm and the values it represents (Contessi 2010, Wiener 2014, Wiener and Puetter 2009). The argument is that 'contestation is an integral part of the processes by which specific policy options are derived', and that actors contest norms at every stage of their 'life cycles', thereby constantly (re-)negotiating their meanings (Wiener and Puetter 2009: 2-3). Interestingly, the most fundamental norms are understood to be among the most contested, tending to vary significantly in their meanings. Because norms surrounding sovereignty, human rights and the use of force are both extremely important to the basic social organisation of society and defined very generally, actors constantly try to influence the meanings and values attached to these norms according to their own identities and interests. During the last couple of decades, for example, China has sought re-establish more traditional interpretations of peacekeeping and sovereignty norms, by strategically shaping the discourse within the UN Security Council. According to (Contessi 2010), these strategic instances of contestation can be seen as part of China's broader project to challenge and re-model the liberal normative order that has underpinned much of post-1945 international relations.

It is clear that these two models of normative change – fundamental change and gradual transformation through social process – are connected. That is, constant altering of the intersubjective structures meanings-in-use will eventually lead to

changes in overall patterns of behaviour. It is also important to keep in mind that although international society's fundamental meta-values that grant certain norms peremptory status are relatively stable over long periods of time, the meaning attached to these norms is subject to and depended on actor's interpretation. This explains why norms such as the prohibition of torture retain their peremptory status, notwithstanding rule-breaking behaviour and strategic contestation on part of certain states. Such actions do not inherently aim to undermine or displace international society's meta-values – they rather seek to alter the specific practices in which those values are manifest.

Is this still 'law'?

The theoretical developments above throw up a number of important questions regarding the nature and workings of law in international relations. So far, I have criticised traditional legal theory for being overly concerned with the formal, treaty-based dimension of the international normative order. Many commentators might have shaken their heads by now, quarrelling that my criticism does not take into account the intellectual diversity of jurisprudence – and they are right. There exist considerable differences among legal scholars on what exactly law is and how it operates, and not all of them fall foul of neglecting the broader social context in which law operates. Therefore, I need to say a little bit more about the way in which I understand law, what it is, what it is not, and how the sociological conceptualisation of *jus cogens* relates to it. Let me do so by reflecting two questions:

1. How can we distinguish between law and other forms of normativity in international relations?
2. Is the account of *jus cogens* offered above still 'law', or is it something else?

As the foregoing discussion suggests, law is not the only instrument through which normativity is deployed. There exist a variety of normative categories in international society, by which its members govern their conduct and establish social order, something lawyers have called 'normative pluralism'. Alongside law, religion and morality, for instance, represent distinct normative orders, each of which contains related sets of rules, injunctions and principles about how to behave. International legal theorists have begun to explore the relationship between law and other normative orders, essentially concluding that they cannot be meaningfully ranked in terms of the influence they exert over international actors (Klabbers and Piiparinen 2013). Clearly, legal rules possess some kind of formal

authority. They are the most explicit norms in international relations in that they are formally elaborated and usually supported by international regimes that help to shape and interpret them. However, as we have seen earlier, legal formalism is not tantamount to effectiveness, and the most influential norms are often social, working through informal compliance mechanisms rather than sanctions. Similarly, moral norms can play a powerful in shaping state behaviour. Consider again the example of NATO's military intervention in Kosovo in the 1999 invoked earlier. While NATO's use of force was illegal, many international lawyers conceded that the intervention was justifiable on ethical grounds and thus morally acceptable (Simma 1999, Cassese 1999). What this shows, then, is that law's authority can be contested under appeal to other normative categories.

The crucial analytical problem is how to separate these normative orders. Where do we draw the line between legal, social and moral mores? If we want to establish a systematic interdisciplinary discourse between international law and international relations about the nature and role of normativity in world politics, some basic agreements about the key categories and terms and the relationship between them needs to be in place.¹²

It is notoriously difficult, if not impossible, to produce unambiguous, mutually exclusive definitions of different forms of normativity. Too convoluted are the conceptual elements that interplay in the context of particular behavioural rules. The prohibition of torture, for example, involves a theory of morality about the dignity and rights of individuals, legal injunctions stipulated in various international conventions, a normative expectation that torture should not be used as a practice for interrogating prisoners and an observable regularity that results from agents acting according to these expectations in instances in which torture could be used. Given these perplexing conceptual problems, it is unsurprising that even the most sophisticated IR works on norms do not establish final and absolute criteria for demarcating between different types of rules and the elements that comprise them. That said we should aim for as much clarity as possible regarding the normative categories we deploy in our research.

One of the main sources of confusion surrounding normative analysis is the terminological indeterminacy among rules, norms and principles. They are often used interchangeably, without being conceptualised at all, or having been defined only casually. Even less clear than their individual definitions is what exactly distinguishes them. Consider, for example, Puchala and Hopkins (1982: 247) who

¹² Scholars from both sides have frequently called for more nuanced models that differentiate amongst the different types of normativity that influence behaviour in international life. See for example Toope (2000: 93); Toope and Brunnee (2000-2001: 34-36); Finnemore (1999-2000).

hold that 'wherever there is regularity in behaviour, some kind of principles, norms and rules must exist to account for it'. While this notion is often invoked in normative discussion, it is difficult to work with it analytically. Are rules and norms the same thing? What is the difference between norms and principles? In the English School literature, where all of these normative categories occupy a central space, this troubling confusion persists.

Within the English School, Buzan (2004: 163-167) perhaps comes closest to grappling with the conceptual issues surrounding normative analysis. Buzan starts by scrutinising Krasner's seminal definition of regimes, which sets out the key terms as follows: 'Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions for actions.' Buzan (2004: 164) recognises the entanglements among this scheme, most notably the blurred line between norms and rules, but eventually retains Krasner's implicit suggestion that 'norms represent the customary, implicit end of the authoritative social regulation of behaviour, and rules the more specific, explicit end [...]'. This seems to be broadly in line with Dworkin's typology, which perhaps represents the best jurisprudential attempt to organise those terms. According to Dworkin (1977) rules are norms, which contain certain facts and legal consequences that flow automatically from the presence of those facts. Principles are even more abstract than norms. As Dworkin (1977: 22) argues, a principle is 'a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice and fairness or some other dimension of morality'.

This is quite helpful, and I will try to retain this understanding when using the term 'rules' and 'norms'. But it does not confront the problem of how to conceptually separate substantially different forms of normativity. Doing so is crucial though, for the distinction between rules and norms seems not only to hinge on the degree of formality, but also on what exactly qualifies as law and what it is that renders its normative injunctions distinct. International relations theory is of relatively little help here, because it distinguishes norms primarily according to function rather than substance.¹³ International lawyers, on the other hand, are more forthcoming on that matter, since they are professionally accustomed to dealing with norms and naturally prone to think more seriously about whether being 'legal' adds any sort of weight to a norm.

¹³ The most prominent distinction being among regulative and constitutive norms, and fundamental norms, organising principles and standardises procedures, respectively.

Positivism and the specificity of legal normativity

The English School has built its discussion about the nature and role of law in international society around two of the major jurisprudential schools: natural law and positivism. According to natural law theory, there exist certain fundamental principles of right and wrong that can be known through the exercise of rational reason by every human individual. These morally pure standards for rightful behaviour should be the source of and ultimate reference point for the legal order members of international society establish among themselves. As the Christian natural law theorist Thomas Aquinas (1948: 616-627) argued, all law created by political authorities is not law as long as it does not conform to the higher principles of right and wrong. Natural law ideas have re-gained prominence in the second half of the twentieth century, informing the emergence of the concept of *jus cogens* and a number of other internationally shared legal baseline principles such as self-determination, fundamental human rights and non-aggression (see chapter 1).

Theoretically, natural law thinking continues to influence approaches to both IR and legal theory. In contemporary international jurisprudence, natural law ideas prompt the New Haven School to highlight the values of human dignity and the role they should play in legal decision-making. Within the English School, solidarist accounts more or less explicitly conceptualise international society around the premise that justice and morality form a necessary part of the international (legal) order. On this view, one can and should arrive at some rationally persuasive arguments about the good state, the good life, the necessity of human rights and the rightfulness of intervention in the case of humanitarian emergencies.

The analytical problems arising from merging law with some sort of meta-ethics are well documented. It is just not clear anymore where law ends and morality begins, which, in turn, makes it extremely difficult to determine whether stable patterns of behaviour emerge from the presence of and adherence to law, or because some other normative forces are at work. As Hart (1994: 8) holds,

‘theorists that make this close assimilation of law to morality seem, in the end, often confuse one kind of obligatory conduct with another, and leave insufficient room for differences in kind between legal and moral rules and for divergences in requirement’.

Emerging from this criticism, legal positivists offer a theory of law that consciously sets aside any reference to external sources of morality. Instead, they hold that law can be found exclusively in the agreements explicitly acknowledged by states, thereby locating legislative supremacy in its central government (Whelan 1998: 41). On this score, a rule is considered valid if it is created through the proper process of

law making – not because it reflects some abstract moral ideals. The doctrine of legal positivism, Nardin (1998: 30) explains, acknowledges that a given rule can be both legal and moral, and that law can emerge from custom, as long as there are clear procedures for determining the legal status of a given rule, for using them in specific situations, and for ensuring they can be relied on under all circumstances.

With respect to morality, the crucial point is that a rule's moral qualities have to come from and refer to the internalities of law, not from principles rooted in external moral standards, an idea perhaps best expressed in Fuller's (1969) principles of the 'inner morality of law'. According to Fuller (1969), certain moral principles exist which law must adhere to in order to count as 'law', such as rules should be consistently applied, no arbitrary decision-making, no secret or retrospective application of law. This understanding of law's inner morality enabled Fuller to argue that the rules created in Nazi Germany were not law, since they violated the internal moral principles of any legal order. Note that this is different from natural law theories, for the criterion for morality lies in law itself and, thus, does not apply to human ends (Fuller 1958).

While my own understanding of law, as we shall see, differs in many ways from the positivist paradigm, it nevertheless helps to bring out some aspects of the specificity of law as a form of normativity. I will briefly point to two features of law that, in my view, highlights best what is distinct about legal rules.

First, the international legal system has generated procedures for validation through which rules are established, modified or abolished. International legal rules thus emerge from a political, more or less formalised process, depending on whether it is treaty or customary law. By contrast, moral norms, whether metaphysical or emerging from a notion of common humanity, are not the product of traceable, consensually established procedures. It is this observable, impersonal and culturally insensitive process that also lends international law some kind of specific 'rational-legal' authority. Law, understood as the larger formal process by which members organise society, is widely accepted as the general means of regulating behaviour at the international level precisely because the normative prohibitions it stipulates are specific, produced through consensually, pre-defined procedures. The 'legal-rational' authority of law-making is often said to grant international law specific legitimacy. While there is certainly an intrinsic relationship between law and legitimacy, establishing an un-reflexive, natural connection between legality and legitimacy seems problematic for several reasons, not least because legitimacy in IR has become an extremely broad concept used to denote various forms behaviours, norms and institutions.

Second, legal rules are, in principle, enforceable by political authorities.¹⁴ Finnemore (2000-2001: 703) observes that there is a widespread, though in many ways problematic, view that the coercive power of the modern nation state exists precisely for enforcing law. The link between state power and enforcement is problematic in so far as we cannot speak of a systematic and coherent international sanctioning system, since any system in which only the weak can be forced to comply and in which effective sanctions depend on the support of the most powerful states is neither reliable nor legitimate. Indeed, international law's chief problem has always been the lack of a systematic and rigorous enforcement structure. However, one cannot judge international law in terms of domestic legal standard, and legal scholars have developed various theoretical and empirical studies that show how sanctions and alternative, managerial approaches provide the international legal system with distinctive mechanisms to foster norm compliance.¹⁵

This, then, would allow us to draw some conceptual distinctions between the different elements that comprise international society's normative framework. Firstly, moral norms are not enforceable through political authorities in the way that legal rules are. There might be sanctions for violating moral rules outside the political realm such as the punishments made by tribal leaders or certain religious institutions for violating moral codes of conduct, but it is not political authorities that impose and enforce them. Secondly, the same logic can be applied to demarcate the type of non-legal norms English School theorists and constructivists are primarily concerned with, which are widely understood as 'social norms. These norms are 'social' not only because they are *shared* by other members of a society, but also because they are partly sustained by *society's* disapproval or approval (Elster 1989: 99). Social norms bear some resemblances to moral norms, since they usually involve some sort of normative judgement about the action: 'Good people do X, [since] we typically do not consider a rule of conduct to be a norm unless a shared moral assessment is attached to its observance or non-observance' (Fearon quoted in Finnemore and Sikkink: 1998: 892). The moral judgements that norm-following or norm-breaking action provokes among peers is central to the

¹⁴In his classical theory of law, Hans Kelsen (1945) points to enforcement mechanisms as the distinctive element of a legal system, echoing John Austin's claim that enforcement and compliance are essential features of law.

¹⁵For a good discussion of these arguments, see Arend (1999: 28-35). For an alternative 'compliance model' which does not rely on military and economic sanctions, and instead primarily rests on cooperative, problem solving approaches that seek to foster compliance through enhancing the states incentives and capabilities to comply with treaty obligations, see Chayes and Chayes (1995). Kratochwil (2011: 85) even holds that the 'efficacy of law cannot be assessed simply in terms of compliance and non-compliance with prohibitions', for such an Austinian view conflates law with commands and ignores the dynamic of norm compliance.

conceptualisation of a social norm; it not only distinguishes norms from rules, but also illustrates the importance of informal sanctions for the existence of norms in given social settings. We recognise norm-violating behaviour because it provokes disapproval or stigma, and norm-conforming behaviour either because it generates praise or, in cases of highly internalised norms, because the behaviour is so taken for granted that it produces no reaction whatsoever (Finnemore and Sikkink 1995). In any case, these norms are enforced through informal, social mechanisms and the processes by which they influence behaviour are often unconscious, compulsive or mechanic (Elster 1999: 100).

The enforceability of law, coupled with the rational procedures of international validation, thus enables legal rules to play a distinctive role in shaping foreign policy behaviour. That is, they help to clarify actor's expectations in a distinct manner. Legal rules, as Gotlieb (1972: 370) put it, 'provide relatively firm guidance not only with respect to ends but to the means adopted'. It is important to note that such an understanding of the specificity of law is not grounded in or dependent on the existence of institutions. Moreover, as Kratochwil (2011: 89-90) has argued, law derives its distinctiveness from the reasoning process that actors engage in when making decisions. That is, the explicitness and precision of international legal rules and procedures (should) provide states with more or less clear expectations about the consequences of norm violating behaviour, thereby influencing deliberations about foreign policy behaviour in a distinct fashion.

Working across disciplinary borders: law as social process

While legal positivist theory lets us arrive at a relatively clear scheme of the different forms of normativity, it inevitably leaves us with a very narrow character of law. Law becomes a closed, undifferentiated 'all-or-nothing' construct – law either exists or not – that imposes commanding rules through a distinct sense of authority. The apparent consequence is that such an understanding of law excludes the external normative and sociological factors that shape any socially constructed normative order.¹⁶ Normatively, the *a priori* exclusion of values produces a bleak, morally more or less deprived picture of the means by which members of international society establish and maintain social order. This is problematic because any normative order is only intelligible in terms of a society's foundational values which constitutes its normative substance, and sheds light on the significance of its provisions. Sociologically, legal positivism fails to grant

¹⁶ For a classical elaboration of this point, see Morgenthau (1940: 267-273)

recognition to the social processes that shape rules and institutions, thereby insulating law completely from the social context in which it operates. But just as moral principles and shared values are crucial to understanding the nature of legal provisions, legal rules are only comprehensible when law is set against the patterns of social practice that have shaped the structure and content of the legal order.

There are, of course, competing theoretical approaches to law that challenge the positivist notion of the international legal system as a closed system of formalised, authoritatively imposed rules. Drawing on constructivism, social psychology, and social theory more generally, lawyers such as Allott (1999) and Brunnee and Toope (2000-2001) see law as part of a broader social process, emphasising the relationship between the legal order, shared values, interests and social practice. The basic argument of these accounts runs as follows: law is an inventive activity that emerges from a continuous and complex effort to build an institutional framework that meets the needs of social organisation in accordance with certain moral principles.

Note, first, that on this view the legal system is not a finished, perfect project that is imposed by the minds of sovereign lawmakers. Moreover, as Fuller (1969: 106) argues, law is 'dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it [...]'. This chimes well with English School theory, which generally assumes that the legal system does not depend on the state power or sanctions for its existence, but on the cooperative behaviour of the subjects of law and stable patterns of social interaction that are broadly in line with the normative prescriptions of legal rules (e.g. Hurrell 2000: 328). Put simply, while law is in principal enforceable by political authorities, the influence of law is not rooted in force – it is the intersubjective understandings of the members of society about the legitimacy of law and their will to work together towards certain collective goals that renders law persuasive.¹⁷

Note, second, that in a social conception law performs a function that is essential to the organisations of international life. Because law *evolves* through social interaction, it carries the basic procedural rules and principles of international society through time (Allott 1999). In doing so, law not only organises international society in the present, but also generates the normative conditions on which it can develop in the future. *Jus cogens* plays a particularly crucial role in conditioning the

¹⁷ Some legal theorists such as Allott (1999) explicitly link these collective goals to the common interest of international society, presupposing that there exists a broader normative consensus about the moral goals of international society which law seeks to realise. While such a 'thick' understanding about the purpose of international society maybe possible, and even exist, I do not think that actors have to hold the same moral beliefs in order to establish and maintain a functioning legal order that actualises some shared substantive values. For example, the international legal order can be entirely geared towards co-existence and the protection of actors' different cultural practices and ethical beliefs.

development of international society, since it determines which legal relations and rules can be established in the future. Indeed, emerged as a reaction to the mass atrocities conducted by Nazi Germany in World War II, it was the very intention of the founding fathers of the concept of *jus cogens* to build certain normative provisions into the international legal order that would help to prevent similar events in the future by limiting the states freedom of contract.

Note, third, that from a social perspective law does not simply spring from a normative vacuum; it emerges from of pre-existing practices, values and interests that are transformed into legal rules. It follows, crucially, that there is no radical discontinuity between law and other forms of normativity. Moreover, as Brunne and Toope (2000-2001: 68) argue, legal rules are part of a 'normative continuum that bridges from predictable patterns of practice of interaction to legally required behaviour'. The notion of a normative continuum is interesting in so far, as it opens up space to think about the relationship between the social institution of normative hierarchy and its manifestation as a codified element of international law. The hardening of norm into rules through treaty is simply part of a wider social process in which members of international society negotiate the content, meaning and purpose of legal rules. The point is well made by Allott (1999: 843: 'A treaty is not the end of a process, but the beginning of another process. And so is legislation. The treaty and the law become a datum in the general social process, but it is a datum with a life of its own'. Article 54 of the VCLT is thus best understood as a micro-legal system that is constituted by and exists within the general institution of *jus cogens* from which it derives its social effect. This means that the social nature and function of peremptory norms is determined by pre-legal and post-legal interaction in the informal institution of *jus cogens*. Indeed, if there were no *a priori* ideas, norms and interests that promote some basic agreements about a hierarchical order of norms, it would be difficult to imagine how Article 54 of the VCLT could have emerged.

Constructivist legal theory undoubtedly helps to shed light on the societal context in which *jus cogens* operates, and it come closest to my own, English School inspired understanding of international law: law is part of a wider social process by which normativity is created and deployed in a society; legal rules are most effective if congruent with stable patterns of interaction; law contains both substantive and procedural values; and legal rules are part of a normative continuum. However, the trouble with social concepts of the international legal order is that they push the concept of law to its boundaries, if not beyond. As a result, it is not entirely clear anymore what exactly is distinct about law and how we can distinguish between legal rules and other social processes that actualise the

values, interests and purposes of international society. Consider for instance Brunnee and Toope's (2000-2001: 40) interactional theory of law, which stipulates that law and morality are not radically distinct, albeit law does possess some specificity stemming from both the process of articulation and application of the norm. Toope has described this as the 'relative autonomy of international law', arguing that law is distinct from, but not opposite to, politics and power: '[...] law becomes itself through specific juridical process that serves as part of its independent justification'. I suggest that this argument is open to question mainly because Toope is not precise enough in distinguishing between legal rules and other forms of norms that shape international conduct. As is typical for constructivist accounts of law, they define the distinctiveness of law in terms of its specific rhetorical nature and practical reasoning. While this does render law as a distinct normative order in international relations, it does not fully or convincingly explain whether legal rules perform different functions than social or moral norms, and whether they exercise some of the same moral and social 'pulls' as other forms of normativity. In short, bundling all sorts of normativity and social processes that interact in the construction of law into the concept of 'international law' leads to a tangled situation in which the actual identity of international law and legal rules is lost.

It is by dint of this that I refrain from developing my approach explicitly within a broader constructivist theory of law, and instead choose an English School perspective. Analytically, I am keen to retain a distinction between law and legal rules on the one and the sociological and political processes that constitute, shape and sustain non-codified normative structures and institutions of international society on the other hand. If we want to know what law can and cannot do in the international realm, what its moral and political limits and potentials are in terms of promoting shared values, common interests and substantive goals through a specific type of 'legal-rationality' and compliance processes, we need to have some understanding of the conceptual boundaries of law and legal rules. Even if we accept that law is rooted in and constituted by social interaction, and that building legal normativity requires some of the same building blocks as other forms of norms, there remain something distinct about the nature and role of law in international society which sets it apart from the non-legal social processes that shape international social order. As Hurrell (2000: 331) explains, '[i]nternational law represents a particular form of practice, of reasoning, and of argumentation that is socially contrived and historically constructed [...]'.

Given the purpose of this study to shed light on the non-legal nature and workings of normative hierarchy, I believe that a division of labour between

English School theory, understood as a sociological approach to IR, and legal approaches produces greater analytical clarity about the different forms of normativity we are dealing with, and it helps us to think more accurately about the different conceptual components of normative hierarchy and the kinds of norms, rules and attached obligations that compromise it. As an international institution, *jus cogens* contains both codified legal rules established by treaty *and* informal social and moral norms. The crucial theoretical point here is that they structure social order and influence actor's interests and identities in different ways. What I want to show then is that normative hierarchy shapes social practice not only through a moral duty to adhere to law, or through a specific legal rhetorical practice and legitimacy, as legal constructivist would suggest, but through deeper-seated, non-legal processes that are rooted in social and moral obligations and socialise actors according to certain shared values and common interests.

To be sure, my insistence upon the analytical distinction between legal and other forms of normative processes does not imply a belief in the separation of the two academic disciplines. We need to communicate across professional divides, placing IR and legal approaches side by side in order to form a common framework of legal rules and social norms. This is why I have tried to emphasise that the purpose of my conceptual developments is not to replace existing legal accounts of *jus cogens*, but rather to augment them by adding a social-structural dimension.

Conclusions

This chapter developed a sociological take on *jus cogens*, arguing that it does not have to be exclusively understood in and constituted by legal terms, and that it has significant effects on the social organisation of international society that go far beyond the international legal order. To unlock the full nature and implications of the concept, I have drawn on English School theory and constructivism and conceptualised *jus cogens* as an international institution. One can sum up the defining qualities of this institution as follows.

- *Jus cogens* can be an efficacious instrument of social control without specifying precise legal obligations and responsibilities. Rather than achieving norm-adherence by specifying legal provisions, normative hierarchy generates stable patterns of interaction through social mechanisms.
- *Jus cogens* regulates conduct by stipulating which actions are ultimately

permitted in international relations. In doing so, it establishes the normative boundaries of international society, thereby defining the choice environment states face.

- As a generic institutional form, *jus cogens* embodies a constitutive dimension. It generates social order by creating the international normative agenda; mediating the beliefs of culturally different communities about the substantive ends of international society through constituting actors' identities and interest; empowering states to engage in political actions that define and realise these ends.
- *Jus cogens* is constantly (re)-produced by agents. Given the malleable nature of norms and social structures in international relations, normative hierarchy is a dynamic, inherently contested institution. The normative boundaries which peremptory norms establish are relatively stable through time, since they reflect the deeply entrenched shared beliefs and values of international society; but, as social constructs, they remain flexible by definition. Hence, the exact position of these boundaries, and the space that lies within them, is subject to contestation, and actors will try to re-shape the normative content of peremptory norms according to their particular identities and interests.

This account takes us away from the formalised, static concept of *jus cogens* that has occupied legal scholarship, and towards the question of social process and normative content. The principal issue that need to be tackled in thinking about normative hierarchy as an international institution concerns the sources of its normativity. That is, we must turn away from treaty and customary international law and look at the social structures of international society that generate the background conditions in which norms and institutions can emerge. What are the kinds of social structures that give rise to a hierarchical order of norms? Do variations in the social structure of international society matter to the existence and nature of normative relativity? Where do the values that shape the normative content of peremptory norms come from and how do they change?

Hierarchy, normative order and the constitutional structure of international society

To suggest that we understand normative hierarchy as a generic institutional form is merely the beginning of an analytical development. What does it mean to think of normative relativity in social terms? This chapter widens the focus and moves on to a more general consideration of the nature and construction of normative order in international relations. How is the global normative order constituted? Who or what defines its axiology and structure? How does *jus cogens* relate to and function within the wider institutional structure of international society? What is the relationship between the baseline norms and values of international society and social order? What, in sum, are the specific structural features and determinants of a stratified global normative order? This chapter explores these questions and, in doing so, provides the analytical categories and concepts necessary for studying the social construction of the modern international normative order.

So far, I have made the fairly general case that the ranking of international norms is constructed through a process of social interaction in which the members of international society endorse certain norms with specific qualities. If one accepts the argument that the processes by which actors promote, internalise, contest and give weight to certain normative standards and practices are dynamic and context-dependent, then trying to deduce the nature of a society's normative order through sheer reference to formalised institutional developments, court decisions and even to *opinio juris* seems like an impossible task. The key problem with such an endeavour is that it does not tell us how it is that certain norms and institutional practices become normatively superior. The lack of comparative historical work on normative hierarchy stands as the clearest instance of this problem, suggesting that a generic account of the nature and construction of normative order is crucial for understanding how different international systems have 'solved' the problem of differentiating between norms. Such a generic account can not only help to assess variations in normative hierarchy across different historical international systems, but also enable us to look at how the global power structure might affect the standing (or fall) of certain global baseline norms and values. Unless we attribute the

way international society has come to esteem and protect certain values to random patterns of natural societal progression, we must think more seriously about the social processes that drive political agents to privilege one set of normative choices over another.

The analytical developments advanced in this chapter seek to establish some clarity about the way in which a collective body of sovereign political communities organises its normative system. This, in turn, will help us to gain some conceptual understanding about what peremptory norms are and how they operate in international society. The first part of this chapter discusses what it means to talk about normative order in international relations, before moving on in the second part to a more detailed consideration of the way in which normative hierarchy operates in international society. The third and final part opens up some space for theorising the relationship between social order and the stratification of norms, shedding some light on the structural processes by which certain norms and values become peremptory. It introduces a set of questions that can be used to examine the structural composition of international societies and briefly illustrates how these can be used to study the construction of global normative orders. This will see me developing a more structural interpretation of the two main societal-organisational forms of international systems: anarchy and hierarchy. Drawing on Buzan (2004: 139-60), the underlying assumption here is that the nature and structure of the global normative order is determined by the social mechanisms (i.e. coercion, calculation, belief) through which actors comply and endorse international norms and institutions. Without providing a detailed case study, a brief look at the empirical emergence of *jus cogens* will illustrate the way in which normative hierarchy is conditioned by and reflective of the political arrangements and structural processes that forge international society.

Normative order and the nature of society

The debate about normative hierarchy is essentially a debate about the structure and content of the global normative order. At the heart of this debate lies the fundamental assumption that norms, rules and institutions do not exist in isolation, nor are they free floating. They are arranged in a dense and complex network, forming a specific normative order (Kegley and Raymond 2003: 390). This normative order defines and represents what is often referred to as the *nature* (or 'character') of an international society: its core values, its ethical content, its distinct moral purpose and its dominant beliefs about what international life *should* look like. In other

words, to talk about the 'nature' of international society is to make a claim about the structure, content and axiology of its normative order.

The question of the nature of international society is key to both the theory and practice of world politics. As soon as states establish some kind of shared framework of rules and institutions for regulating their interactions, they must have some sense of the deeper purpose and the normative content of their common efforts. In modern international relations, the key term for debating questions of international order has been 'liberal'. Unfortunately, there is a tendency in academic debates and public discourse about liberal international order to devoid the intrinsic value and ideational component of this order. In many cases, it seems, the 'liberal order' orthodoxy is simply used to describe a systemic condition in which Western states or, since the end of World War II, the US have modelled the international system by imposing a number of fairly generic principles and practices such as sovereignty, peaceful-coexistence and non-intervention. But there is something much more specific to a *liberal* model of order: it is inherently value-laden, containing distinct norms and visions of how political systems *should* be organised and how individuals *should* be treated. Scholars such as Doyle (1997) and Dunne and Flockhart (2013), for example, have painstakingly tried to carve out the distinct ideological elements of liberal internationalism by bringing back the classical political and moral philosophy of Kant, Paine and Bentham, carving out the normative significance of liberal ordering principles such as individual rights, responsibilities and representation. To be sure, this is not to suggest that modern international society is normatively superior to its historical predecessors because its order is built around a number of ostensible liberal principles. Instead, this is merely to vindicate the centrality of thinking about the normative composition of international order, and to show what it means when we talk about the 'nature' of international society.

It seems safe to say that the English School presents the only sustained systematic attempt to theorise the constitutive normative elements of international society. The key intellectual purpose of English School theory, pretty much throughout its existence, has been to explore the changing character of international society.¹ What kinds of relationships do states establish among themselves? Why do they develop common rules, norms and institutions and what types of values, if any, do they share? What is the purpose of their cooperative efforts? And, above all, why and how have international societies developed different institutional practices?

¹ The members of the British Committee of International Politics, the intellectual forerunner of the English School, stated explicitly and frequently that the central purpose of their endeavors is to identify and study the 'fundamentals' which underpin and guide international affairs, referring more or less explicitly to institutional structures, or social and economic realities of international life (Viguzzi 2005: 128).

Revolving around the study of global order, English School theorists have looked for answers to these questions by assessing and understanding the constitutional structure in which states, international organisations, regimes and other international actors are embedded. In this sense, the School's interest in the normative elements of international relations differs in an important respect from its (more prominent) constructivist counterpart. In contrast to most constructivists, with the notable exception of Reus-Smit (1999) and Alexander Wendt (1999), the English School approach to norms and rules is, for the most part, of macro-sociological nature. That is, rather than tracking the emergence, evolution and effects of particular norms through case study research, English School theorists contemplate norms as the building blocks of international social life, and the principal aim for studying them is to infer claims about the nature and working of the social whole (Schouenburg 2011: 40-41). Thus, when English School scholars turn their attention to the historical evolution of norms surrounding sovereignty, human rights or international dispute settlement, then this is because it helps to uncover and compare the broader normative framework that organises different state systems.

English School theorists have continuously emphasised the intimate relationship between norms, rules, institutions and the values and normative aspirations of international societies. The underlying assumption that drives these endeavours is that norms and institutions are manifestations of international societies' distinct underlying beliefs about what actions are morally permissible under which circumstances at a given moment in time. This, in turn, reveals something about the goals that a given group of states pursues, and it tells us something about the foundational values around which this group organises its relationships and interactions. For example, the emergence of the norms surrounding sustainable development in the 1990s tell us something about the expansion of international society's shared goals and values into areas of environmental protection. These norms, and the regimes under which they have been constructed, define common policy goals, create procedural obligations and provide guidelines for relevant state action. In short, their emergence reflects changing normative expectations about appropriate behaviour towards the global environment. In doing so, they express a set of values and ends that are characteristic to contemporary international society.

Its explicit concern for the normative character of international state systems has been repeatedly identified as one of the most distinctive features of the English School approach to IR (Reus-Smit 2009). All its classical writers pondered on the nature and role of common values and shared moral obligations in some way or another, for they saw them embodying the essence of the distinct character of

political systems. International societies, Butterfield and Wight (1966: 13) noted, have been held together by 'principles of prudence and moral obligation'; they form the very basis of the rules, norms and institutions on which international order rests. Bull (1979) also grappled extensively with normative issues in international affairs, in particular with the question of how much justice an imperfect, deeply fragile society of sovereigns can sustain. Although inherently sceptical of the moral potential of society without government, even Bull (2000: 168) had to admit that certain moral premises must exist that 'are shared universally, or nearly universally'. Only in this way he was able to make sense of the fact that a minimalistic set of moral rules surrounding the protection of life, property and the sanctity of agreements are universally present and respected in all societies, including the society of states.

Normative order, however, is more than just a heuristic tool for thinking about the nature of state systems. It is, I argue, an essential part of the ontology of any social system, including international society. Let me briefly elaborate on this point by recalling the society/system distinction outlined in chapter 2. In the classical Bullian understanding (1977:13), an international system exists when states interact 'in such a way as to be necessary factors in each other calculation's', whereas a society is present when states conceive themselves to be bound by certain shared rules, institutions and values.³ The difference between international system and international society thus hinges on the presence of some kind of common interests and values as a binding force. I do agree with Buzan (2004: 108-118) that the concept of society in IR is much more complicated than Bull's classical treatment seems to suggest; not at least because 'society' has historically been associated with a group of individuals, and not with an assembly of collective actors such as sovereign states. What is clear, however, is that it is shared norms, rules and institutions – whether they embody minimal moral standards limited to peaceful coexistence, or ethically more pronounced moral obligations concerning justice and individual rights – that give society its ontological status. It is therefore impossible to think of the international state system in terms of society without acknowledging the presence of some kind of normative order.

³ See also Luard (1976: viii), who viewed international society as being marked by 'some common customs and traditions, common expectations concerning the relationships and behaviour to be expected among its members'.

Society as social system: sorting out values, institutions and higher-order norms

How, then, can we make the normative order of international society intelligible? Conceptually speaking, where do the normative, value-laden elements of international order lie? A good starting point for conceptualising the components of international order is Christian Reus-Smit's (1997; 1999: 12-40) account of the layered institutional structure through which ideas about the nature and goals of order in international relations become socially relevant. His approach is especially useful for it provides a kind of 'analytical map' through which the relationships between different types of institutional arrangements, and the way in which they perform normative functions, can be illustrated. Moreover, by understanding international society in terms of institutional levels which are entangled in distinctive processes of constitution and regulation, the following account also illustrates the methodological premises of this thesis (see chapter 2): that international social reality is stratified, consisting of multiple layers of complex social structures that lead to the emergence of certain key political institutions.

Reus-Smit begins with the concept of institutions as set out in the previous chapter; that is stable sets of norms, rules, and principles that constitute actors as meaningful social agents, and regulate the social interaction between them. According to Reus-Smit (1997; 1999: 12-15), there exist three distinct types of institutional structures, which can be differentiated according to the level of international society on which they operate (see figure 1). I will briefly elaborate each of them in turn, before showing how normativity works in each of them.

On the first, most immediate and concrete level of international society operate a multitude of international and regional organisations and issue specific regimes. They are for the most part intergovernmental arrangements consciously designed by states to serve specific purposes, including the United Nations, the World Bank, the World Trade Organization and the Nuclear Non-proliferation Regime. At the theoretical level, these kind of institutions have been the principal concern of the liberal regime literature that emerged in 1980s (Keohane 1980, 1984, Krasner 1982a, 1982b), which defines them as 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations' (Kratochwil and Ruggie 1986: 769). Empirical studies have documented the formation and working of these institutions in issue-areas ranging from trade to human rights protection, showing how they foster international cooperation through lowering transaction costs, increasing costs for defection and enabling the flow of information.

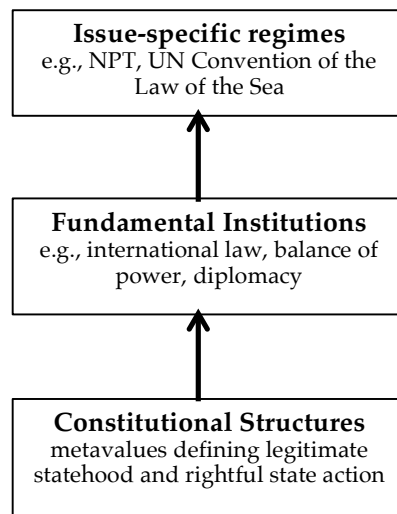


Figure 3: The layered institutional structure of international society (Reus-Smit 1997: 559)

At the second, deeper level of international society operate a number of fundamental institutions. They are the principal social mechanisms through which states solve the problem of collaboration and cooperation under the conditions of anarchy (Reus-Smit 1999: 13-14). As early as the 1970s, Bull (1977) set the English School study of international society off along the path of fundamental institutions with his idea that order under the condition of anarchy is achieved and sustained by a number of elementary rules of social practice, including the balance of power, international law, diplomacy, war, and great power management. Bull (1979: 71) was clear that he did not mean the kind of 'organisation or administrative machinery' associated with issue-specific regimes and modern international organizations when talking about institutions, but rather a set of historically evolved fundamental 'habits and practices shaped towards the realisation of common goals'.³ Since Bull put the idea of fundamental institutions on the agenda, much of the English School's intellectual labour has been directed towards exploring the nature (Buzan 2004), transformation (Holsti 2004, Spandler 2015) and functional categories (Schouenbourg 2011) of these institutions.

³ The terms fundamental institutions, primary institutions and master institutions are used interchangeably in the English School literature.

⁴ Martin Wight (1991:140-141), quoting Ginsberg and Fairchild, later specified Bull's definition, seeing institutions as 'recognized and established usages governing the relations between individuals or groups ... an enduring, complex, integrated, organized behavior pattern through which social control is exerted and by means of which the fundamental social desires or needs are met'.

The third and deepest institutional layer of international society is made up of constitutional structures. These complex social structures contain sets of hard-wired intersubjective principles, norms, beliefs and meta-values that perform two distinct functions in ordering international society: 'they define what constitutes a legitimate actor, entitled to all the rights and privileges of statehood; and they define the basic parameters of state action' (Reus-Smit 1999: 30). They are constitutive because they establish polities as rightful members of international society, and they structure social interactions within this society by shaping the normative preferences of agents and pointing them towards some common ends (Reus-Smit 1999: 30-31). While the nature and function of primary and secondary institutions has received high levels of attention in the literature, IR theorists, including English School scholars, have largely failed to appreciate the significance of the deeper constitutional structures for thinking about global order. This omission, I argue, has fundamentally limited our ability to understand how normativity works in ordering international society. I will try to remedy parts of this problem by grounding the question of normative order within the wider complex of global constitutional structures.

The place of peremptory norms in international society

The key limitation in relation to the role of normativity in international order in English School theory is placing too much emphasis on primary institutions, thereby isolating them from the deeper normative structures in which they are embedded. While, as I will argue later, primary institutions are crucial for the manifestation of normativity in international relations, they should also be seen as an expression of more fundamental constellations of shared values, beliefs and principles that bind the society of states together. Some authors have touched upon the nested existence of fundamental institutions, though without fleshing it out conceptually. Wight realised that 'the institutions of international society are according to its nature', but ultimately failed to investigate where this 'nature' comes from. Being more specific, Ian Clark (2005: 21) notes in his study of legitimacy in international society that legitimacy 'is a more fundamental property, of which these [primary] institutions are an expression'. This idea acknowledges that the nature of international society at any point is more than the sum of its primary institutions – something many English School theorists seem to suggest (Buzan 2004; Holsti 2004; Schounburg 2011). In fact, as Williams (2015: 116) points out, 'institutions are a variable manifestation of [an] underpinning normative account'.

I argue that the global normative order - and the nature of international society respectively - is defined, forged and shaped by the make up of the deep normative

(or constitutional) structures that underpin both its primary and secondary institutional layers. In its basic understanding of the nature and existence of international society, this approach is not too dissimilar from the one Clark advocates (2005: 23-25). Most importantly, it detaches international society from any particular institution, or from any specific set of values: indeed, it is possible to think of many constellations of normative order, even ethically less desirable ones that merely perform rudimentary tasks of peaceful coexistence.

This has an important corollary for theorising normative hierarchy in international relations, for it opens up analytical space for re-thinking the ethical content of the modern legal concept of *jus cogens*. Because the structure of normative order is detached from any specific set of purposive values, it allows us to decouple the debate about normative hierarchy from abstract notions of natural law – something that has traditionally limited our understanding of the normative sources of *jus cogens*. I will return to this point later in chapter 5, when I tease out what an alternative normative account of *jus cogens* could look like.

With the above considerations in mind, I argue that the question of normative hierarchy is about the norms, values and principles international society selects at any given point in time in order to define what constitutes legitimate membership, and what this society ultimately considers as rightful and permissible social behaviour. In this sense, peremptory norms are part of the international constitutional structure: they embody international society's identity and legitimise its institutions. By formally stating the absolute impermissibility of certain behaviours, peremptory norms have a constitutional effect on international social order; they set out the fundamental and non-derogable rules according to which states interact. For an actor to breach these rules essentially means placing oneself outside the normative framework of international society and the conventions which establish its normative boundaries.

In that they are the foundations of the social order of society, and set out its basic ordering principles, peremptory norms come close to Bull's (1977: 65-66) category of 'constitutional normative principles'. A number of scholars not necessarily associated with the English School have thought in similar terms about peremptory norms. Onuf (1994: 13-14), for example, drawing on Hart's distinction between primary and secondary rules, argued that the latter operate as international society's constitution by laying out criteria for membership and 'conferring and limiting power'. We can also hear clear echoes of Onuf's argument in Jason Ralph's (2007) study of the International Criminal Court. Like Onuf, he suggests that the moral foundation of international society rests on a number of constitutional rules precisely because they identify states as legitimate members and place limitations of

their actions. In modern international law, Ralph (2007: 15) observes, 'such rules are considered *jus cogens*'.

If we think about peremptory norms as part of the global constitutional structure, the very idea of international society becomes rooted in the recognition of being bound by the 'highest', most essential norms, values and principles, whatever they may be, and by the obligation its members feel to act in accordance with them. This is not to say that the existence of international society depends on all states adhering to these peremptory norms, rules and principles all the time – remember that a key feature of social norms is that they are, to a point, counterfactually valid. But, as Reus-Smit (1999: 26-28) makes clear, it is hard to imagine, how a social group such as the society of states can continue to exist peacefully without a shared belief in and commonly felt obligation towards the basic normative background structures concerning legitimate membership and rightful behaviour. In other words, without mutually recognising the higher, peremptory quality of certain norms and values, strategic and self-interest orientated behaviour is likely to replace meaningful social interaction, ultimately threatening the society of states. This is because reasoned agreements, resulting in stable patterns of predictable behaviour, rely heavily on 'preexisting, mutually recognised higher order values [that] are considered valid (Reus-Smit 1999: 28).⁵ Indeed, if states cannot reach some sort of consensually mediated, more or less stable agreement on which norms are to be considered primary for appropriate behaviour and legitimate membership, then the basis of social order is in danger. Without normative structures carrying social identity, international society cannot have either fundamental institutions or issue specific regimes, because it cannot be constituted as an ontological entity.

A sociological perspective then couches an explanation of *jus cogens* in functionalist terms. It sees *jus cogens* as an objective feature of international society that contributes to its social cohesion and thereby to its continuity and survival. Crucially, such an approach links the legitimacy of higher order norms in international law to the wider social function they perform in international society: *jus cogens* is legitimate because it is functional for demarcating the outer boundaries of the basic normative background structures of international society. In other words, accounting for *jus cogens*' legitimacy as a universally binding element of the global normative order (international law) and explaining its effect in relation to its social environment (international society) become two sides of the same coin.

By making normative hierarchy a feature of international society, the door opens up for empirical analysis of different constellations of normative hierarchy across

⁵ This argument is informed by Habermas' communicative action theory and was also invoked by other constructivist scholars such as Kratochwil

historical state systems. The existing, primarily legal, accounts that have looked at relative normativity have done so exclusively in the context of the modern international order, thus focusing on the second half of the twentieth century and the first decade or so of the twenty first. However, if certain rules must have higher, constitutional status in order for states to sustain some kind of stable pattern of social interaction, then the stratification of normative order is a necessary part of every international society, not just the post-1945 society of states.

Conceptualising peremptory norms as constitutional structures also enables us to get to grips with changes in normative hierarchies. As my consideration of the inherently dynamic nature of norms and normative orders in chapter 3 suggests, constitutional structures are variable. Historical works by Bobbitt (2002) and Fukuyama (2012) remind us of the fact that beliefs about the social identity of the state and the legitimacy of key political institutions have varied considerably. It is, indeed, absurd to think that normative relativity is static. Only if understood in the strictly legal sense, can we speak of fixed provisions. However, when understood as a social and political construct, the constitution of international society will change. Consider, for example, the changing principles and norms regarding the granting of membership in international society. In the late nineteenth century access to international society was based on an essentially normative logic of exclusion-inclusion. That is, Europeans expected non-European nations such as China, Japan and Turkey needed to conform to a 'standard of civilizations' if they wished to become members of the so-called family of nations (Gong 1984; Koskenniemi 2002: 127-132). By the beginning of the twentieth century, however, state recognition had become about the ability of a political entity to fulfil a number of, objective empirical characteristics commonly associated with the 1933 Montevideo Convention of the rights and duties of states: (1) a permanent population, (2) a defined territory, (3) a functioning government able to control the territory in question, and (4) the capacity to enter into relations with other states on its own account.

Whether or not current practice of recognition is, in fact, objective has been fiercely discussed among international lawyers – the US and Israel's policy towards Palestinian statehood perhaps stands as the clearest example of how recognition is less dependent on empirical characteristics, but rather a matter of political and strategic considerations. Crucially for my purpose, membership practice in modern international society is still normatively charged. After the dissolution of the Soviet Union, for example, the EU based its recognition of new states in Eastern Europe on the principles of the Helsinki Final Act and the Charter of Paris. The EU requirements for these new states clearly exceeded objective empirical criteria

⁴ For a classic analysis of the different approaches to recognition see Lauterpacht (1947).

concerning territory, population and control; instead they contained explicit judgements about the legal, social and normative constitution of the new political entities. Interestingly, these normative requirements overlap heavily with the norms and values that have driven the development of and debate about the content of *jus cogens*: respect for fundamental human rights and individual freedoms; non-use of force; and equal rights and self-determination of people. This would reinforce the argument that peremptory norms should be understood as part of the deep constitutional structure, defining the social identity of the members of international society and setting normative boundaries to agents' actions and policies.

The ways in which international society is founded through its deep constitutional structures has, of course, consequences for international social practices. But since meta-values and principles are highly unintelligible by nature, their meaning and weight needs to be transmitted in order to become socially relevant. It is here where the idea of institutions enters the picture. By constituting and regulating actors and social practice, institutions provide the precondition of meaningful interaction and steer actors towards certain outcomes. The question then is: How exactly do institutions deploy normativity in world politics?

How normativity is deployed in international society: institutions as transmitters

Since Buzan, in his 2004 volume, placed the idea of primary institutions at the centre of his understanding of order in international relations, their study has become an important aspect of the development of English School thinking. For Buzan (2004: 161) the concept of institutions is key to English School theory because 'it fleshes out the substantive content of international society'. Perhaps Buzan's most impressive move was to work out more clearly the conceptual distinctions between different types of institutions, something that was only latent in Reus-Smit's account. Drawing on conventional institutional theory he developed a distinction between 'primary' and 'secondary' institutions, which loosely corresponds to Reus-Smit's layers of fundamental institutions and issue specific regimes, respectively. Buzan defined secondary institutions as designed human practices founded for specific purposes and included intergovernmental arrangements. He then disentangled them from the English School's central analytical device - primary institutions - which he defined as relatively fundamental and durable social practices, that are historically evolved more than consciously designed (Buzan 2004: 167), including international law.

The key limitation to Buzan's account of institutions stems from his overarching social-structural agenda: because he sets aside normative theory in favour of

analytical precision, Buzan discounts the value-laden nature and function of institutions. Somehow unfortunately, it seems that many of his followers (Schouenberg 2011; Spandler 2015) have accepted this move and sidestepped the normative logic of institutions. The notable exception is Williams (2011; 2015) who points to the way in which institutions are constituted by and of values and the way in which they mandate certain courses of actions and not others. In doing so, Williams (2015) reminds us that institutions frequently differentiate between different actors and privilege some of them over others in the process of judging. He illustrates this claim through looking at the limited applicability of Article 3 of the 1949 Geneva Convention and international law's struggle to decisively accommodate the role of non-state actors in armed conflicts. Because it is often not clear who possesses legitimate authority in civil wars and colour revolutions, Williams (2015: 113) makes clear, the decision as to which legal rules to apply 'reflects and is reflected in how we use the rules to constitute actors as possessing certain character'.

There is an underlying assumption here that international law endows actors with certain rights and status based on some kind of notion international society has about the moral purpose of the state. With respect to civil wars and armed revolutions, we are indeed likely to apply international rules in a way that supports those kind of actors who we think pursue an ethically more desirable agenda; in modern international relations, people are inclined to endorse those actors that are more likely to govern a state in a way that conforms to our moral beliefs and principles about justice, individual rights and rights-based rule. Of course, who to support and what is the right thing to do is often not clear: we are presented with dilemmas, challenges and contradictions when making these decisions, and we are often required to choose among a wide range of equally disagreeable scenarios; something reflected in recent debates about supplying arms to non-state actors in Iraq and Syria. However, without some kind of underlying, pre-existing and shared understanding about international society's core values and moral purpose, it would be almost impossible for international lawyers to play a crucial part in addressing some of the most intractable questions of world politics.

Historically, law has always been the central institutional mechanism for transmitting the baseline values of international society's normative order. This should come as no surprise for English School theorists since, as I have shown in chapter 1, they tend to view international law as the bedrock institution on which the a society of states rests. But international law's itself depends on states' pre-existing normative account about its identity and objectives. As Bull (1977: 66) made clear, constitutional rules are 'prior to international law, or to any particular

formulation of law'. To put it differently, there is no international law without peremptory norms. Remember, for English School scholars, international law is historically evolved social practice. As such it is intimately connected to and emanates from the values and beliefs of the political communities that constitute and engage in this practice. As Bobbitt's impressive study of the relationship between law, history and strategy makes clear, without constitutional values and principles about its identity international society cannot establish a legal order, because 'every system of laws depends upon the continuity of legitimacy, which is an attribute of identity'. International law, for Bobbitt (2002: xxix), is thus 'a symptom of the triumph of a particular constitutional order within the individual states of which that society consists'. If we accept this argument, then the structure and content of the international legal order, and the way in which we apply its rules, becomes an expression of the norms and values that compose society's deep-rooted normative structures.

Let me flesh out the way in which law has been a transmitter of social identity and meta-norms in a little more detail by picking up the logic of inclusion and exclusion again through which historically the social identity of political entities has been established. During the medieval period the church promoted a normative account of insiders and outsiders that was firmly rooted in its religious identity and the notion of European Christendom. Together with theology and legal philosophy, clerics, lords and kings used natural law 'to back up the universalist notion of Christendom', and to suppress the idea of state sovereignty as absolute power – something that ran against the church's religious belief that God's will and reason are the only legitimate source for governing polities (Brown 2002: 25). Of course, one might argue that the medieval natural law based legal order seems like a circular example, as its source is meta-physical by nature. But the practice of using international law to project constitutional structures, legitimatise statehood, and to privilege certain actors and cultural practices over others, continued with the rise of legal positivism. As Koskenniemi's (2002) historical account of international law shows, at the end of the nineteenth century scholars structured international law according to cultural distinctions in order to limit the application of natural rights to Europeans. To do so, Koskenniemi (2002: 128) observes, 'late nineteenth-century legal textbooks normally affirmed the international law's non-applicability in non-civilized territory'. Surely, the value driven character of the international legal project has not disappeared with the global expansion of the 'public law community'

in the twentieth century.⁷ Jouannet's (2014) recent account of the 'liberal-welfarist purpose' of modern international law provides an interesting example of how public international law has been organised around particular notions of the 'good', rather than simply of the 'right'.

These, admittedly brief, examples serve to highlight the link between international society's deep normative structures and law, and they help us to gain a better conceptual understanding of the social and legal dimension of normative hierarchy. As an institutional form normative hierarchy exists independently from international law, for constitutional structures are logically prior to the development of any legal system. In this sense, the modern *concept* of *jus cogens* that has emerged as a part of international law in the second half of the twentieth century does not constitute a hierarchically differentiated order of norms – norms with special preemptory authorities emerge as soon as actors decide to form a permanent social grouping. Instead, the integration of *jus cogens* into international law has helped to manifest and legitimise the current constellation of normative order in important ways.

My discussion of the distinctiveness of law in chapter 2 is worth recalling a little at this point, because it helps to explain the utility of the 'legalisation' of normative hierarchy. Crucial here is the legitimacy law adds to any norm as well as to the way in which actors feel bound by the obligations and courses of action they stipulate. It is the source and process of international law, not so much the substance – since *jus cogens* as stipulated in the VCLT is, strictly speaking, an 'empty' concept - that augment the legitimacy of a hierarchical order of norms and give effective embodiment to the *common* interests and purpose of international society as a whole. In the international realm, the grounding of law in sovereign consent extends the validity of treaty-based normative orders. *Jus cogens* does remain abstract in that it is quite detached from the content of the norms it seeks to elevate, but its legal status does increase the perceived validity of the current normative order, making it appear to be more 'just'. Perhaps even more importantly, by formally establishing preemptory norms as universal and non-derogable, *jus cogens* makes international society's meta-norms and values regarding legitimate statehood and rightful conduct an inescapable aspect of international relations all actors have to face when engaging in social interaction, even the most powerful ones.

Having looked at the nature of normative order and its different components, it is necessary to move on to think about how normative orders are constructed in

⁷ In fact, there never emerged a stable normative standard that guided access to the public law community, and many non-Western nation had to wait until decolonization wave in the 1960s to become full members of the community of international law (Kokenniemi 2002: 134).

international relations. If we accept the argument that the source of the superior position of peremptory norms their normative force, does not lie in treaty or the authority of sovereign lawmakers, then we have to start looking at the way in which normative orders are set up.

Normative order and the social structure of international society

Having looked at the nature of normative order and its different components, it seems necessary to move on to think about how institutional arrangements are developed and maintained in international relations. If the global normative order is in fact socially constructed, then a sociological approach involves an obligation to be clear about the social facts and processes that generate it. Who or what determines the character and structure of institutional arrangements? What kind of social organisation lies beneath certain modes of normative-order making? Following critical realist philosophy set out in Chapter 2, I wish to begin an inquiry into the nature and structure of the global normative order through an exploration of the social architecture that underpins the society of states. Analytically, this perspective turns the spotlight on to the organisation of the international social system, the basic institutionalised relationships between its members, and the means by which its constitutional complexes are held in place.

Marti Koskenniemi's work provides a good starting point for an inquiry into the social-normative nexus of *jus cogens*. For Koskenniemi (1997; 2002) hierarchy in international law, even in its conceptual form, expresses and consolidates a specific distribution of social power in the international system.⁸ From this line of argument, he establishes a relationship between legal hierarchy and social organization that emphasizes the dynamic, socially contingent and subjective nature of law. Most importantly, he questions to what extent international law, and legal hierarchy in particular, can fulfil universal notions of fundamental rights and justice: Structures of 'unlawful/lawful', he argues, are always flexible and often modelled in a fashion suitable to the socially dominant agents; and theories of law that build on notions of justice, fundamental rights, social necessity and so forth are always vulnerable to ideological manipulation (Koskenniemi 1997: 577). More recently, he (2005: 116) reiterated this claim in an even more explicit fashion, arguing that the idea of *jus cogens* is nothing more than a 'hegemonic manoeuvre', and all appeals to the

⁸ Also emphasising the link between social hierarchy and law, Charlesworth and Chinkin (1993: 75) argue that the concept of *jus cogens* and its content essentially reflect the structural inequalities between men and woman in international relation. As they explain: 'The very human rights principles that are most frequently designated as *jus cogens* do not in fact operate equally upon men and women. They are gendered and not therefore of universal validity.'

universal notion of humanity and fundamental rights vested in the concept are in fact an effort to promote Western particular interests by making reference to universal ideas.

Koskeniemmi appears to be overly critical,⁹ but his argument nonetheless serves well to illustrate that peremptory norms may be held in place by far more than objective manifestations of universal values – something the bulk of jurisprudence seems to suggest. One task for a sociological approach to normative hierarchy is to consider a bit more carefully the claim that peremptory norms express particular, subjective visions of an international normative framework which is grounded in and contributes to an asymmetrical distribution of social power in international society. We must, at least analytically, consider the possibility that the differentiation of international legal norms represents an effort by the dominant members of international society to shape the international normative framework for the purpose of fortifying and advancing certain social hierarchies – something entirely counterintuitive to the widely established notion of *jus cogens*' role as the legal incarnation of the moral interests of international society as a whole. In order to follow up on this hypothesis, we need to uncouple relative normativity from natural law inspired notions of universal rights and ethics and embed it in a social-structure scheme. This move, I argue, opens the way for finding out how a hierarchical order of international norms actually comes about.

Before introducing a number of different social-structural constellations and their possible normative consequences, it is important to reiterate that there are no direct causal relationships between social structures and precise configurations of normative orders. One of the points I took away from English School methodology in Chapter 2 is that the generic types of institutions, social relationships, roles and statuses theorists identify carry no causal properties in the sense that they exercise effects independently of the intentions of its members. Instead, as instances of social structure, they provide the background conditions that establish certain international political practices as strategically and/or ethically more desirable than others. What the following section seeks to do, then, is to give an account of the kind of social structures that lie beneath observable patterns of normative order-making. I will begin with the most basic structural configurations of international society, anarchy and hierarchy, and then move on to show how it has given rise to different kinds of logics of normative-order making.

An account that seeks to discern large-scale patterns of order-making necessarily simplifies many issues. By understanding international society as a property of

⁹ For a critical reflection on his provocative portrayal of international law as a political instrument for (Western) imperialistic goals, see Gerstenberg (2005).

social differentiation, my account is consciously acontextual. As such it does not claim to make sense of the historical events and processes it samples, and it cannot offer a deep understanding of all the forces that drive them. Furthermore, by focusing on the anarchy-hierarchy dyad, I pass over other organisational arrangements of international society that seeks to blur the boundaries between anarchy and hierarchy. Ruggie's (1993) concept of 'heteromony', Deudney and Ikeberry's (1999) notion of 'security-co-binding', Watson's (1992) idea of a 'pendulum' movement between empire and multi-unit systems, and Buzan and Albert's (2010) thinking about functional logics of differentiation are important reminders that international relations involve many forms of structure that are neither purely anarchic, nor strictly hierarchical. I have tried to emphasise variations and nuances, but my approach is ultimately focused on the role stratified social-structures play in the construction of normative orders.

On anarchy and its consequences

The idea of anarchy is arguably the most fundamental and pervasive element of international mainstream theory. Nearly all scholars work with the presumption that the international system is inherently anarchic, lacking any common institutional authority to which sovereign nation states would be subordinate.¹⁰ At the theoretical level, students of IR learn that it is the structural feature of anarchy that distinguishes the society of states from all other human societies, warranting us to formulate distinct theories and concepts for political conduct at the global level – to think of International Relations as an academic discipline is to think about anarchy and its consequences for the nature and conduct of world politics. As Hedley Bull observed half a century ago (1966: 79):

'Whereas men within each state are subject to a common government, sovereign states in their mutual relations are not. This anarchy it is possible to regard as the central fact of international life and the starting point for theorizing about it'.

We can find many of the assumptions about anarchy and structure in Kenneth Waltz's (1979) systemic theory, which has been instrumental in establishing the analytical significance of anarchy as the central ordering principle of political conduct in the international arena. Waltz (1979: 80) recognised that there are distinct system level forces in play that influence how states are arranged in relation to each other, producing what he called the 'positional picture of society'. Like Waltz, I take

¹⁰ For works examining the assumption of anarchy in IR, see for example Bull (1966); Milner (1991); Schmidt (1998); Adem (2002).

anarchy as the key conceptual touchstone in structural theorising about international society. The absence of centralised authority creates distinct tendencies for creation of political actors and their patterns of interactions, and it conditions the development of any kind of order at the global level, whether social, normative or material. It is precisely because of the way in which anarchy poses a distinctive problem of order-making, that any attempt to account for the structural constitution of the global normative system has to begin with the concept of anarchy and its implications for social interaction at the system level.

The disciplinary discourse about anarchy has been firmly tied to Thomas Hobbes vision of a state of nature. Realists such as Grieco (1988) and Waltz (1979: 11) have associated the lack of a world government with the continued occurrence of violence, which in turn makes them see self-help as the 'necessary condition of action in an anarchic system'. Much has been written about the fallacy of the so-called 'domestic analogy' (Bull 1969, Suganami 1989) – the application of domestic principles to the international realm – and the fact that Hobbes never actually applied the rationale of his political theory to international relations (Williams 1996). What is most interesting for my purpose, however, are the different ways in which anarchy has been said to influence international order. In the discussion of my methodology in Chapter 2, I have differentiated structure by ontology into materialistic and social interpretations. As we shall see below, this distinction has wide ranging consequences for the way in which we see anarchy playing out in structuring international society. Although the former, mechanistic interpretation is one that I seek to reject, it nevertheless serves as a useful reference point against which to elaborate a social-structural perspective on normative order-making.

Waltz's solution to the problem of anarchy has been self-consciously materialistic. Building on economic theory about market systems, the effects he attributes to structure are mechanical, one directional and more or less definitive. Because structure is made of material 'stuff' that exists independently of states and their interactions, the study of International Relations becomes about understanding the timeless laws that govern anarchically ordered system, and to deduce from it the right conclusions for power balancing behaviour. We may call this line of reasoning the 'mono—causality' of anarchy, that is, the logic by which the international structures only exerts one, unmediated material effect. Buzan and Little (2000: 41) nicely capture the essence of this logic, as well as the specific sorts of relationships it gives rise to: 'As soon as states begin to co-act (...) power-orientated structure springs ready made into existence, compelling states to adopt a competitive relationship with each other (...)'. Anarchy essentially becomes a self-fulfilling prophecy. One of the key consequences of this account of structure, and the reason

why neo-realists are not so much interested in norms, rules and institutions, is that the (competitive) relationships anarchy engenders do not require normative guidelines about how to act and what to expect during social interactions.

Of course, from the sociological perspective developed here, this position is unsatisfactory. At the explanatory level, it fails to answer any questions about the relationship between structure and normative order, other than through the claim that structural theorising cannot deliver much insight into the normative complexes that form the constitutional core of international society. At the methodological level, it excludes any reference to the characteristics of the members of international society. In fact, the claim that anarchy leads to only one kind of form of societal organisation, one characterised by self-help and power balancing, is only intelligible when one assumes that the intentions, interests and identities of political communities can be bracketed out of debates about international structures.

The critique of realist interpretations of anarchy and materialistic readings of structure, in particular as developed by constructivists such as Wendt (1992, 1999: 139-184) and Copeland (2000), is a familiar one, so familiar that it does not need restating here. Moreover, I have hopefully already gone a long way to establishing the claim that politics, whether at the unit or system level, is inevitably and unavoidably social. Rather than a summary, I thus want to briefly focus on how a non-reductionist reading of anarchy can connect the concept of structure to normative order.

The first step is to recognise the distinct way in which an anarchical system produces order in its own right. Complexity approaches to theorising international relations make this point quite well. The idea of complexity theory draws on the claim that decentralised governance systems exhibit distinct organisational parameters, which causes agents to develop dynamic structures of interactions.¹¹ According to Cudworth and Hobden (2010: 9), all complex systems, including the international one, are characterised by self-organisation, the notion that 'order can arise without a specific orderer'. Self-organisation, they go on to explain, is the tendency of units to interact with each other to produce even more complex forms of social organisation, most notably cooperation between the units concerned. There is thus a sense of evolution that underlies the social structures that permeate international systems. That is, higher, more complex forms of organisation emerge

¹¹ Complex system theory has its roots in the mathematics, engineering and computational sciences. During the last fifteen years or so, various research groups, workshops and special issues of scholarly journals have helped to put complexity approaches on the map for IR scholars. According to its proponents, the ontological, epistemological and conceptual issues raised by complexity theory can help IR scholars to re-think and advance traditional systemic approaches. For an overview of complexity approaches, their central claims and their potential usage in IR, see Bousquet and Geyer (2011), Bousquet and Curtis (2011), Cudworth and Hobden (2009).

out of simpler ones (e.g. Buzan and Albert 2010: 5-6). This may sound rather abstract, but it chimes well with the English School language of institutions and order, encapsulating much of what underpins Bull's account of an 'anarchichal society'. Like Waltz, Bull (1977: 46) accepted that international relations were the interaction between autonomous units, but he rejected the claim that a lack of government equates to a lack of societal order. On his account, the anarchical international system had produced an ever-evolving structure of shared norms, rules and institutions that maintain a degree of order.

Norms, rules and institutions are thus reinstated as being central pillars of a decentralised, but nevertheless ordered, international system. As hinted above, this way of thinking about structure demands that we pay attention to the social relationships between states, and the nature their own identities and institutions. Wendt's (1992, see also Hopf 1998) famous claim that 'anarchy is what states make of it', one that English School scholars whole-heartedly embrace, rests on the methodological assumption that the meaning actors attach to structure matters. We therefore have an account of structure in international society in which anarchy takes a back seat to orderly co-existence as the basic relational principles of world politics, and one that is firmly grounded in in the language of legitimacy, authority and social forms of power.

Connecting structure to norms and institutions is one thing, theorising its effects on their nature and ranking another. The tricky part here comes not only in marking out different constellations of social-structures, but also in relating them to more empirical questions about the institutional and procedural realities of international political systems. Wendt (1999: 246-313) essentially confronted the first task when he differentiated between Hobbesian, Lockean and Kantian 'cultures of anarchy'. Each of these cultures describes a set of *shared* ideas and expectations about the roles of states - enemy, rival, and friend - and the sort of relationships they engender. Wendt's analytical development of roles and structures is fascinating, and the proposition that structure can be understood in terms of the relationships it gives rise to is certainly significant, not least because it challenges the realist inspired notion that social attributes, and states' perception of them, are not part and parcel of any structural account of world politics. The problem is, however, that we have to go a long way from (three) generic relationships to more concrete claims about the complex processes through which role structures affect the development of norms and institutions. Kantian culture, for example, appears to be the social structural basis for collective security systems *a la* Karl Deutsch, but who or what exactly determines the procedure, purpose and normative orientation of such a system is difficult to explain by mere reference to a culture of friendship.

It is here where Buzan's analytical re-working of English School theory makes an important contribution. He sticks with Wendt's idea of role structures, but instead of focusing on the type of social structure, he emphasise the mechanisms by which they are held in place. This shift in focus allows him to make Wendt's schema more workable for those of us who are interested in historical macro-sociological studies of state systems, because he allows for variations and complexities within different role structures. Building on Buzan (2004: 128-139), I assume that we can shed light on some of the processes through which a given society of states generates its normative character by placing the spotlight on mechanisms of normative order maintenance: *how and why values are shared (coercion, calculation, belief), to what degree and with what kind of social opposition?* Note that by concentrating on mechanisms rather than normative content, Buzan's approach brings the whole spectrum of political arrangements, strategies and commitments into play, not just normatively desirable ones. Because social-structural analysis ought to be detached from normative judgements about, for example, the good state or good international order, it allows for theorising social orders that are based on normatively undesirable structures and a plurality of values.

On social hierarchy

The identification and historical analysis of international system structures tends to focus on the European context, where the birthplace of the modern global legal and political structures is commonly located (e.g. Bobbitt 2002, Kupchan 2012). Within the English School, Bull and Watson's (1984) *The Expansion of International Society* stands as the preeminent example of such work. There is, of course, ample reason to be cautious about any empirical record that restricts itself to one, geographically and culturally limited, experience. More critical engagements with the Westphalian expansion story (e.g. Kayaoglu 2010) suggest that the Eurocentric nature of those accounts has somewhat overshadowed the social, cultural and economic processes by which other, non-Western political communities have developed distinct organisational patterns. Yet, for the present purpose, the European states system can serve as an illustrative analytical laboratory in which many of the sociological elements of a self-organising system can be observed, in particular the prevalence of 'hierarchy' as the defining feature of social organisation in international relations.

The depiction of anarchy as the central ordering principle of world politics typically finds its empirical justification in the legal and political development associated with the Peace of Westphalia in 1648, which ended the Thirty Years War in Europe. It is widely considered that Westphalia marked a shift in the

development of the modern states system, because of the way in which it transformed a plethora of functionally differentiated entities into a more or less coherent group of legally equal, and politically autonomous, states: Before the Peace of Westphalia, the conventional view holds, the European system was a patchwork of polities linked through various combinations of overlapping horizontal and vertical authority structures. Horizontally, princely states were formally subordinated to the religious emperor and the Habsburg monarchy. Vertically, city realms, feudal barons and noble-vassals were entangled in interdependent relationships. With the conclusion of a series of comprehensive peace agreements at the German cities of Osnabrück and Münster, this fuzzy and highly complex patchwork of loyalties, jurisdictions and political authorities gave way to the 'Westphalian' model of sovereign-like-units, each of them confined to and with exclusive judicial authority over a relatively well-defined territory. What is interesting about the Westphalian orthodoxy from a social structural perspective is the way in which it suggests that the idea of sovereignty transformed the international system, fundamentally and indefinitely, from hierarchy/heteronomy to anarchy/equality. As Kalevi Holsti (1991: 39) claims, 'the peace legitimated the ideas of sovereignty and dynastic autonomy from hierarchical control [and] licensed an anarchical dynastic states system'. Precursors of this analysis are widespread. They can also be found in the classical realist work of Hans Morgenthau (1948: 312) and, on the international law side, in Leo Gross's (1948: 28-29) seminal essay *The Peace of Westphalia 1648-1948*.

The narrative that presents the twin-congress as the birthday of an anarchical, sovereignty-based system structure has been around for some time, but it is faulty not least on empirical grounds, resting on an extremely simplified assumption about the role and distribution of legal authority and political autonomy in the creation of European international society. Once conventional textbook wisdom is left aside, historical studies offer strong contrary claims that counsel against the understanding of 1648 as the year in which an entire spectrum of disparate political communities were uniformly set on sovereign feet, walking an equal playing field as of then.¹² Two interlocking perspectives provide corrections here.

The first, which is perhaps best exemplified by Osiander's notion of the 'Westphalian Myth' (2001: 268, see also Beaulac 2000, 2004), holds that the actual

¹² Osiander (1994: 82), for example, notes that 'the peacemakers by no means regarded each other as equal'. Adam Watson (1992: 187) explicitly stated that the Westphalian settlement did not establish judicial and political equality across the board, but instead generated a number of independent states that 'were still thought of as a ranked hierarchy'. See, among other scholars who describe 17th century European international society as hierarchical, Reus-Smit (1999: 87-115), Lebow (2008: 262: 304).

treaties do not contain any of the claims quoted above; the sovereignty/non-intervention framework is, in fact, a product of 'nineteenth and twentieth century-historians adopting a certain standard account (...)'. In a similar vein, Peter Stirk (2012) recently questioned the link between Westphalia and sovereignty, describing the peace as 'restorative not innovative'. According to his analysis, the parties involved in the settlement did not seek to introduce a new bundle of rights that would forge an egalitarian structure among them. Sovereign equality, he concludes, was not fully realised as a normative principle until the second half of the twentieth century (Stirk 2012: 657-659). Osiander and Stirk add important voices to the debate about the nature and structure of the international social system, because of the way in which they systematically show how the normative developments and constitutional changes associated with the rise of the modern state have been complex, contingent and gradual, unfolding throughout different centuries - there was no epochal turning point.

Those accounts link up with a number of other works (e.g. Buzan et al. 1993, Lake 1996, Cooley 2005, Hobson and Sherman 2005) which seek to demonstrate that various forms of structural inequalities, both material as well as social, can and do exist alongside the Westphalian template of sovereignty, non-intervention and anarchy. The crucial difference is that instead of merely postponing the emergence of the sovereignty regime to the 19th and 20th century, they maintain, and to my mind convincingly, that international relations have *always* comprised mixed organisational forms: 'In the period since 1648 neither European nor the global political systems has been purely anarchical, but have instead exhibited varying combinations of sub-systems hierarchy alongside anarchy' (Hobson and Sherman 2005: 64). Note that this is not to say that international hierarchy has replaced anarchy, or that it exists in some one-dimensional, immutable sense that leaves out other forms of organisational principles. Nevertheless, it is to suggest that albeit the increasing normative manifestation of the sovereign equality doctrine, the post-1945 world involves significant elements of social differentiation that shape the way in which political actors have access to and are able to draw on global public resources, whether institutional, material or discursive.

The claim to equality via the principle of sovereignty is immensely important, but it does not suppress the social and material forces that are foundational of a society's structural organisation. There is, and most likely always will be, a discrepancy between the normative aspirations vested in the sovereignty framework and the empirical realities many political communities see themselves confronted with. We can see evidence of this in the way international society's institutional and procedural elements work. Social structural inequalities become salient in inter-state

bargaining situations at international economic institutions such as the WTO and the IMF, where developing states find it difficult to match the expertise and overall bargaining power of delegations from wealthier, technically more advanced nations. They are also hardwired into the central institution of our modern global governance framework, the UN system, which endows the five permanent members of its Security Council with special legislative authorities in the most sensitive area of international politics: security. In his seminal assessment of post-colonial statehood in central Asia and sub-Saharan Africa, Jackson (1990) recovered another central aspect of this structural discrepancy, when he showed how legal manifestations of sovereignty have disguised the lack of capacity of many countries from the global south to perform basic governance functions, ultimately stretching the term 'sovereign state' beyond recognition – they are 'quasi-states'. Other Western states such as Germany and Japan have also been labelled 'semi-sovereign' (Ikenberry 2006: 96-99), albeit for very different reasons. While both states were quickly accorded juridical sovereignty in the aftermath of the Second World War, their ability to perform the role and activities associated with great powers was not restored until decades later. In short, states may gain formal sovereignty through the accordance of a bundle of distinct rights and responsibilities, but this does not necessarily make them equal partners in their social relationships. Being sovereign does not take them out of historically evolved social-structural constraints.

If the emergence of state sovereignty, understood as a normative doctrine against structures of superiority and ostensibly associated with Westphalia, never eradicated societal differentiation, then hierarchy becomes a key form of social organisation in international society, and thus an important structural configuration upon which global normative orders are built. To gain some perspective on the logic of hierarchy, it is useful to briefly turn to a question which appears to be rarely asked in IR mainstream discussion: Why is hierarchy such a pervasive feature of international political practice? Given the English School's vested conceptual and historical interest in hierarchies, it is somewhat surprising the reason(s) for its considerable persistence as a structural make up of international society have never been systematically discussed by its members.¹³ While it is beyond the scope and purpose of this thesis to offer an answer here, it is nevertheless helpful to briefly look at some basic psychological and sociological features of hierarchy before drawing the link to normative order-making.

The first issue concerns terminology. Drawing on organisational research, which makes extensive use of hierarchy in their theories, I define international hierarchy as

¹³ In fact, as Mathias Albert and Buzan (2010) highlight, mainstream IR has never showed a real interest in differentiation.

an implicit or explicit rank order of human communities with respect to one or more valued dimensions (Magee and Galinsky 2008: 354). Hierarchy, to use Buzan and Albert's (2010: 4) taxonomy of societal differentiation, is a stratificatory form of differentiation 'where some persons or groups raise themselves above others (...). One important distinction here is between implicit and explicit forms of hierarchy. Formal hierarchies point to empires, trusteeship arrangements and military occupations, donor and recipient states, and to the division of the UN framework into permanent Security Council members, member states and non-member observer states. As we have seen though, key amongst the legal effects of the sovereignty doctrine, and its increasing empirical manifestation during the second half of the twentieth century, has been an effort to eradicate formal inequalities among states. Instead, modern world politics takes place against the backdrop of a complex array of organically evolved, informal rank orders. Those hierarchies are not only organised along the distribution of material resources (i.e. financial, technological, military), the most immediate dimension for hierarchical differentiation among sovereign like units. Instead, the majority of asymmetrical relationships that have permeated international society have been to a considerable extent identity-based, socially constructed, and normatively laden such as superior and inferior races, ethnicities or cultures (see e.g. Gong 1984, Buzan and Little 2000, Keene 2007).

The second issue concerns function. As a mechanism of social organisation, hierarchical structures provide members of international society with a distinct solution to the social order problem. We know from organisational theory that hierarchy is a psychologically appealing arrangement, especially compared to more egalitarian structures, because it is effective when it comes to facilitating coordination, managing expectations and stipulating clear guidelines of direction and deference (Magee and Galinsky 2008: 354). The idea that ranking orders benefit the accomplishment of shared organisational goals – one of Max Weber's six principles of efficient bureaucracy (1946) – is a familiar one for IR theorists. The claim that the concentration of power is conducive to, and may even be the only stable condition for, international order, became prominent in the 1980s under the banner of Hegemonic Stability Theory (e.g. Gilpin 1981, Snidal 1985, Webb and Krasner 1989). The terms 'hierarchy' and 'hegemony' are difficult to separate in the literature, since the latter is usually treated as a 'hierarchical order among rival great powers' (Ikenberry and Kupchan 1990a: 49). Given my affinity to social theory, I prefer the notion of 'hierarchy', as opposed to the more politicised term 'hegemony', because it does not carry the kind of (negative) value-connotations typically associated with hegemonic systems; and because it brings out more clearly the

social-structural characteristics of ranks, roles and primacy, rather than their mere material foundations.

If the above argument is conceded, then the analytical focus at this stage is about the social organisation of international society and the processes through which normative elements are constructed, not about sovereign equality and its juridical corollaries treaty, or customary law. Here, a sociological perspective on normative hierarchy leaves positivist legal theory somewhat sidestepped, because it sees an agent's ability to shape the axiology of international society's normative order as being fundamentally determined by its social relationship with its peers, and the relative societal rank order that emerges from it. Connecting social structure to normative order also reminds us that investigations into the emergence and maintenance of *jus cogens* are more complex than traditional legal theory would have it. International society is composed of members who necessarily adjust their normative strategies, interests and practices to take into account changes in the social order. Structural changes in roles, identities and positions of power, like those associated with the end of major inter-state wars, inevitably produce changes in the constitution of the society of states and the mechanisms through which it is held in place. Bobbit's (2002) analysis of the way in which changes in law and strategy have determined the form of the state, and ultimately the character of historical eras, highlights exactly this. Without Sweden and France's victory in the Thirty Years War, it is difficult to imagine the secular state. Suppose there had been no Allied victory in 1945: Would the notions of 'genocide' and 'crimes against humanity' found its way into positive international law? Would there have been a sustained effort to promote human rights norms via institutional-interlocking?

The dynamic nature of power and status, and the diversity of sources for societal differentiation, even within the crude, state-based anarchy-hierarchy classification considered here, rule out any kind of simple, asocial propositions about the way norms gain, maintain or lose *jus cogens* standing. The following pages seek to elaborate these claims in a little more detail. Although I can only scratch the surface, they hopefully show that the ability to engage with key normative-order making processes is crucial for understanding international society's normative system.

Connecting social structure to normative order-making

What counts as acceptable/unacceptable international practice and the modes by which this distinction is established and transformed (exercise or threat of power, normative consent or even a mixture of both) is often seen as an immediate function of the politico-strategic power structure of international society. Kegley and

Raymond (2003: 393), for example, argue that a crucial factor in defining the 'normative climate' of different historical periods has been the distribution of power within the society of states. There are, indeed, good arguments, both empirical and theoretical, suggesting that the global normative order and its constitutional principles have been shaped by a few leading members of international society. It is hard to quarrel with the claim that the degree of influence different cultural and political communities exercise on the content and structure of the global normative framework have differed vastly. We have already seen that historically liberal Western human communities have been able to shape the international normative order much more profoundly than communities from the global south. With the expansion of the European-led international society in the 18th and 19th century to global scale, Europeans were able to export their vision of an international order and gradually fashion a framework based on the balance of power, diplomacy, sovereignty and secular law – this is the essence of the classical 'expansion' story developed by Bull and Watson (1984).

It does not go too far to say that Europeans set out the blueprint of the modern international normative order, as evidenced in the evolution from natural to positive law, and the subsequent globalisation of the latter. By dictating membership criteria based on 'standards of civilization', defining the criteria for 'just war' and, spreading values and practices through forms of empire and colonialism, Europe was able to infuse the normative structures with ideas and values initially developed within Latin Christendom (Gong 1984, Bull and Watson 1984, Koskenniemi 2004). In doing so Western nations have successfully shaped those kind of key norms, institutions, principles that define the parameters for legitimate agency and permissible social conduct, and, perhaps even more importantly, the organisational and procedural arrangements through which normative claims are formed.

The resulting account of international law is one in which norms and institutions are instrumental to, and shaped by, the dominance of powerful states. Most classical IR scholars who displayed an interest in law and morality have more or less subscribed to this account, highlighting how the two are heavily contingent on the distribution of power (e.g. Carr 1939, Bull 1977). Powerful states, in this view, refuse to join treaties, multilateral initiatives and global forums for dispute settlement when they do not further their immediate interests; and should they choose to engage in multilateral institutions, then simply to (ab)use them as 'arenas for power politics' (Mearsheimer 1994). This charge is, of course, not without merit. One prominent example is the structural adjustment programs employed by the International Monetary Fund and the World Bank in the late 1980s and early 1990s, which required borrowing countries, the majority coming from Sub-Saharan Africa,

to implement liberal, Western-styled economic policies to secure loans and foreign aid. In the eyes of many political economists, those policies 'did nothing to improve their [borrowing countries'] position in the global hierarchy of wealth but greatly facilitated (...) the revival of US wealth and power' (Arrighi 2010: 35).

The notion of 'hegemony' received revived attention at the turn of the millennia (Vagts 2001, Alvarez 2003, Beyers and Nolte 2003). To many legal commentators, the US' post-9/11 willingness and capability to act unilaterally against Iraq was a reminder that the significance and function of key international legal instruments, most importantly the UN Security Council, ultimately depended on the national interest of a single state. Coming from an English School angle, Tim Dunne (2003) has situated these developments in a wider, societal context. According to Dunne (2003: 315), the September 2001 terrorist attacks in Washington and New York have triggered a phase in international affairs in which one dominant nation 'lays down the law to others'. This 'unilateralist overdrive', he maintains (Dunne 2003: 303), not only poses a threat to the international legal order, but also gives reason to re-evaluate the entire English School idea of an international society rooted in common rules, norms and institutions: 'How far can international society be maintained alongside an hierarchical system?' If society is a cooperative arrangement, constituted by a mutual willingness of its members to contribute to its shared order goals, then too much concentration of power in the hands of a single state can potentially be highly detrimental to its existence. There is, as I have contested, no incompatibility between hierarchy and an international society: Ranking orders are an 'organic' organisational feature of all social groups, and there is no reason to assume that international society can not accommodate durable hierarchies alongside egalitarian norms and principles.⁴⁴ That said, I do share Dunne's implicit theoretical concern that we have to get to grips much more clearly with the relationship between norms, rules and institutions on the one side, and stratified form of social order on the other.

So far, the logic that guides this relationship sounded relatively simple – great powers lay down the constitutional rules and principles for the rest – but it is not. Krisch (2005: 372), who works with a dynamic, constructivist understanding of law and institutions similar to my own, sums up the problem nicely:

[N]either the view that regards law as an order of equality and thus as depending on a rough balance of power, nor the approach that sees international law as merely an instrument of power, can capture the complexity of the situation. Likewise, attempts at discerning different modes of international law – an

⁴⁴ There appears to be an increasing recognition in English School theory that the concept of international society can indeed accommodate various forms of hierarchy, see Clapton (2014) and Clark (2011: 28-30).

international law of 'power' as opposed to a law of community or reciprocity – overemphasises the contrast and fail to bring out the internal links between these modes.

One way of cutting through the complexity is to proceed inductively. That is, instead of trying to infer claims about the nature and content of normative orders from large-scale system concepts such as 'solidarism', 'pluralism' or 'cultures of anarchy', we have to narrow our focus and look in detail at the mechanisms by which specific normative arrangements have been held in place. This is a massive undertaking, requiring painstaking empirically-inclined work across different international societies. Although those kinds of studies are still rare in IR, recent works, loosely connected through an interest in norms and international order, offer a number of crucial insights into the processes of normative order-making.

First, there undeniably exists a close and dynamic relationship between the social ordering of states as inferior and superior, the normative character of international society, and the ranking of international norms. Edward Keene's work on practices of intervention (2013) and the British treaty-making against slave trade (2007) demonstrate how different forms of social hierarchy are connected to both the nature of international legal regimes and transnational identity-formation processes. In the case of the changing nature of norms surrounding the use of force, for example, he finds that

'(...) the hierarchical structure of international society determines the specific qualifications and restrictions on sovereignty that operate within the practice of intervention at any given time, and so decides what is always one of the central questions: *who* has the right to intervene against *whom*.'

It is impossible to do full justice to Keene's observations here, but they should serve particularly well as empirical cases to illustrate and further elaborate the theoretical points about normative hierarchy advanced in this chapter. He is not only concerned with the historical influence of stratified social-structures on those kinds of norms typically labelled peremptory (sovereignty, racial equality, and the prohibition of the use of force), but also highlight the conflictual nature of simultaneous normative developments that have occurred within those structures - progress in the abolition of slave trade in the early 19th century was accompanied by the exclusion of African states from the 'family of civilised nations' (Keene 2007: 335). In doing so, he encourages us to pay careful attention to the complex and even contradictory effects social hierarchies exert on international societies' normative structures.

Second, the relationship between normative order and social hierarchy is circular. In a fascinating study of the global policy diffusion of legal sex quotas, Ann Towns

(2012: 183), finds that a state's ranking in the spectrum between 'modern' democracies and 'traditional societies' provided the basis for increasing the level of female legislators, because 'a larger share of female legislators is seen as one indicator of a state being 'advanced and 'modern''. What is interesting here is how the spread of a new policy was not simply a case of coercion, or a product of the explicit promotion of liberal standards by Western nations. Instead, the adoption of an ostensible liberal norm such as gender equality was a result of lower ranking states seeking to improve their social standing within international society. This not only points to a clear link between the ranking of states as inferior and superior and the emergence and change of normative standards. Moreover, Towns' (2012: 180) account highlights that 'international norms necessarily both draw on and generate social hierarchies', which in turn has important implications for the way in which new international norms are legitimated and framed.

Third, the unequal distribution of material capabilities is important for understanding stratified normative systems, but the mechanisms through which social hierarchies are translated into stable normative systems are more subtle and diverse than rational IR theories suggest. It is now generally accepted that the maintenance of hierarchical international orders involves more than power and coercion. We have been urged to think about 'subtle components of hegemonic power' (Ikenberry and Kupchan 1990: 283) or the 'social legitimacy' of hegemony (Clark 2011: 4), while yet others remind us that systems of rule foster compliance 'based on a conviction that it is necessary and right' (Krisch 2005: 374). What ties these approaches together is a mounting concern for the various social processes through which normative structures are produced, diffused and rejected. Wendt (1999) and Buzan's (2004) distinction between different forms of norm internalisation is important here, because it allows us to place 'belief' and 'calculation' alongside 'coercion' as distinct social mechanisms through which hierarchical structures are held in place.

This typology certainly covers a wide range of normative order-making mechanisms. Yet, to illustrate the immense complexity through which institutional arrangements about the purpose and normative boundaries of international society are constructed, I want to point towards a fourth possible social practice through which states are socialised into normative structures: 'stigmatisation'. According to Adler-Nissen (2014: 149), who recently transferred the concept from sociology to IR, strategies such as denouncing and shaming help to display normality, thereby offering an 'important source of information about the normative outlines of society'. She (2014: 147-149) even goes so far to argue that deviance is crucial to the construction of international order, using the English School approach as a frame of

reference for establishing the significance of stigmatisation for maintaining *shared* norms and values. While this might overemphasise the social function of stigma processes, singling out normative differences and establishing categories of 'normal', 'outlaw' or 'rogue' does indeed contribute to clarifying what normative visions are acceptable and what behaviour is tolerable within a social group. International society, typically via its dominant members, is frequently trying to preserve its order by making membership dependent on conformation to established patterns of behaviour. Within contemporary international society, the identification of actors as 'rogue states' or 'nuclear outlaws' (Klare 1996) stands as an example of how deviance is marked out and used to prop up existing standards. In short, while stigmatisation is a relatively new, still underexplored notion in IR, demanding further empirical and conceptual development, it ought to be an important analytical category for *jus cogens* theorists, because of the way in which it can help to identify and clarify the normative boundaries of permissible state behaviour.

The challenging task to emerge from these theoretical insights is arguably of an empirical nature. Because different mechanisms of normative-order making are mutually reinforcing and more often than not simultaneously at work, they are difficult to disentangle. Ikenberry and Kupchan (1990: 286) had given voice to this problem in their effort to explain the socialisation of elites into hegemonic orders: 'The core problem is that the outcomes we would expect to see if coercion were solely at work may not differ substantially from those associated with socialisation'. Despite these methodological problems, the added analytical complexity of normative-order making should be of central concern to *jus cogens* theorists, because it helps to understand why the constitutional order of a given international society is not necessarily a mere reflection of the distribution of power within that society.

Conclusions

Taking forward the concept of normative hierarchy as a generic institutional form, the goal of this chapter was to look at the way this idea plays out in thinking about normative order in international society. As we have seen, I am deeply sceptical about an approach to normative hierarchy that couches the issue in a strictly legal account which sees *jus cogens* as a formal concept of international law. The problem with such an account is the way in which this casts the issue of the ranking of international norms and values in very limited terms, ignoring important questions about the social, political and ethical compositions of international society. In order to further facilitate the shift away from a purely legal understanding of the matter, this chapter related the issue of normative hierarchy to some of the key components

of the international society approach as understood in the English School literature and some constructivist scholarship: order, institutions and values.

This chapter also picked up the notion of institutions in more detail, a theme central to English School research because it delivers important insight into the character and practice of social order and the way states solve their coordination and cooperation problems. Contrary to traditional treatments of institutions, which primarily use them comparatively and functionally, I have focused on the normative logic of institutions. Institutions necessarily privilege certain actors, practices and discourses over others. In other words, international law deploys normativity in world politics. As we have seen, international law has established (subjective) criteria for state recognition, and it has promoted certain economic and moral purposes related to the liberal welfare state. In doing so, international law transmits society's constitutional structures, thereby grating them meaning and making them an inescapable aspect of international practice. This reinforces the claim that the legal doctrine of *jus cogens* is indeed a manifestation, rather than the cause, of normative differentiation in international relations.

There is one last point in relation to institutions I want to raise here. I have not said much about secondary institutions and their role in the English School narrative about society and order. There is, indeed, a tendency in English School writings to focus on the constitutional qualities of international society's fundamental social practices, leaving the study of the more issue specific regimes and international organisations to others, including international lawyers. For the most part this is because of an oversimplified and underdeveloped understanding of the relationship between primary and secondary institutions, which depicts international organisations and regimes as residual by-products of international society's fundamental social practices.¹⁵ However, institutions such as the UN, the ICC and the EU are political forums in which international society's political and normative conflicts play out, and we need to get a much better grip on the role of these institutions in the construction of shared norms and values.

The second part of the Chapter considered the ability to engage with the social-structural composition of international society as an integral part of thinking about the construction of normative orders. Key amongst these considerations has been the claim that making sense of *jus cogens* exclusively within the context of Western hegemony oversimplifies the complex processes by which peremptory norms have been sustained and endorsed. As seen earlier in the thesis, the co-existence and

¹⁵ Spandler (2015) recently provided an interesting critique of this view, offering some useful points of departure for bringing secondary institutions back into the spotlight and securing its proper place in the English School.

continuous interplay of different spheres of social interaction, is a key English School assumption - and it is one that ought to be important for thinking about the construction of normative orders. Almost all theoretically possible types of international system structures are created and sustained by some subtle blend of coercion, stigmatisation, calculation and belief (Buzan 2004: 130-1, Bellamy 2005: 291-2). Even in eras marked by the dominance of a single state, such as Britain in the second half of the 19th or the US in the early 21st century, we should expect to find constitutional structures being held together by more than power and domination. The expansion of international society's constitutional framework may be a story overshadowed by power, coercion and cultural imposition, but it is also an account of the internalisation beyond Europe and North America of Western norms and principles such as sovereign equality and nationalism (Buzan and Little 2014).

What I have sought to do in the second half of this chapter, then, is to show that there exists no causal relationship between the social structures of international society and its normative order. It may be tempting to draw a direct connection between the ordering of states as inferior and superior and its representing a vision of what international society should look like. But the interplay between different forms of international hierarchy and practices of collective normative order-making is much more complex than traditional accounts of relative normativity suggest. There is no inherent reason to assume that the social-structural ordering of international society and the nature and value-content of its normative framework *have* to line up: as a diverse social grouping, international society is comprised of a wide array of norms, values and ethical *schemas*, emanating from a plurality of states with different material resources, identities and social rankings. Moreover, and adding further complexity, normative arrangements can remain intact even when the strategic environment in which they have been created evolves. Historical analysis of large-scale changes in international relations has highlighted how it is that political institutions, including the modern state and law, can resist changes in social structures (e.g. Fukuyama 2012).

One key insight, therefore, is that the social structures that frame international society are multifaceted, and reasoning and actions do not always line up to produce clear normative structures, a point that has also been stressed by Williams (2011: 1249). A social structural approach recognises that the normative content vested in *jus cogens* rules is not simply a manifestation of a universal normative vision of fundamental rights and obligations inherent to all human communities, neither is it the simple product of the social dominance of one or more those communities. Instead, we should see the nature and significance of certain norms, including constitutional norms, as a result of both shared values and a complex mixture of

social practices that involve compromises and concessions among members of international society about multiple, deep-seated and frequently conflicting views about the constitutional principles of global life. The structural perspective that a sociological approach brings encourages us to engage with the competing and frequently conflicting social dynamics that are in constant interplay. We must identify the exact social-structural conditions that sustain normative hierarchy in contemporary international society. By making use of their rich historical knowledge of the formation and social organisation of international societies as well as their comparative analysis of international systems, the English School can make an important contribution here.

Ethics, peremptory norms and world order values

In pursuit of capturing the structural constellations of normative orders, the previous chapter provided a highly rational, social-structural conception of a normatively stratified international society. Having set normative considerations aside for analytical reasons, we now need to bring normativity back in: a social theory of normative hierarchy must be able to account for the normative foundations on which this hierarchy is constructed. In order to understand why contemporary international society regards certain norms such as self-determination or the prohibition of genocide as hierarchically superior, and not others, we need to look a bit closer at the normative picture of international life.

This chapter retains the functional element, while adding a normative interpretation of the sources of *jus cogens*. The purpose is to open some space for thinking through the foundational determinants of values from which peremptory rules derive their status as a distinct, normatively superior category of international norms. It argues that the normative content of peremptory norms is not just an expression of the shared values and purposes of international society, but also sets important limits to the practices and ethical *schemas* its members are allowed to pursue. In this sense, peremptory norms set boundaries to the way in which the normative character of international society can evolve, and they enable and constraint the exercise of political agency in a decentralised social system.

To cast some light on the ethical foundations of a hierarchy of norms, this chapter narrows the conceptual focus again, concentrating on *jus cogens* and the distinct characteristics (universality and non-derogability) to which it gives rise. The vast literature on normative hierarchy has served to emphasise the centrality of *jus cogens* not just for taming sovereign powers through imposing definitive limits on their freedom of action, but also, and perhaps even more so, for implanting a shared sense of morality in world politics. Indeed, looking at the norms typically invoked in debates about peremptory norms, it appears that their characteristics are intimately related to the normative content imbued in them. The prohibition of slavery, torture, and genocide all seem to carry a normative weight that is heavier, more visible than those of ordinary international norms. The way in which peremptory norms have

come to be associated with the protection of the ethical standards of modern international society becomes particularly vivid when considering the intrinsic relationship between *jus cogens* and human rights. As Binachi (2008: 495) observes, to associate peremptory norms with human rights obligations is almost like a 'natural intellectual reflex'.

The chapter starts with outlining a normative agenda for the study of *jus cogens*, identifying the concept of 'international community' as the key source of its normative significance. The second section will introduce the English School's pluralist-solidarist debate as a framework for thinking about the values in play in international society, how they fit together, and how they can help us think about community and shared values at the global level. Using this framework, the third section will construct two different logics through which international society constructs its community ethos. It rejects a solidarist logic, which sees universal norms as the manifestation of cosmopolitan ideas about inalienable rights. Instead, it argues for a pluralist approach to ethics and order that depicts *jus cogens* as key to the development of international society towards a social site marked by diversity and respect for difference. This should hopefully allow us to think more broadly, and maybe more innovatively, about the sources of *jus cogens* and the way in which peremptory norms shape the normative boundaries of international society.

The case for a normative agenda

Theorising the meta-values of international society and the processes that give rise to them is crucial for understanding both the nature of relative normativity and the significance of peremptory norms for organizing world politics. Without a clear understanding of what the dominant interests and values of international society are, it is difficult to see how *jus cogens* can be anything more than just a theoretical construct with symbolic relevance. As Christenson (1987-1988: 593) puts it: 'How can a system-bound norm, meant to protect the [society's] legal order, limit that legal order without some broader normative criteria?' Some lawyers even argue that the absence of explanations for the superior normative status of peremptory norms poses risk to the international legal system and the integrity of international tribunals and legal authors who invoke these norms (see for example Shelton 2006). Natural law, the most common *ethical* justification of *jus cogens*, seems to presume a pre-existing source of values that grants universal rights their supreme moral quality in the first place. But if this source remains abstract or unacknowledged, as it has typically been the case, the rights and principles that emanate from it are rather intangible.

'International community' as a normative source

The key to understanding *jus cogens'* universal character and normative foundation, I wish to suggest, lies in an exploration of the concept of 'international community' and the nature, scope and depth of normative arrangements that constitute it. Reading both international adjudication and legal theory, it becomes apparent that both the existence and justification of *jus cogens*, and with it the peremptory qualities of certain norms, is inextricably linked to the notion of 'international community'. My conceptual discussion of the genealogy in Chapter 1 is worth recalling here. Alfred Verdross drew a clear connection between *jus cogens* and the ethics of the international community. The prohibition that forbids states to conclude any treaty that violates peremptory norms, he (Verdross 1937: 572) argued, 'stems from the fact that every juridical order regulates the rational and moral coexistence of the members of a community'. The same link has also been conveyed into VCLT, which arguably serves as the key reference point for asserting the existence of peremptory norms. Recall that Article 53 of the VCLT identifies a norm of *jus cogens* as being 'accepted and recognized by the *international community of States as a whole* as a norm form which no derogation is permitted' (my emphasis).

The relationship between the identity of *jus cogens* and the international community has also been highlighted in international adjudication. The final judgment of the International Criminal Tribunal for Former Yugoslavia is particularly instructive for our purposes, for it indicates the various entanglements between the two concepts. Looking at the normative force of the prohibition against torture, the Tribunal sought to explain its significance by reference to its *jus cogens* status. Claiming that the prohibition against torture has evolved into a rule of *jus cogens*, the judges concluded that 'the prohibition has now become one of the most fundamental standards of the international community'.¹ This holding not only acknowledges the legal outcome the prohibition of torture produces in the specific situation, but also confirms the categorical quality of peremptory norms as being the most fundamental type of international rule with superior normative forces.² Most interesting for my purposes, however, is that it points to the fact the prohibition has been upgraded to a 'fundamental standard of the international community'.

The *Furundzija* judgement of the International Criminal Tribunal for Former Yugoslavia vindicates the idea that the international community is the principal creator of the superior force of peremptory norms. According to the Tribunal, the *jus*

¹ *Prosecutor v. Anto Furundzija* (1998), Case No. IT-95-17/1-T, Trial Judgment, p. 54, para 153.

² There is an important though often overlooked distinction between the substantive content of a peremptory that outlaws a particular behaviour and its peremptory effect. The former is a property of the individual norm, while the latter is constituted by its *jus cogens* status (Orakhelashvili 2012: 867).

cogens nature of the prohibition of torture is, in the words of the judges, ‘bestowed’ by the international community.³ This is an interesting formulation in so far as it explicitly suggests that the international community as a whole, as distinct from the individual interests of its members, is both the beneficiary of peremptory norms – remember that the purpose of *jus cogens* is to protect the values of international community (e.g. Verdross 1966: 58; Orakhelashvili 2006: 46; Gormley 1985: 130) – and the author of their normative content.⁴

The idea that *jus cogens* constitutes community norms becomes even more intelligible when related to the distinct nature of obligations that belong peremptory law. As noted in Chapter 1, *jus cogens* imposes obligations upon states that are *erga omnes*, that is, obligations owed towards the international community as a whole. While some legal commentators have lamented that the concept of *erga omnes* remains part of ‘the world of the “ought” rather than that of the “is”’ (Simma 1993: 125), it nevertheless helps to understand the essence of community norms: they contain rights and obligations appertaining to parties which are not directly affected by the breaches in questions. International courts have made reference to *erga omnes* norms, most famously in the *Barcelona Traction* case, citing the obligations stemming from the prohibition of genocide, aggression, and slavery as well as those deriving from basic human rights as examples.⁵ The problem is that because international adjudication is, by its very nature, largely concerned with the application and clarification of rules, it does not offer careful accounts for the ethical basis of their claims.⁶ If hard pressed, those judgements offer no sufficient normative clarifications as to why some obligations are more extensive, more fundamental than others, and one is left wondering why states, or any other member of the international normative system, owe any kind of obligation to the international community, even if they are not affected by the violation of the norm in question. One can already notice how this relates to one of the central conundrums surrounding higher order norms: What constitutes the presumed universal appeal of peremptory norms? Why are the members of international society more tightly bound by some norms, and not others?

So where do we search for the sources of the extraordinary qualities of peremptory norms? Of the various theoretical approaches to *jus cogens* it is perhaps

³ *Prosecutor v. Anto Furundzija* (1998), Case No. IT-95-17/1-T, Trial Judgment, page 60, paragraph 156.

⁴ This seems to be in line with Crawford’s (2011: 229) tentative definition, which sees as an essential feature of all *erga omnes* norms that they are not only owed to but also established by the international community as a whole.

⁵ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgement, ICJ Reports 1970, p. 33, para. 34.

⁶ For an overview of the application of the concept of *erga omnes* in international jurisprudence, see Crawford (2011).

public order theorists who come closest to grappling with the normative source from which peremptory norms derive their unique status. For international lawyers such as Christenson (1987-1988), Orakhelashvili (2006) and Rozakis (1976), peremptory norms are not only key to the functioning of the international legal system, but also critical to the existence of global public order.⁷ Based on this claim, Orakhelashvili (2006: 47) sees the link to community interests as a central to determining the peremptory status of a norm. In order to qualify as a belonging to *jus cogens*, he argues, the breach of the norm in question must be 'considered absolutely unacceptable by the international community as a whole' (Orakhelashvili 2006: 50).

Although both legal theory and international adjudication frequently make reference to the international community in the context of *jus cogens*, the nature of their relationship remains conspicuously underdeveloped. William Conklin (2012: 844) and Marc Retter (2011) recently offered accounts that deal precisely with this issue. Both are dissatisfied with the attempts to understand the identity of peremptory norms in terms of treaty or custom, arguing that it is the international community itself that provides the basis for peremptory norms. Above all, Conklin (2012 84-844) laments, the traditional source thesis fails to deliver on the key question: who or what grants Article 53 of the VCLT the power to elevate certain norms above others? Indeed, it appears that any effort that seeks to explain the superior ethical qualities of norms purely in terms of law does offer a somewhat tautological explanation, for it nests one normative source (peremptory effects) within the other (*jus cogens* status).

By introducing the concept of international community as the missing referent in the debate about the sources of peremptory norms, Conklin and Retter make an important contribution. The idea that *jus cogens* originates from the international community has, at least from a theory-building perspective, big implications, because it urges us to re-think the way in which the source of *jus cogens*, and to some extent the very existence of a stratified global legal order, can be traced back to international law. The key problem, at least from a normative perspective, is that both accounts do not go deep enough. Conklin (2012: 860) links the higher order qualities of peremptory norms to the socio-cultural ethos of the international community, which he rightly sees as 'analytically and experientially prior to states'

⁷ It is worth recalling that the public order argument has a long history in legal scholarship, and its argumentative relevance for the existence of peremptory norms seems to be undeniable; it is presumed that in every legal system a limited number of fundamental norms and principles exist which the subjects of law are not permitted to violate by their contractual agreements. Indeed, as MacNair (1961: 213) acknowledges, it is difficult to envision any society – whether comprised of states or individuals – which does not limit the freedom of contract between its members in order to protect the higher public interest from being violated by private transactions.

consent'; whereas Retter (2011: 537)) sees the superior status of certain norms as 'arising from the normative commitments that states make by necessary implication for the achievement of the shared objectives and goods of the international community'. But in the end we never get to know what the substantial content of Conklin's alleged social-cultural ethos is, or where we should look for Retter's conception of 'common good'. One is therefore left guessing as to why a specific norm protects the ethos of a community, or why this ethos bestows certain norms with universal qualities and not others. Although Conklin (2012: 840) rightly points out that jurists are too often 'satisfied with a list of norms which are continually repeated as peremptory in international law rhetoric', I am sceptical as to how his account can escape this fallacy. Without an understanding of the substantive value content of the community ethos, it is difficult to see how one can determine which norms are key to its protection. Why, to pick just one example, is the outlawing of torture an alleged part of *jus cogens* and not, let's say, rules on sexualized violence or property ownership? The former is directly related to the harm and suffering of the most vulnerable members of human communities and seems to be perceived as a threat to global peace and security, as indicated by the UN Security Council's decision to take up the issue, and the latter has arguably become a universal feature of one of international society's central institutions, free trade. My point is that in the absence of a conception of the values and normative goals of the specific community *jus cogens* seeks to serve, one cannot satisfactory answer this question.

Bringing values back-in

It is therefore only in the presence of some kind of account of the dominant values and ethical beliefs underpinning international life that we can begin to theorise meaningfully about the identity of peremptory norms. John Tasioulas (1996), who is more concerned than most with the specifically normative aspects of a stratified international legal order, has stressed the key role world order values play in the process of ranking norms, thereby pointing to the centrality of shared values for the formation of communitarian international norms and institutions. 'It is substantive value judgements regarding the comparative world order importance of norms', Tasioulas (1996: 88) argues, 'that furnish the rationale for upgrading their status or enhancing their scope'. Establishing an explicit link between the creation and nature of legal arrangements and substantive considerations of the ethics and morality of the society in which it works is a crucial move in understanding *jus cogens*, because it allows engaging with the nature and depth of value-consensus that presuppose the existence of norms with superior legal force and universal ethical appeal.

The failure of jurists to account for the substantive value content of peremptory norms *vis a vis* the international community returns us to Kelsen's conception of *Grundnorm* with which I introduced this thesis. Kelsen did not wish to account for the identity and source of the 'basic norm' of international law from which all other rules lower down the hierarchy derive their validity, because it lies outside the scope of international jurisprudence. In a pure theory of law, the constitutional norm 'is a fundamental datum that simply must be taken as it is', to borrow Bobbit's (2002: 590) formulation. In other words, the jurist must simply presuppose the basic norm that sits at the top of international normative order, whatever its character, ethical content or source might be. As a result of this normative antagonism, the identity of the 'basic norm', and with it the very character of legal order, remains unknown.

At the theoretical level, we might be able to construe a 'pure' theory of law, but the problems of insulating law from values become particularly acute once law is put into practice. Lawyers, just like any other agent participating in social life, are inevitably and unavoidably embedded in the values and beliefs that circle around her or him. As moral agents, they see themselves continuously confronted with tensions between different sets of values (i.e. humanitarian, environmental, economic, social, political). The Shrimp/Turtle case in which India, Malaysia, Pakistan and Thailand asked the Appellate Body of the World Trade Organization to determine the legality of the US import prohibition of certain shrimps might be a good example here.⁸ Central to the body's decision was the need to identify the international community's values regarding the desirability of the conservation of certain species and the relative value of a shared environmental resource. What is interesting about the body's deliberations, at least for my purpose, is that the search for identity and relative weight of those values lies outside the scope of international law. As Philippe Sands (2000: 300) observed:

Clearly this [the identification of community, conservation and cooperation values] is a different task from identifying the rules of international law and the sources of international obligation, which direct one towards treaty or custom and the other formal material referred to in Article 38(1) of the Statute of the International Court.

This nicely captures the epistemological challenge *jus cogens* theorists face. That is, if one wants to understand the character of peremptory norms, and the ethical quality that constitute their significance for our contemporary global normative order, then bringing in philosophy and political theory and developing normative claims about

⁸ The US claimed that the way in which the shrimps were harvested would threaten the existence of endangered sea turtles. See, WTO case Nos. 58 (and 61). Ruling adopted on 6 November 1998, available at www.wto.org/english/tratop_e/envir_e/edis08_e.htm.

the purpose of social order values and the nature and source of obligations and rights is an inescapable task.

Before introducing a conceptual framework that can help us to go about this exercise, let me briefly sum up some of the above considerations. The assertion that it is the international community conferring extraordinary qualities on a norm opens an alternative way for thinking about the normative determinants of *jus cogens*. The public order account, in particular Retter's and Conklin's attempt to theorise the international community as a source, is particularly important for the development of a normative perspective in that it demonstrates the explanatory role of shared values and common purpose for the nature of *jus cogens*; but it only brings one so far down the road, glossing over key questions about the foundational claims upon which the superior status of *jus cogens* rules rest. Most importantly, those theorists have failed to address the most interesting – certainly for English School scholars the most vexing – question of all: What exactly are the overriding interests and values of the international community? Existing justificatory theories of *jus cogens* work with a latent, natural law/natural rights inspired vision of these interests and values, usually linking some widely accepted conception of good international order to morality. However, this reads rather unconvincingly and one cannot escape the feeling that references to ethics and morality are, to put matters starkly, rather rhetorical flourishes than part of a sophisticated explanation. In the end, existing legal accounts seem to come short in explaining why the international community is the primary source of *jus cogens*.

Part of the problem is compounded by the lack of theoretically and philosophically grounded discussions of the ethical side of global social and political structures and the moral sources of legal obligations.⁹ Peremptory law, and the universal standards for social conduct it established, is only intelligible in terms of the normative beliefs held by the society in which it operates. International lawyers will always struggle to identify particular peremptory norms, and their efficacy in international legal practice will always be negligible, as long as the superior status of these rules does not become intelligible in terms of the obligations and propositions that give rise to it.

⁹ International lawyers such as Orakhelashvili (2006) and van Hoof (1983) argued that the 'vagueness' of *jus cogens* and the absence of concrete criteria for identifying peremptory character of these rules neither deprives it of its legal character, nor is it a basis for rejecting the concept. However, given the deeply entrenched ethical nature of peremptory norms, I strongly doubt that the normative emptiness of these accounts can be persuasively justified.

Thinking conceptually about 'international community'

If the concept of 'international community' is to play a coherent role in thinking about the opaque questions surrounding the character and ethical significance *jus cogens*, we need to do a little more than simply presume its existence. What is needed is some kind of conception of 'international community'. Rhetorically, 'international community' has become a heavily travelled site in political and public discourse. Whether it is the protection of human rights, the fight against global terrorism, crisis management of and response to environmental disasters and humanitarian emergencies, or international negotiations with regimes in Iran and North Korea, in the age of globalization the international community seems to be at the forefront whenever global peace and security is under threat. While talk would suggest that there exists some kind of unitary and durable actor called 'international community', it is far from clear who or what it represents. As Thakur (1998: 12) noted, however: 'we use the phrase 'international community' by habit and without thinking'.

Inflationary use of the term in public and political discourse has been somewhat matched by academic interest. Lawyers and IR theorists alike have dealt with the formation, role and nature of the international community, both conceptually and historically, though this has not resulted in any clear, consensual account.¹⁰ This is not the place to engage with many complex issues and questions the concept of 'community' throws up.¹¹ Instead, I want to focus on its constitutive features in order to establish a bit more carefully what the 'international community' that is linked to *jus cogens* is, how it comes into being, and how it is distinct from the notion of 'international society'.

It is possible to approach the study of the existence and formation of 'international community' in many (potentially overlapping) ways, two of which I want to note here. The first is a legal perspective that focuses on the nature and extent of the norms that are accepted as forming the constitutional core of international law. On this view, it is law which glues states together, providing them with the necessary means to form a community governed by some common normative order. More specifically, an international *legal* community (*Voelkerrechtsgemeinschaft*) comes into being when states consensually agree to establish certain constitutional elements that set out the basic criteria for global law-

¹⁰ Paulus (2003) for example identifies four meanings of the concept (traditional; institutionalised; liberal; and postmodern), while Conklin (2009) identifies three conceptions (community as an aggregate of the will of states, community as a rational construction, and community as a social-cultural ethos).

¹¹ Ellis (2009) provides a good overview of the conundrums surrounding the concept of 'community' in International Relations.

making, and which provide the foundation of communitarian obligations. Mosler (1980) is perhaps the classical exponent of this view, but it is also present in the works of Tomuschat (1993) and Fassbender (2009). For Mosler (1990: 15) it is the constitution, understood as the highest law of society, which 'transforms a society into a community governed by law'. Any society, he claimed, 'must have one essential constitutional rule in the absence of which it would not be a community [...] (Mosler 1980: 16). Note that the 'constitution' as such does not necessarily involve substantive values or normative principles, but merely refers to meta-rules of law-making and functions of governance (see Tomuschat 1993: 216).

Today's image of an international (legal) community, however, is closely linked to and often inferred from progressive moral ideals, most notably human rights and equality, and it is frequently associated with the UN Charter and the substantive rules and normative goals imbued in it (e.g. Simma 1994, Fassbender 2009). Bruno Simma's (1994) essay 'From Bilateralism to Community Interest in International Law' nicely captures the essence of the way in which both the making and nature of international law has evolved. As Kingsbury and Donaldson (2011: 79) summarise:

International law is, and should be, building on and evolving from its foundations in a minimal statist system based on a series of consent-based bilateral legal relations of opposability between States ('bilateralism'), toward a legal order of something he [Simma] termed 'international community'. By this he meant a 'more socially conscious legal order', increasingly reflective of community interests'.

Rather than a purely legal entity, this suggests that 'international community' stands for, and is the key manifestation of, the marked shifts in the political and ethical global environment in which modern international law operates. Its emergence not just signifies the new (moral) purpose behind global normative order making – international rules should reflect the shared values and interests of its subjects, as distinct from their particular interests – but also 'grounds international law's promise of universalism', to borrow Kingsbury and Donaldson (2011: 79) phrase.

The kind of 'international community' that can generate universal norms and globally shared ethical standards may be extrapolated through and against international law, but it has to transcend and presuppose any normative order founded on state consent and individual interests. Moreover, even if the international community is conceived in the minimal sense as a legal entity with a 'merely' prudential constitution, there must be some kind of pre-existing common interests and social goals that animate the formation of such a constitution. In other words, community interests do not emerge from a normative vacuum, and questions about the normative ends of a legal system logically precede its concrete

organisation.

If one comes at 'international community' from a second, sociological perspective, the focus thus shifts to a somewhat more abstract level. Here, it is much less about the role and rule of law than about the degree of human interconnectedness, the feelings of belonging together, and the construction and perception of what differentiates 'We' from 'Others'. This is the perspective I intend to adopt when talking about the relationship between 'international community' and the normative foundations of *jus cogens*.¹² It is manifested in Ferdinand Toennies' (2002) seminal distinction between 'society' and 'community', and it is also present in English School discussions of world society and culture (Buzan 2004: 74-76). Toennies' (2002: 33-37) distinction essentially hangs on the type of bond between the members of a social group. Community is 'organic', rooted in natural attraction between its members. Society on the other hand is 'mechanic', artificially formed for the purpose of realising its members' rational interests. Here, the distinct nature of community relationships is generated by a common identity and ethos. David Ellis (2009) elaborates this account of an organic community with regard to the international context, and it fits quite well with the English School understanding of international relations as historically evolved patterns of social behaviour. The crucial determinant in the distinction between an international society rooted in interdependence and an international community is, in Ellis (2009: 7) view, the existence of a sufficiently developed common ethos.

The common ethos comprises the constitutive values and norms that define the collective identity of the community. It produces hypothesized material effects of cultural environments: states orient their self-presentations toward, and draw their frames from, the community ethos (Schimmelfennig quoted in Ellis 2009: 7).

A conception of an international community grounded in common ethos and collective identity is particularly useful for my purposes, levering open doors to consider how the normative requisites for universality and community obligations are construed.

The first is the way in which this distinction serves to address the relationship between international society and international community by establishing some tentative boundaries between the concepts. Common ethos is conceived as analytically prior to the existence of a rational, contractual arrangement such as the society of states (Toennies 2000, Conklin 2009). State consent, coherent practices and

¹² The legal and the sociological perspective are not mutually exclusive. They simply seem to work on different levels, with the legal perspective focusing on the more immediate institutional structures (law), and the sociological concentrating on the deeper-seated normative structures.

the presence of certain constitutional principles for the development and application of rules may serve to infer the existence of international society, but it does not, from a sociological perspective, presuppose the kind of organic unity necessary for the formation of an international community. English School theory is very clear on this point. International law is seen as the constitutive basis of international society, indicating the kind of rule-governed interaction which are central to Bull and Watson's (1984: 1) famous definition. But law and procedural arrangements alone neither constitutes nor represents the organic 'we' feeling that binds human communities together.

This raises extremely complicated questions about the relationship between 'international community' and 'international society'. As hinted above, society is the more basic, and certainly from an anthropologically perspective, prior idea. The English School literature conforms this view. Both Bull (1977: 16) and Wight (1977: 33) held that there must be a degree of common interest and cultural unity on the basis of which international society can be built. In his analysis of the international system/international society distinction, Buzan (1993) suggests that there is some historical evidence that vindicates this view, pointing to Wight's case studies of classical Greece and early modern Europe as well as Gong's (1984) genealogy of the standard of 'civilization'. Yet, he concedes that in principal 'international society could evolve functionally from the logic of anarchy without preexisting cultural bond' (Buzan 1993: 334). Ellis (2009: 8) even reverses the logic entirely, arguing that the density of interaction induced and propelled by the presence of international society is a necessary condition for the development of common ethos. This would suggest a derivative relationship with international society coming first, providing the normative background structures necessary for the development of socio-cultural bonds. My somewhat unsatisfying intuition is that both logics are in play, and that the relationship between international society and international community is reticular rather than derivative: continues interaction, made possible through and facilitated by international society's fundamental institutions such as diplomacy, great power management and international law, results in, and is generated by, common ethos.¹³

Secondly, it appears that the two concepts work with different ontologies. Whereas 'international society' is about instrumental relations between states, 'international community' is about the value-laden interaction between individuals and/or human communities typically associated with the domain of world society

¹³ The problem of Buzan's account is that he confuses the concepts of *Gesellschaft* and community *Gemeinschaft* in his attempt to establish a boundary between international system and international society, suggesting that there is a society-society and a community-society. In his later work (Buzan 2004: 74-76), he seems to be much clearer about the distinction.

(e.g. Jackson 2000). Intuitively, this seems to make sense. The organic, moral unity that transcends individual states is much more easily understood in terms of cosmopolitan bonds between human beings than emotional sentiments shared by sovereign states. That said, a sharp ontological distinction is problematic, because it blinds out the way in which globalization and higher interaction between human communities, respectively, has widened the range and scope of inter-state cooperation that are based, at least to some degree, on shared identities and common values. The UN, EU and the Arab League come to mind. The logic also runs in reverse in the sense that permanent, dense social and economic interaction between states can produce spill-overs that spark the development of common interests and loyalties at the civil society level. For these reasons, it seems to be more useful to think of the construction of 'international community' as an interplay between transnational actors and states.

Finally, it is immediately apparent that the conditions for the existence of an international community are normatively much more demanding than those upon which the concept of international society is predicated. Bull (1977) shows how a society of states can, in principal, operate on an instrumental set of shared norms, rules and principles as long as the fundamental social ordering objectives (security, *pacta sunt servanda*, private property ownership) are secured. Of course, even Bull's minimal, functional image of international society presuppose both a common interest in upholding social order and a minimal moral agreement on basic ordering values and questions of right and wrong – it is indeed difficult to imagine an international society without some sense of shared identity. But the common ethos that underscores natural bonds between members of a community needs much more than shared normative ordering principles. It is a sense of collective identity and common morality that leads states to share a sense of belonging to a common purpose (Ellis 2009: 8-9; Jackson 2000: 336, Brown 1995: 91).

This raises some serious problems for the concept of international community. Collective identity not only requires some sense of emotional allegiance that mobilises states to act as, or at least represent, a collective *moral* agent, but, and perhaps even more problematically, it also needs an outside environment against which the 'self' can be established (Simma and Paulus 1998: 268). The universal identity element raises the normative threshold for the formation of an international community up to a point at which some writers (e.g. Brown 1995: 100-106) call the entire idea of a globally spanning community into question. They have a point. The UN perhaps comes closest to resembling the idea of an international community rooted in a common identity associated with the principles of its Charter, as Fassbender (2009) wishes to suggest. But notwithstanding Kofi Annan's (1999: 3)

invigorating statement that the international community 'has an address [and] achievements to its credit', the UN does not (yet) satisfy the requirements, and expectations towards, a durable, institutionalised universal global political community. Ad-hoc coalitions of states may occasionally exercise agency on behalf of the international community. However, as Brown's (2001) study of the Gulf War in 1990 and the NATO intervention in Kosovo in 1999 shows, even the ideological coherence and value commitments of 'collations of the willing' have varied greatly. In the end, Simma and Paulus' (1998: 277) statement issued almost two decades ago seems to be valid after all: 'The concept of an "international community" contains as much aspiration as reality'.

Does this not jeopardise the whole idea of international community as a normative source (after all, it is precisely the identity element and its ability to generate common conceptions of higher community interests that is critical to the development of global universal prohibition regimes)? I do not think so. Rather than imagining contemporary international relations as either communitarian or societal, we should expect to find both elements co-existing and interacting, with the relative weight of each depending on context. Epistemologically, we can take the idea of international community meaningfully forward by thinking of 'international community' as an idea-type to which recourse when theorising the normative basis of communitarian norms, institutions and values.

Normative inquiry in the English School: pluralism, solidarism and the space in-between

In the hope of shedding some light on the substantive content of the normative claims that underpins *jus cogens*, the rest of the chapter looks at the way in which international society constructs the its common ethos *visa a vis* the international community. Given my theoretical orientation, it should come as no surprise by now that I propose to frame an inquiry into the normative dimension of *jus cogens* in terms of the English School's pluralist-solidarist debate.

The pluralist-solidarist debate is essentially about the depth of consensus among the members of international society and the potential for collective action that follows from it (Buzan 2004: 141; Suganami 2002: 13). In its classical, though somewhat oversimplified representation,⁴ solidarism and pluralism mark mutually exclusive, diametrically opposed theoretical positions. Pluralist accounts of international society, usually drawn from the works of the young Bull (1977) and

⁴For an excellent survey of the pluralist-solidarist debate in English School theory, see Buzan (2004: 45-62).

Jackson (2000), are depicted as state-centric, pessimistic and exclusivist, focused on the preservation of a limited set of norms, values and principles. On this view, sovereignty and non-intervention are both empirical reality and theoretically sacrosanct, as they ensure that a plurality of culturally different political communities can exercise their moral freedoms while peacefully coexisting. The absolute significance of the sovereign nation state for the preservation of order in international life has led pluralists in the past to exclude human beings as subjects of law and sources of moral obligations. Bull (1977: 64) made it perfectly clear that the 'rules of coexistence' on which international society is founded can only be borne out and function within a positive, state-consent based conception of international law. Because of its focus on state sovereignty, non-intervention and notions of self-interest and survival, Buzan (2004: 141) asserts, that 'pluralism generally stands for the familiar Westphalian model [of international relations]'.

Pitched against this normatively rather unflattering view is the solidarist, morally 'thicker' account of international society. Usually identified with the works of Vincent (1986), Wheeler (2000) and Hurrell (2007), it sees an ethical purpose deeply inscribed in the institutional fabric of international life which transcends national borders, binds individuals together and commits international society to pursue common goals and values. Crucially, on this view, international law must be justifiable in terms of these shared moral values, a notion heavily inspired by the natural law tradition. Contrary to pluralism's positive international law account, solidarism's image of international society is firmly grounded in the claim that the content of the international legal system cannot merely be a product of inter-state bargaining, contractual agreements and self-interest. As Wheeler's (2000) study of humanitarian intervention painstakingly seeks to demonstrate, international society does recognize certain universal notions of human dignity and justice, grants rights to individuals and responds to severe violations of them. In short, to borrow Linklater's (1998: 24) formulation, solidarism is based on the idea that an 'elementary universalism underpins the society of states and contributes to the survival of international order'.

Over the last four decades or so, the concepts of pluralism and solidarism have become the principal tool for English School theorists who wish to discern the normative character underpinning different types of international society. As I will hopefully show in this chapter, the pluralist-solidarist debate has great analytical potential to help us think through the underexplored normative foundations on which the debate about relative normativity rests. As with any concept, however, the analytical leverage pluralism and solidarism can yield hinges on how we construe and deploy them. In other words, the way we think about a problem

depends, to a large extent, on the lens through which we see it. The traditional image presented above that casts pluralism and solidarism in binary terms has recently been called into question, thereby urging English School scholars to be clearer about what they perceive the two concepts to be, and how they can add value to thinking about the normative organisation of international life more generally.

The first problem of the standard account as presented above comes across most clearly in Mathew Weinert's (2011: 2) reworking of the pluralist-solidarist debate, because of the way in which he identifies its central analytical weakness:

'Employed as macro judgments of the nature of international society, they [pluralism and solidarism] strongly encourage overstatement of particular facts and normative judgements at the expense of other equally valid facts and judgements [...].'

As a result, Weinert (2011: 3) claims, English School scholars tend to *either* overemphasise the moral unity and normative consensus among members of international society, *or* overstate the limits state sovereignty and order place on justice, individual rights and common interests. International society, on such a reading, is either solidarist or pluralist – there is no space in between. At the risk of stating the obvious, this conceptual bifurcation is starkly at odds with a global political system in which commitment to the durability of sovereignty norms and positive international law exist alongside supranational global governance institutions, transnational courts and tribunals and notions of human security. We thus need to be able, theoretically, to acknowledge the complexities and contradictions inherent in the norms, rules and institutions that structure contemporary international society, and be able to search for spillovers, variations and mixtures that lie between the border that divides pluralism and solidarism.

Fortunately, there seems to be a consensus in English School theory of how to move forward. To restore the analytical value of the pluralist-solidarist frame, Weinert (2011) proposes to accentuate variations in the key norms, principles and practices that characterise specific conceptions of international society, and to deploy pluralism and solidarism as idea-types. This move is more or less in line with Buzan's (2004: 139-161) reworking of the pluralist-solidarist debate, which construes the two concepts as ends of a spectrum that covers the many variations in the way states share values. Buzan (2004: 159-160) even goes one step further than Weinert and equips us with a number of types of 'interstate societies' that can be located along the pluralist-solidarist spectrum, ranging from 'asocial' to 'confederative'.

Reconfiguring pluralism and solidarism as flexible, coexisting concepts is a critical and necessary development in recent English School theory, enabling scholars to articulate the many possible theoretical images of international society that lie between minimal agreements on fundamental rules of co-existence and a post-sovereign world society characterised by ideological uniformity. That said, it seems that a proper (re)evaluation of pluralist-solidarist frame remains incomplete as long as we do not explicitly address the concepts' capabilities for thinking normatively about the many ethical questions and moral puzzles international norms and institutions throw up. After all, normative theory is not only central to the English School project, but also, and even more importantly with respect to my own goal, key to uncovering the ethical basis of relative normativity that seem to lie outside the scope of international legal theory. Buzan's *schema* is of little help here, for he completely withdraws the pluralist-solidarist debate from its normative connotation. Due to the rigour in which he privileges analytical over normative modes of theorising (see chapter two), Buzan's approach forecloses a lot of possibilities for thinking about the moral foundations of international norms, rules and institutions, and *jus cogens* respectively. The utility of Buzan's approach, as I have hopefully shown in the previous chapter, lies in its ability to allow researchers to get to grips with the different modes through which values and norms are shared in international relations. But those campaigning for an understanding of the normative determinants of those norms and values will have to look elsewhere.

Weinert is somewhat more attentive towards the normative content of the two concepts. Although his approach does not come without problems either, the way in which he understands pluralism and solidarism does provide a good starting point for cutting into the normative dimension of English School theorising. Weinert reads the notion of human security in terms of the pluralist-solidarist prism and, in doing so, relates some of its central claims (protection and empowerment of individuals) to the familiar normative commitments that reside at the heart of the two concepts. Solidarism, as one would expect, ends up to be equated with a cosmopolitan agenda that links universal rights of individuals to the homogenisation of the interests of sovereign states, whereas pluralism is seen as a form of political organisation restricted to minimal consensus about essential rules for coexistence (Weinert 2011: 9-10). The ostensible normative antagonism of pluralist conceptions of international society, and the normative superiority of solidarism that follow from it, are particularly vivid in Jackson's (2000: 291) statement about the legitimacy of humanitarian intervention and the value of order, respectively:

‘The stability of international society, especially the unity of the great powers, is more important, indeed far more important than minority rights and humanitarian protection in Yugoslavia or any other country – if we have to choose between the two sets of values’.

There seems to be an element of truth in the way Weinert sets up the normative visions inherent in the two concepts – they rely on and conform to the traditional image portrayed in much of the English School literature, and IR in general: solidarism is liberal, progressive, and ethically desirable; pluralism is instrumental, conservative and normatively bleak.¹⁵

This image, however, is problematic for at least one main reason: it fundamentally limits the normative inquiry into international law, or any other institutional order, for it *a priori* renders any pluralist account as normatively inferior in relation to its solidarist counterpart. In other words, if one wants to think about which norms, institutions and principles international society ought to construct and transform in order to enhance the well-being of its members, solidarism seems to be the only desirable way forward. On first glance Weinert’s account seems to confirm this claim. He concludes that the ‘implementation [of human security] in several areas has been rather solidarist’. That said, he acknowledges that some aspects of human security, most notably the ability of human security notions to strengthen domestic democratic processes and institutions, can be paired with pluralist sentiments for strong sovereign nation states. This leads him to make, at least for my purposes, the most thought-provoking statement about the pluralist-solidarist debate: ‘pluralism and solidarism alone do not compel movement in any particular direction’ (Weinert 2011: 13).

Indeed, the exclusivity with which solidarism and pluralism have been related to particular models of and developments in international society does not, on the face of it, look very plausible. It is, for example, not clear to me at all that to argue for the durability of sovereignty as the basic constitutive principle of international relations is to reject the legal or moral significance of human beings that has driven many progressive developments in international law, including the concept of *jus cogens*. The tensions between the basic ordering principles of sovereignty/non-intervention on the one hand and humanitarian sentiments on the other that Jackson starkly highlights are, undoubtedly, real and well-documented, but theoretically and politically in no way irresolvable.

Furthermore, one can easily imagine solidarist conceptions of international society that are at odds with the egalitarian beliefs that underpin the peremptory norm of self-determination. Linklater (2002: 323) hints at this potential when

¹⁵ See for example Wheeler (1992); Buzan (2004); Keating (2013).

identifying ‘doctrinal imperialism’ as one possible way of constructing the ideological homogeneity that is at the basis of the kind of ‘Wightian’ revolutionism to which solidarists typically lean. English School scholars have, of course, never advocated the imposition of uniformity, but it nevertheless shows how the natural law type universalism solidarists often wish to fashion can, in principle, be (ab)used to develop forms of international society that suppress legitimate forms of contestation and minority right, something certainly undesirable from an ethical perspective. My point is simply that both positions, if taken seriously, open up a whole range of possibilities for thinking about the normative determinants of *jus cogens*, and we should not exclude any of them on *prima facie* grounds.

With these conceptual considerations in place, we should now be in a position to look a bit more carefully at the nature of the shared values and common interests that give rise to *jus cogens*. Using the pluralist-solidarist debate to explore different ways of thinking about ‘international community’ and common ethos, the rest of the chapter develops two possible logics through which the normative basis of *jus cogens* can be constructed.

Solidarism: the obvious candidate

The majority of work on *jus cogens* (implicitly) relies on some kind of cosmopolitan, natural law inspired account of ethics, framing the concept’s evolution as part of the wider progressive development of international society towards a space in which identity and community are not state-based (e.g. Verdross 1966, Tomuschat 1993, O’Connell 2012,). The trend towards relative normativity in international law, Tasioulas (1996: 117) suggests, is best reconstructed by presupposing a ‘communitarian’ account of international society, which takes the ‘community of mankind’ and ‘human dignity’ as the constitutive features of modern public order. The normative appeal of solidarist ideas, in particular from a liberal-Western perspective, is, of course, not only easily visible, but also well developed in English School theory, especially in the domain of human rights (e.g. Vincent 1986, Wheeler 2000, Hurrell 2009). It is indeed intuitively plausible to situate the concept of *jus cogens* within the solidarist framework. Bull’s (1977) entrenched ‘moral scepticism’,¹⁶ the prevalence of positive law, pluralism’s emphasis on cultural differences and so forth create a quite hostile environment for a category of international norms whose existence depends heavily on moral consensus and the limitation of state

¹⁶ For an analysis of Bull’s moral scepticism, in particular with regard to international law, see Kingsbury (1997).

sovereignty. Moreover, there are powerful arguments, both empirical and normative, for a solidarist theory of *jus cogens*.

Solidarism emerges from Grotian inspired conceptions of international law (Bull 1966, see also Keene 2002), and it is not difficult to see how their natural rights-inspired normative basis is consistent with the main attributes of *jus cogens*.^v Bull (1966: 67), who set out the basic solidarist position, argued that it was Grotius acceptance that certain fundamental principles are 'beyond question' which enabled him to 'prescribe rules for an international society united by an area of agreement much wider than any to which it has given its consent'. Perhaps the most important point of departure for the development of solidarism is the way in which Bull (1966: 64-64) depicted individual human beings as moral referents and holder of rights. Under the Grotian view, he inferred, law does not only regulate the relations of sovereign states, but it also confers upon international society an obligation to respect and enforce individual rights, thereby making human beings subjects of international law.

The normative *schema* on which the solidarist assertions of individual rights and universal humanitarian responsibilities rest is firmly grounded in and derived from political thought and rich philosophical discussions about at least three interrelated issue: just war, human rights, and cosmopolitanism. Influence of just war thinking on conceptions of international society is most vivid in the domain of humanitarian intervention, where it is used to construe a moral theory of humanitarian responsibility in foreign policy decision-making. Bull (1966) discussed Grotius position on the principles of war at length, showing that the protection of the safety and welfare of foreign citizens can be a just cause for intervening in civil conflicts. Perhaps the most prominent current exponent of a solidarist doctrine of humanitarian intervention is Wheeler (2000), who draws on Walzer's just war theory to advance the notion of 'supreme humanitarian emergency', arguing that state leaders are entitled to put civilians at risk in cases where there is 'no other option available to assure the survival of a particular moral community' (Wheeler 2000: 50).

Discussions of humanitarian intervention are typically augmented by some kind of theory of 'rights'. Here the characteristic of rights, in particular their ethical justification, is grounded in an appeal to the physical *and* moral side of human nature and treated as a fundamental requisite for living a worthy, dignified life.

^v Accounts of international society are typically built around a specific conception of international law and the sources by which states are bound. Buzan (2004: 45) even sees the entire pluralist-solidarist debate hanging mainly on questions of international law. While this might downplay other crucial and interesting issues, Buzan's emphasis nevertheless highlights the way in which legal rights concerning the limits of autonomy, authority, obligation and legitimate use of force fundamentally colour international society's normative character.

Vincent (1986: 14) uses this kind of natural law/natural rights logic to establish the universality of 'basic rights', arguing that 'what they seek is basic to our humanity, not to our membership of this or that community'. To be sure, universality claims can be constructed in many ways (i.e. anthropological, ontological, functional, legal) and some versions are philosophically untenable, empirically impossible to achieve, and politically precarious. There thus seems to be a tendency in contemporary human rights discourse to understand universal rights in limited, relative terms; as political conceptions of social justice that allows particularistic claims by granting individuals and communities a certain degree of freedom in shaping those rights (e.g. Buchanan 2014; Donnelly 2007).

Though solidarists have largely limited their discussion to human rights and humanitarian intervention, one can also see affinity to cosmopolitanism and Kantian notions of universal reasoning. We have insightful studies of the erosion of the moral significance of national boundaries, perhaps most notable here is Linklater's (1998; 2007) effort to show how political communities realise higher levels of solidarity while reducing basic moral deficits resulting from domination, imposition and inequality. Linklater's extensive work on the intersection between English School theory, sociology and Frankfurt School critical theory has significantly advanced the sophistication of cosmopolitan normative arguments about citizenship, justice and community. Outside the English School, cosmopolitan ethics has given rise to commitments to principles of equal worth, and their normative purchase for debates about democracy, accountability and social justice in a globalized world is well known (e.g. Held 2010, Pogge 2007).

These breadths of ways of constructing normative visions grounded in inalienable rights and humanitarianism are usually coupled with a teleological view of social evolution and human nature: international society is susceptible to fundamental change and, slowly but surely, mankind as a whole is achieving progress towards higher levels of ethical universalism. The institutional side of this view comes through strongly in Hurrell's (2009) account of the evolving global political order. Normatively, it is clearly articulated by Linklater's (1998: 35) restatement of Kant's assumption that 'there are no immutable structures which demand that human loyalties must stay confined within the limits of the parochial sovereign nation-state'.

This lineage of thought bears some resemblance to the liberal internationalism of the early 20th century that inspired writers such as Norman Angell (1914). At its roots lies the assumption that human nature is subject to positive development and/or that education and enlightenment will eventually bring about an international political system in which the moral significance of national boundaries will diminish

and a universal conception of the good life can flourish. Evidence for progress in the direction of 'universal legal and moral community' is said to be found in the complex and wide-ranging structural changes that marked the global institutional order during the last 70 years or so: an exponential increase of global rules, the rise of transnational civil society, the intensification of non-state actors in global law making, the emergence of comprehensive multilateral agreements and treaties with constitutional qualities such as the UN Charter or the EU, and perhaps most important in the evolution of human rights regimes and humanitarian intervention practices (e.g. Hurrell 2007: 61-63; Weiler 2004). *Jus cogens* fits neatly within this context. The existence of a category of universal legal norms with non-derogable qualities and superior ethical force is not only the logical consequence of the process of teleological change, but perhaps even an intrinsic institutional feature of a modern, transnationally bounded international society.

When considering the notion of positive change in international society, we may pause for thought about the way in which solidarism has traditionally been seen as progressive, and pluralism as static and backward looking. According to English School's classical three traditions model (see chapter 1), pluralist conceptions of international society border with the Hobbesian/realist international system element, whereas solidarism leans towards the Kantian/revolutionism world society element. The kind of pluralism the model works with is rooted in and derived from Bull's extremely rational conception of social order developed in *The Anarchical Society*. In this conception, the social contract that establishes international society is heavily driven by realist concerns for survival and co-existence under anarchy. The purely 'procedural and hence non-developmental character' Mayall (2000: 14) rightly sees as characterising the English School's pluralist vision is simply the logical corollary of limited, minimal world order goals, and the absolute value of sovereignty and the non-intervention principle that come with it.

If pluralism's ostensible affinity for the realist brand of rationalism is a token for normative deadlock, then world society indicates solidarism's progressive potential. The possibility of the development of more expansive sets of shared norms, rules and institutions with substantial moral content is typically predicated on the idea of a common humanity transcending national borders. As noted above, most solidarist conceptions of international society draw, in some way or another, on Kantian notions of cosmopolitanism and solidarity between human individuals. I take Wheeler's (2000: 34) pledge to forcefully respond to 'supreme humanitarian emergency', Hurrell's (2009: 70) emphasise on the global upsurge of 'cosmopolitan ethic demands' and Vincent's (1986: 125) 'conscience of mankind' to be assertions of permissive conditions for the development of world society ideals. Vincent (1986:

151-152) seems to take this idea to its logical extreme, arguing that a fully developed solidarist international society would in fact resemble a world society because the internal regimes of all its members would adhere to the same cosmopolitan laws and principles on human rights and intervention. While the merger of international and world society seems to be problematic, not at least for ontological reasons, I nevertheless agree with Buzan (1993) that solidarist' advances in international society have to be somehow enmeshed with cosmopolitan world society elements.

Commitments of this kind render a state-based international society much more precarious and inherently susceptible to notions of community interests, collective identity and universal norms and values. Indeed, the prospects for the existence of a form of common ethos anchored in cosmopolitan ethics is immanent within a solidarist conception of international society. Members of the English School have spent time and effort to show that diverse communities acting within a state-based order can and do give political expression to cosmopolitan values rooted in the idea of human unity. Linklater's (1998; 2002; 2007; 2011) work on community and harm in world politics is instructive here, because of the way in which he complements a moral defence of a universal community built around cosmopolitan harm conventions with a recognition of difference and a sociological account of its realisation. Although it is beyond the scope of this chapter to engage with the complexities of his thinking, I do wish to outline its basic normative commitments to show how a solidarist conception of the normative source of *jus cogens* could look like.

Linklater (1998: 9) sees the modern society of states as 'the first international society which is not destroyed by conquest and war, but transformed peacefully by the normative commitment to extending the moral and political boundaries of community'. The result of this transformation is a more universalistic form of political organisation rooted in the Habermasian idea of a 'universal dialogical community' which confers rights of dialogue and citizenship on all its members. Appreciating both the politics and moral significance of difference, Linklater (1998: 46-77) is well aware of the complexities of social solidarity and the ethical dilemma that emerges from questions about how far the moral frontiers of bounded national communities can be extended to include duties to all humanity. He is careful not impose a single 'common humanity' identity upon mankind, though his general language is unapologetically universalistic. His defence of universalism is expressed in the central claim that all human are entitled to a right to participate in 'universal communication communities', which determine the legitimacy of global institutional frameworks (Linklater 1998:10).

At the risk of leaving out some of its nuances, this line of argument allows us to construe the broad contours of the common ethos that gives rise to peremptory norms. From a solidarist perspective, such ethos is rooted in a normative commitment towards reducing the moral significance of nationalist logics of exclusion as well as reducing the moral deficits of members of particular communities, and, perhaps more concrete, towards a global universal discourse among states designed to reduce harm in international relations. On this view, the formation of international community is animated by the ethical ideal that all human beings must enjoy human, civil, social and political rights, because of the way in which those rights enable meaningful participation in the global universal discourse that shapes the economic, political and social structures in which we are embedded.

The language of 'harm' invoked in much of cosmopolitan discourse seems particularly pertinent to the question of the normative source of *jus cogens*, because of the way in which it gives distinct substance to peremptory norms' intrinsic relationship with human rights. The claim that we ought to see the abstract human individual as the moral referent should and not give privilege to the distress or suffering of insiders over outsiders – we are all equally entitled to be free from, and to protest against, harm by virtue of belonging to the same universal dialogical community (Linklater's 2007; 2011) – seems capable of providing the normative justification for the obligation *erga omnes* that belong to peremptory norms. Those obligations arise from a 'human interconnectedness', which animates independent political communities to develop 'conventions that place moral and legal constraints on the power to harm or the right to hurt' (Linklater 2002: 326).

Of course, this is only one, and admittedly a very brief, account of a community ethos rooted in the idea of cosmopolitan harm convention. One can imagine others. What is distinct to a solidarist approach to the sources of *jus cogens* is the way in which it seeks to ground the normative basis of *jus cogens* in an individual-universal international community ethos. Its underlying normative commitment is essentially cosmopolitan and it is hard to imagine a solidarist international community ethos without recourse to notions of common humanity. And its logic proceeds from some more or less abstract, impersonal notion of what individual human beings need in order to live a worthy and dignified and generalises it across all political, cultural and social communities. This is what we may call a 'top-down' approach to constructing community ethos.

On this view, then, the collective interest peremptory norms are supposed to reinforce and guard is derived from a single, globally shared answer to the question of what the most effective and appropriate way of addressing ethical questions

related to harm, justice, dignity and political participation and so forth is. Deciding which norms fall into the category of *jus cogens* has proven to be extremely difficult. If one accepts rights-based cosmopolitanism as an approach to universal norms and obligations, however, then the list of norms commonly associated with *jus cogens* seems to be incomplete. Some social, cultural and economic rights would clearly be contenders for peremptory status, because of the way in which those rights are paramount to both the worth of a human person and its ability to participate in global discourse. Maurice Cranston's (1973) widely cited philosophical argument that economic, social and cultural rights are universal in the narrower sense because they refer directly to a particular class of people, and not to all human beings, does not stand up to cosmopolitan scrutiny. It is hard to see where a cosmopolitan inventory of peremptory norms would end, but the right to a standard of health and well-being, for example, is surely a moral necessity according to solidarist ethics. Denials of food, housing and basic health care are serious affront to the inherent dignity of all members of the human family, to paraphrase the Preamble of the Universal Declaration of Human Rights. Moreover, it seems safe to say that malnutrition and hunger resulting from global distributive injustice have caused more human suffering than torture or genocide. In fact, cosmopolitans such as Thomas Pogge (2010: 1-4) and Gwylim Blunt (2015) have repeatedly argued that the causes of global poverty are comparable with crimes against humanity typically associated with slavery and apartheid. It is, of course, hard to achieve a perfect score in defence of a standard of adequate life and well-being, but from a cosmopolitan point of view it would make no sense to claim that this justifies their exclusion from the interests of international society as a whole.

In any case, for the solidarist, *jus cogens* raises the significance of a universal human community in an unequivocal way, because it formalises the idea that certain obligations and standards of behaviour override particularistic normative visions. To be sure, such an approach to *jus cogens* does not require some implausible high level of common morality that supersedes all particularistic loyalties. But it does work with a cosmopolitan vision of international community that demands that we give the suffering and moral deficits of others equal weight with our own, and it challenges some of the structural conceptualisation of international society, most notably the absolute legal and political significance of the state.

Pluralism: the counter-intuitive solution

Solidarism's long-standing endeavour to reconcile a society based on nation states with a cosmopolitan, Kantian inspired account of a universal global community in

which individuals hold rights and duties does add the necessary normative meat to the theoretical bones of *jus cogens*.⁸ Yet, juxtaposing normative hierarchy to solidarism does not come without problems. Natural law-based accounts have long been criticized for being overtly idealistic, difficult to implement, and insulated from the social and politics realities of modern world politics. Indeed, what is 'universal' in relation to global discourse construction, to stick with Linklater's account, appears to be as difficult as figuring out discussions about natural rights. When the superior legal and moral force of peremptory norm is simply derived from an abstract, rather than concrete, deliberations about 'good' and 'right', then *jus cogens*' role in international relations is prone to being reduced to rhetorical symbolism.

Another challenge every conception with appeal to a single mode of universal reasoning has to face stems from its inherent potential for domination. Those concerns have been raised explicitly in relation to *jus cogens*, most notably by Koskeniemi (2005: 197), who claims that appeals to the universal notion of humanity and fundamental rights vested in the concept are in fact an effort to promote Western particular interests by making reference to universal ideas. The tendency to herald enlightenment, science and rationality as universal benchmarks for human development has featured powerfully in both IR theory and International Law, and it is qualified on historical grounds by sustained periods of Western cultural dominance and expansion.⁹ Whilst decolonization has de-institutionalised immediate forms of dominance, the emergence of US as the global hyperpower, in particular Washington's 'unilateralist overdrive' after 9/11, revived concerns about a single state 'laying down the law' for the rest of international society (Dunne 2003: 315).

Finally, generating a global common interest and ethos among sociocultural diverse communities with different ethical schemas on the basis of a universal-individual logic is theoretically enchanting, but empirically hard to achieve. It seems fair to say that global life has always been more diverse than some solidarists wish to have it – there has never been such thing as a single global culture. The world consists of a variety of social, cultural and ethical communities and many of them have not only followed different understandings of what is good, right and just, but

⁸ Of course, any natural law/natural rights type theory has to address the problem of how to reconcile norms of sovereignty with the universally binding character of peremptory rules. However, this relates more or less directly to the classical English School problem concerning the way in which human rights rub up against sovereignty and non-intervention, widely discussed in the context of the responsibility to protect doctrine (see for example Bellamy 2003; Wheeler 1992, 2000); and solidarists, far from offering a definitive solution here, have something to say about this as well.

⁹ For an excellent study of the way in which Westerncentrism has historically been entrenched in IR as well as other related disciplines, see Hobson (2012). For a critique of the politics of universalism in international law, see Koskeniemi (2004; 2005).

have also made different claims about central political questions such as how to organize private and public authority structures. Debates about censorship and free-speech in China, for example, suggest that a collectivist culture rooted in Confucian philosophy involves a quite different understanding of what is the 'right' way, ethically speaking, of producing and sharing public knowledge Western liberal-individual societies. There is also a normative question here: *should* we work towards the eradication of competing discourse practices, as cosmopolitanism wishes to suggest? There are discordant voices about the normatively desirability of a universalised global communication community which seeks to establish an authoritative consensus around common interests, purposes and values of international society. Nancy Fraser (1990), for example, has offered a powerful critique of Habermas' account of a single public sphere. Fraser (1990: 66) not only stressed that 'full parity in participation in public debate and deliberation is not within the reach of possibility', but, and perhaps even more importantly, that the existence of a plurality of competing discourses about common good is crucial to balance forces of domination and social-structural inequality.

All of this would point towards an account that pays attention to the principles and values that actually circulate in international life, and that is rooted in the diverse social, material and political composition of global order. Such an analytical construct must be contingent and disentangled from any definitive judgements about the values and moral purposes of international society. Instead of universalising ethical hierarchies, and subsequently foreclosing certain constitutional arrangements, an account that revolves around the interface between common ethos and cultural plurality seems to be a desirable alternative.

This opens up ways for a pluralist conception of international society, appreciation of diversity and the politics of difference, and a less ethnocentric, way of thinking about the shared values associated with *jus cogens*. But can we develop a pluralistic image of common ethos in international society that has enough normative substance to serve as source for norms with superior ethical force and universal appeal? Following Chris Brown (1995: 106), it is plausible to suggest that some of the positive features of international community such as mutual aid and assistance could be realised within a pluralist society of states. He even concedes that pluralism may be the only viable and feasible alternative to a cosmopolitan vision of global human solidarity. Yet, a pluralist association, Brown (1995: 106) notes, remains primarily practical, founded on and preoccupied with the rule of law and not united in the pursuit of any 'global project'.

Those kind of restrictions are emblematic of pluralism's traditional image as caricatured in English School theory and beyond. Since Bull (1966, 1977) set out a

limited normative agenda based on the preservation of social order, deep scepticism about the possibility of shared values across global society has been a recurrent issue in summaries of pluralist accounts of world politics (e.g. Hurrell 2009: 40-49; Weinert 2011; Keating 2013). States, as Bull (1966: 55) espoused the pluralist position, are 'capable only for certain minimum purposes which fall short of that of the enforcement of law'. It is no coincidence that English School studies of human security, human rights, or the Responsibility to Protect doctrine are almost exclusively solidaritsts' territory. If we follow Bull's (1977) and Jackson's (2000) theoretical treatments of international society, there are some serious obstacles to developing an understanding of the foundations of value-laden normative arrangements which is not in accord with consensual normative order making and a positive account of international law, respectively. Bull (1984: 13) warned that the global human rights projects without 'consensus as to their meaning and priorities among them', has the potential to undermine 'coexistence among states, on which the whole fabric of world order in our time depends'. It seems as if he speaks directly to the debate about *jus cogens*, which has hitherto not produced a consensus around its normative content.

The argument that *jus cogens* is destructive of an international order that promotes peaceful co-existence in the face of difference is also inherent in Weil's (1983) famous critique of relative normativity in international law. In line with the classical pluralist view, Weil held that any feature of the global normative system which is not in accordance with sovereignty and consensual law-making undermines the purpose of this system, that is, to secure co-existence among sovereign and equal states (1983: 418-419). As I will argue below, such a dogmatic commitment to sovereignty and co-existence as the single, overriding foundational objective of international society misconstrues the pluralist position, because it ignores the crucial function peremptory norms play in an international society marked by different interests and identities. To show that a diverse international society can generate norms with universal qualities *vis a vis* its common ethos, its useful to briefly recall some of the core pluralist assumptions.

Pluralism's deeply entrenched adherence to the primacy of order, and its corollaries – positive international law, sovereignty and non-intervention – is usually explained by the political centrality of the nation state in international relations. By exercising political authority and control over territory, the state is portrayed as the 'bulwark against anarchy', preventing the outbreak of large-scale social violence in a system constantly on the edge of the abyss of a Hobbesian state of nature (Hurrell 2009: 27). This argument is usually coupled with a prudential claim about peacefully facilitating difference and co-existence by way of

territorialising diversity. The world consists of a multitude of societies, cultures and social groups, which hold different values, follow different ethical guidelines about what is 'good', 'right' and 'wrong'. Through centuries of war, bloodshed and peace settlements, the argument goes, the nation state has established itself as the best solution to the *problem* of normative polarisation, because of the way it divides the social whole into hard-shelled particularistic sovereign communities. Outside state boundaries exist anarchy, uncertainty and insecurity. Inside those boundaries exist general agreements on the sources and scope of rights and obligations, the legitimacy of institutions, justice, equality and social conventions. In short, intimately connected to the historical logic of the evolution, and subsequent globalisation, of the European state-system, pluralism is seen as valuable way to thinking about world politics because it captures a central, inescapable empirical aspect of international relation.

There is an important general point to be made here. As we have seen, the solidarist position has been advanced both empirically (progressive developments in the areas of human rights, criminal justice, environmental governance) and normatively (the ethical desirability of those developments) (see also Buzan 2004: 47). In contrast, pluralism's conferral of primacy upon the value of order appears to be driven primarily by empirical concerns. Intimately connected to the historical logic of the evolution, and subsequent globalisation, of the European state-system, pluralism is seen as valuable way to thinking about world politics because it captures central, inescapable aspects of international relations (i.e. the protection of plurality through an order of co-existence).

If there is to be any prospect in providing a pluralist account of the sources of *jus cogens*, we need to be able to construct a normative vision around its foundations that challenges the notion that diversity is a state-based ideal. To be sure, such a vision does not need to be cosmopolitan, but it has to be strong enough to animate a society of sovereign states to develop a common ethos deemed worthy enough by its members to subordinate their particularistic national interest to certain universal norms. The normative basis for such an ethos, I want to suggest, finds its genesis in Williams (2015) endeavour to recuperate pluralism as a philosophically sophisticated, non-statist theory. Contrary to what is often assumed, Williams shows that a commitment to pluralism need not result in some morally deprived, state-centric approach to global politics. It is impossible to do full justice to Williams' work here, but two mutually reinforcing ideas appear to be key for unlocking the idea of a pluralist conception of *jus cogens*: the possibility of a pluralist world society; and the ethical desirability of human diversity. In what follows, I will sketch out both ideas in a little more detail, arguing that they create a normative logic which

leads to a conceptualisation of ethos and universal norms quite different from the one traditionally associated with *jus cogens*.

In an attempt to challenge the way English School scholars handed the progressive cause to solidarism, Williams (2005) espouses an approach to world society which resists appeals to cosmopolitan or universal ethical ideals. He sees the classic pluralist focus on static notions of borders and sovereign space as the central obstacle to envisioning any change at the level of structural principles or normative orientation in international society (Williams 2005: 24). The first step in breaking the impasse in pluralist debates about progress is thus to clear up the relationship between territoriality and diversity in international relations:

‘It is not that territorialisation engenders diversity or has in some sense become prior to it. Instead, diversity has been corralled into a territorial form as part of the means for dealing with the special problems and circumstances that come with the constitution of international relations (...)’ (Williams 2005: 29).

The analytical consequence of this move is significant. Once diversity is de-territorialised it becomes an essential feature of international life – something that can well be accommodated by a progressive political space such as world society. The institutional framework of this sort of space is not designed towards agreement or resolution, as cosmopolitan accounts suggest, but about learning from and comprehending those that live outside our bounded community (Williams 2005: 32).

The idea that diversity can generate a global public space where expressions of interest and identity are not merely state-based opens the door for thinking about a pluralist conception international community, but the door is kept more permanently opened by William’s (2015) normative commitment to the ethical desirability of human plurality recently developed in *Ethics, Diversity and World Politics*. Drawing on the political philosophy of Hannah Arendt and the sociology of Gerald Delanty, he argues that international society as a pluralist association of human communities is normatively significant, because there is something inherently desirable about preserving the diverse nature of human life. The fact that the world is composed of ‘diverse human social systems with different normative positions arising from different understandings of a whole range of ethical questions’, Williams (2015: 41) argues, is ‘a normatively desirable state of affairs’. This claim enables him to establish the centrality of lived reality, space and ‘subaltern views’ for theorizing international society’s norms, institutions and practices. What distinguishes his way of thinking from its solidarist counterpart then is the admission that the normative content imbued in those norms, institutions and practices cannot be encapsulated into a single judgement

Peremptory norms in a pluralist society: ethics, function and practice

Taking a normative commitment to diversity in human life as a starting point for thinking about common identity and ethos engenders an alternative image of *jus cogens*. A pluralistic international society is a site of the toleration of difference, of comprehension and learning from others, and of restatement of the authenticity of plurality in global life. The critical question is, of course, how such an international society can generate universal agreements on certain norms. William's (2015: 181-223) discussions of notions of human security and distributive justice seems to suggest that a normative commitment to diversity does admit the existence of globally shared standards and practices. But how an association of multiple human communities predicated on the enactment of difference establishes universal, non-derogable norms that transcend space, context and time without requiring a resolution of competing ethical *schemas* and source stories is not entirely clear. If there is no durable common conception of identity, purpose and interest, the ground to generate norms that protect the international community as whole seems to be lacking. It appears that a normative commitment to diversity places impossible limitations on universality and non-derogability. Does the problem of *jus cogens* push pluralism beyond its theoretical boundaries?

Perhaps this issue can be cast in another way, by asking: what are the most ethically desirable relations between diverse human communities which find themselves entangled in an international society marked by the excitements, tensions and dangerous of difference relations? A response to this, I wish to suggest, begins by charting a different perspective on the nature of community and collective identity. As the inconsistent responses to humanitarian emergencies in Rwanda, Kosovo, Darfur Libya and Syria and countless other places show, the logic by which international society's common interest and purpose is established does not proceed from some universal foundations through deliberation about its realisation to necessary conclusions about specific political actions. To treat the idea of global community, as it is typically done in IR, as a site at which the society of states shares the same identity or at which debate and agreement will reveal one set of common values may thus not be the best way of thinking about international society's collective ideals and interests. The standards of unity and homogeneity which traditional conceptions of international community presuppose, and which cosmopolitan accounts of basic rights and obligations wish to fulfil, ignore the ambiguity and contingency of identity. For example, components that are key to the constitution of one state's identity may be dispensable for another.

Accepting that identity is contingent, ambiguous and can be reconstituted leads to a conception of international community that establishes bounds between its

members via a common ethos of respect. William Connolly's (1991) work on 'agonistic democracy' is interesting here, because of the way in which his underlying conception of community is designed as a political space in which relations are based on adversarial respect rather than value consensus. Connolly's political theory is rich and complex, and efforts to explore his thought in ways that can help to explore problems in IR remain limited, although potentially very interesting (e.g. Tambakaki 2009; 2012). What matters most to my purpose about his thinking is the notion of 'agonistic respect': A social site marked by agonistic respect, Connolly (1991: 142) argues, 'allows people to honour different final sources, to cultivate reciprocal respect across difference, and to negotiate larger assemblages to set general policies'. Crucially, his argument is couched in terms that insert care for human dignity into the relationships between diverse, interlocking and contending constituencies without imposing a single identity (Connolly 1991: x).

How does this help? In the first place, a conception of 'international community' built on agonistic respect moves away from the pursuit of a single, substantive vision or purpose. Instead, it becomes a place where common ethos is an expression of cultivating a specific culture of interaction, rather than a place of resolution of difference. This culture is rooted in the recognition that different human communities constituted by different identities and operating with different ethical schemas and normative visions face the same issues, struggles and problems. Respecting the different ways in which others frame, debate and resolve those issues, struggles and problems, and acknowledging self-limits in relation to one's own solutions and practices, are the virtues that establish connections across differences. Though 'respect' is still an underexplored concept in IR, Reinhard Wolf's (2011) first theoretical cut at the issue reinforces the argument that 'respect' is central for developing closer ties among states. Wolf (2011: 106) sees ample ground to assume that respect can foster international cooperation, precisely because of the way confirmation of one's self-ascribed value and characteristics nurtures trust, open debate and mutual identification.

This kind of international community develops a common sense of morality by carrying a concern for *human dignity* that grows out of the respect for those who draw on different final sources.²⁸ I take human dignity as a central element of a pluralist version of common ethos, because it is not part and parcel of a specific identity, but the condition under which human communities can develop their

²⁸ By taking 'respect' as the central element of international community ethics, I suggest that the task of 'ethics' here is not so much about contemplating the nature of moral judgement. Instead, moral philosophy on this count parallels Brown's (2000: 200-212) version of virtue ethics, which is about being the sort of actor who would behave appropriately when faced with moral dilemmas arising from difference.

specific characteristics (Dillion 2007). A normative agenda that honours contestation, diversity and pluralism as a collective ideal therefore offers a way of generating a sense of belonging among the members of international society that resists presumptions of a single, true and harmonious collective identity. To be sure, agonistic respect does not exhaust the global social space, but it can be a crucial logic through which a common ethos is established in international relations without universalising identity, interests and values value consensus.

At the empirical level, an account of community that mediates normative differences based on respect seems appropriate to a globalised political territory in which multiple bounded human communities find themselves in intensive relations of social, economic and political interdependence. At the theoretical level, I want to suggest, such a conception cannot only account for the existence of norms with peremptory qualities, but perhaps offer a better understanding of the contemporary inventory of *jus cogens* than natural rights-based cosmopolitan ethics.

A normative commitment to diversity and reciprocal respect makes unpredictability a central feature of world politics, and indeterminacy an integral part of normative order. For pluralists, this is a desirable scenario, because it presumes that human communities engage and behave in a social way on their own terms. There are, however, limits to tolerable diversity and the restatement and enactment of difference. Even a more conservative voice like Connelly (2008: 144-145), whose view on ethical standards and normative judgements is far more contextual than Williams', recognises that in order for diversity to flourish, some kind of limits need to be set. When terrorist groups, dictators or religious extremists seek to impose and universalise their fundamental beliefs in pursuit of their visions, principles and institutions, a threat is posed to the ethos of respect. Diversity, to borrow Williams' (2005: 32) phrase, 'needs both protection and limitation', and it is here where *jus cogens* plays its role: A pluralist international society must develop some universally accepted constitutional norms that that are able to operate as a constraint on violently intolerant members of international society that deny people to practice their own normative and social visions. *Jus cogens* is arguably among the principal international institution of this sort, because of the way in which it seeks to set fundamental and definitive limits to the way in which political communities can realize their pluralistic, self-directed freedom.

It is beyond the scope of this thesis provide a comprehensive list of current peremptory norms, or to offer any concrete methodological guidelines for their identification. At the most general level, I have suggested that an analysis of international society's constitutional values and principles is analytically prior to the development of criteria for identification, because the *jus cogens* status of a norm is

determined by the normative character of international society – rather than simply being expressions of a particular class of liberal human rights norms that have spread across international society after World War II. From the pluralist perspective advanced here, peremptory norms are normatively superior because they are essential instruments for protecting the diversity, the principles of tolerance and respect and, ultimately, the essential freedom of human individuals – they enable rather than constrain. They provide the conditions for preserving, restating and enacting the diversity of human life and plural freedom. Human beings cannot go about their lives and practice cultural plurality in the absence of security and ethnic, cultural and political tolerance, and peremptory norms secure these fundamental conditions. All human beings regardless of race, religion or other defining characteristics are entitled to what Bull (1977: 4) identified as the three goals of social order: security, property rights and respect for agreements. It is thus not on account of universal prescriptions regarding the proper meaning of what is good, right and desirable in global life that peremptory norms are legally and ethically superior; instead, they sit at the top of the international normative order because they stipulate some of the essential conditions necessary for the realisation of the pluralistic, self-directed freedom of all human beings.

My intuition is that such a reading of *jus cogens* would yield a more limited inventory than its solidarist counterpart. The right to self-determination is clearly a constitutional norm in the pluralist sense, because of the way in which establishes a community's claim to develop and pursue its own political structures and ethical schemas. The peremptory status of the prohibition of slavery and genocide, and the non-use of force can also be 'relatively' easy understood in pluralist terms, for they outlaw behavior that is, if not deadly, destructive of agent's distinct identities and social environment. The more controversial cases, of course, are those norms that seem to be exclusive expressions of cosmopolitan ideas about harm and inhumane treatments, most notably the prohibition of torture. This is not to say that societal relations grounded in agonistic respect cannot generate any highly durable, robust (moral) agreement about the peremptory status of certain individual rights that transcends context, only that such an account implies a different logic through which they are created and sustained. Rather than being constructed as a top-down exercise, the universal character of human rights is predicated on a hard core of similarities in ethical standards and social practices coupled with a common ethos of respect.²¹

²¹ The idea that universal rights are best understood in relative terms seems to find increasing recognition in contemporary human rights discourse, which has begun to understand them as political conceptions of social justice that allow particularistic claims by granting individuals and communities a certain degree of freedom in shaping those rights (e.g. Buchanan 2013; Donnelly

Because there is no single, eternal, universal normative logic that brings about foundational claims about the 'authentic' interests and moral vision of international society as a whole, the peremptory status of specific norms is, and ought to be, constructed through meaningful conversation and dialogue in which contestation, reappraisal and reinterpretation are likely to play a key role. This explains, and perhaps even supports, the deliberate 'emptiness' of the *jus cogens* provision in the VCLT. The obligation, values and proscription enshrined in a specific peremptory norm can only be legitimate if they are a product of practice, not dictate, thereby remaining contextual, circumstantial and ultimately amendable. Lawyers sometimes seem to be puzzled by the degree of contestation surrounding peremptory rules, most notably because of the way such behaviour undermines their non-derogable character. This issue has been particularly salient in the context of George W. Bush's post 9/11 efforts to reduce the scope of what is meant by torture. As Rosemary Foot writes (2006: 132): 'Why, (...) given the rhetorical, moral and legal status of this prohibition, is torture being debated, contemplated and even resurrected as an unsavoury and allegedly necessary course of action?' For constructivists, however, contestation is an integral part of every norm's lifecycle, no matter how fundamental their status. Because the social recognition of norms, including legal norms, evolve and persist through interaction in contexts, their meanings and significance ultimately remain dynamic by definition (Wiener 2009: 179-180). This holds particularly true for beyond-the-state contexts, where acceptance of and compliance with rules depend decisively on shared recognition rather than on their formal validity (Wiener and Puetter 2009: 4). In fact, as Reus-Smit 's (1997) comparative analysis of international systems shows, it is not uncommon for states to contest even the most basic constitutional rules and principles of a historical era.

To be sure, to privilege a politics of difference over judgements from an independent reference point does not rule out any highly durable, robust normative agreement that transcends context – such a radical version of moral relativism would tell against any notion of development of widely accepted international norms with moral content. A pluralist approach to *jus cogens* simply implies a different logic through which peremptoriness is created. Rather than being constructed as a top-down cosmopolitan exercise, the universality and non-derogability of certain rights and obligations is predicated on a hard core of similarities in ethical standards and social practices coupled with a common sentiment. There is empirical evidence that supports this logic. For example,

2007). Anthropologists, who are naturally sceptical about universalist claims, have also shown that despite disagreement about the specifics of particular human rights and their fulfilment, 'a core of similarities in concept and practice can be identified across different cultures and political systems' (Messer (1997: 305).

anthropologists, who are naturally sceptical about universalist claims, have examined 'rights' discourse across different communities, showing that notwithstanding widespread disagreement about on the specifics of rights, their fulfilment and understanding of moral agency, 'a core of similarities in concept and practice can be identified across different cultures and political systems' (Messer (1997: 305). Indeed, international society has generated powerful universal prohibition regimes, such as the universal outlawing of privacy, slavery and genocide, without any definitive resolution of the multiple identities and existential faiths of its members.

Conclusions

In international relations, normative differences increasingly play out at the institutional level. Decolonization and the emergence of the Third World have led to a more multilateral, and certainly more complex, process of normative order-making in which a plurality of ethically and culturally diverse actors participate in the construction of global governance and normative order. This chapter sought to establish the normative desirability of a pluralist international society, seeing tolerance, learning and respect for different ethical codes, faiths and ideologies as central virtues. It has also made clear, however, that freedom of agency in a pluralist-based international society is only permissible up to a certain point at which the practice of freedom and diversity starts to clash with and impede on the values and obligations enshrined in the (peremptory) norms that protect the ethos of diversity. Even if members of international society would decide that it is desirable, whether for political, economical, ethical or any other reason, to engage in practices such as slave trade or colonialism, *jus cogens* renders these policies illegitimate and illegal. It is in this sense that *jus cogens* performs its constitutive social function as demarcating the normative boundaries of a pluralist international society. Because peremptory norms are universal, non-derogable and essentially immutable, all communities, regardless of their social-structural composition and ethical *schemas*, have to somehow operate within the boundaries of the values and principles they set out.

An account that highlights the centrality and normative significance of the diversity of human life has a number of important corollaries for the way in which we theorise about the nature of normative hierarchy and the process through which the superior status of peremptory norms is constructed. First, it calls forth an account of international community that is alive to the multiplicity of cultural and ethnic communities that make up normative subjectivity in global politics. By

conceiving world politics in terms of diverse human communities, philosophical questions about the nature and meaning of peremptory norms can be made intelligible without invoking the classical natural law type argument. In other words, the concept of *jus cogens* becomes decoupled from the natural law inspired notion of promoting a single, specific type of order and value system in international society.

Secondly and related, a social theory of normative hierarchy involves recognition of multiple forms of agency. That is, alongside the state, it sees human communities as meaningful participants in the construction of global norms and institutions.²² Formally, of course, the state remains the principal actor in international relations. After all, states 'make' international law, and membership in international organizations is still limited to sovereign nation states – although certain developments such as the granting of 'non-member observer state status' to the Palestinian Authority has arguably bent this norm. However, the growing influence of transnational actors through new forms of network-governance is undeniable (e.g. Kahler 2009, Slaughter 2004), and individuals shape the normative preferences of states through voting, identity formation and discourse construction, thereby participating in the processes that shape the normative content of the global institutional structure. In light of these developments, the claim that meaningful participation in international society is limited to states, and that rules and norms are made in the absence of individuals, global cooperation and other non-state actors, does not reflect empirical reality. Domestic and transnational civil society networks underlie the emergence of virtually all global prohibition regimes with universal reach (Nadelmann 1990). Acting on behalf of moral ideas and beliefs that transcend particular states and political communities, these non-state actors play a crucial role in depoliticizing the individual human being.

It is, admittedly, not obvious that all of the current norms of *jus cogens* have a functional relationship to protecting diversity and the common ethos of pluralism in international society, as opposed to being expressions of liberal human rights norms that have spread across the entire system since World War II. While it is beyond the scope of this thesis to offer elaborate criteria for the identification of peremptory norms, the concluding chapter will look at some implications of a pluralistic conception of *jus cogens* for thinking about peremptory law.

²² With regard to the study of international society, Dunne (2005), for example, urges us not to separate the inter-human from the inter-state and the transnational realm and, instead, to theorise how international society and world society interact in certain issue areas.



Conclusions

Taking the concept of *jus cogens* as a starting point, the goal of this thesis has been to provide a sociological account of the nature, function and sources of higher-order norms in international relations. Taking International Law as an intellectual starting point, I have sought to reveal the key limitations of the jurisprudential debate about peremptory law and, in recognition of those limitations, show how an IR driven approach can yield critical insight into foundational determinants of international higher-order norms. Those insights have pointed me away from legal debates about the positive sources of normativity, and they have involved some rather significant departures from existing accounts, including a shift towards the constitutive properties *jus cogens*, the politics of contestation, and societal and normative context as being the analytical and normative focus of *jus cogens* theory. The result of this is an account of peremptory norms that is not restricted to a fairly narrow focus on the legal efficacy, formal sources and practical application of peremptory norms in international dispute settlement, but one that connects *jus cogens*' key conceptual features – non-derogability, ethical superiority and universality – to contemporary debates about the complex normative constitution of international society. This account challenges state-centric notions of law, while recognising that treaty-regimes and formalised institutions will remain key elements of the regulatory framework that structures international relations for the foreseeable future.

Over the preceding chapters, I have advanced what I hope is a clearer and more robust theoretical lens through which to study peremptory law in international relations. To a greater extent than originally expected, my agenda led me to an in-depth engagement with IR theory and methodological questions about the nature of interaction, the ontological status of international norms, institutions and structures, and the way in which we can capture social entities, processes and events that cannot be easily understood in terms of observable variables. I committed myself to using the English School theory and constructivist thinking and developed a philosophically grounded framework for rethinking the concept of *jus cogens*, what it is, how it is constructed and how it functions. This, in my eyes, has worked towards correcting various misconceptions, including the impression that *jus cogens* is simply a normative ideal not sufficiently moored in international society's

institutional structure. Irrespective of the perceived outcome of my effort to come up with an alternative account of *jus cogens*, I hope that some people will see merit in the way I have sought to bridge jurisprudence and international society thinking. In particular, I hope that the discussions about the methodological basis of sociological claims about status, role and limits of law in contemporary international society will encourage researchers to engage more systematically with the normative propositions and social order principles that manifest themselves in international law and legal practice; and to appreciate plurality, interaction capacity, and varying degrees of congruence and institutionalization when thinking about normative order at the global level.

Perhaps the main epistemological theme throughout this thesis has been that social inquiry into the constitutional order of world politics ought to involve both a social-structural analysis and normative interpretations. If this thesis is read as an exercise in English School theory, then the main point for departure is keeping social-structural and normative arguments in play. International society, I have argued, is a product of structural order *and* shared values and ideas that infuse those structures with meaning and purpose. Social-structural conditions generate and maintain different configurations of normative orders. By examining how and why values are shared (coercion, calculation, belief) in international relations, to what degree and with what kind of social opposition, I have tried to show how social-structural theory can help us chart the contours of the social forces that shape and establish certain practices, events and outcomes and normatively more desirable. This, in turn, has hopefully opened up critical analytical space for thinking through the relationship between normative hierarchy and different, often subtle and frequently deeply-entrenched constellations of social order – even normatively undesirable form such as empire, hegemony or the privileged positions of great powers.

In recognition of the moral significance legal discussions typically attach to the emergence of higher-order norms, the thesis has also sought to fill in, or perhaps shore up, the insufficient normative foundations on which justificatory claims to the superior normative status and value-laden content of peremptory norms have been built. In the existing literature, those claims are typically drawn from natural law and cosmopolitan approaches to individual rights and communitarian obligations; the argument I have sought to advance, however, is that those approaches rely on simplified presumptions about the ethical coherence of international society, downplaying the normative tensions between different human communities. If we want to get to grips with tensions between state sovereignty and universally binding moral obligations that frequently play out in the context of *jus cogens*, we need to

think less constricted and more innovatively about the ethical purposes and requirements for a 'good' human life, the foundational values that hold human communities together, and the normative boundaries of international social practice.

I hope, of course, that this thesis has done a little more than criticising legal approaches for understanding the normative bases of peremptory law in terms of a single, universalised set of beliefs and ethical standards. Drawing on the idea that human diversity is not only an analytical reference point, but also a normative aspiration powerful enough to yield substantive, philosophically rich, accounts of the moral purpose of society, this thesis has sought to show how pluralist virtues such as toleration, respect and resistance to definitive solutions can serve as a bases for theorising normative orders. Doing so, it seems to me, is a crucial move if we want to produce empirically plausible accounts that, despite their focus on historical actualities, possess the ability to meaningfully engage with fundamental questions about political life, moral agency and the value-laden context in which norms, rules and institutions are situated. If this thesis can help to advance pluralist understandings of international society as a public space for discussing competing claim and acting out difference relationships, then it will have served a useful purpose.

Applying the theory: a short trial run

What has hopefully become clear by now is that my approach does not produce simple and well-specified hypothesis that can be verified or falsified like those offered by positivists. Yet, it does provide a way for restoring some of the analytical potential that has been lost as a result of focusing too much on formal sources of normativity and legal enforcement. A sociological approach to *jus cogens* is committed to thinking holistically about law and institutional arrangements, and it is equipped to engage with the analytical challenges and complexities inherent in processes of governance and normative order-making in a decentralised system. Because those processes are essentially open-ended and contextual, I have defended the immanence of contestation, the centrality of social status and the inescapability of dissent and political struggle. The result is a theory which encourages us to engage with the myriad ways in which social roles and normative claims are worked out in daily global life, rather than assessing their abstract properties and effects.

It seems appropriate to conclude this thesis with a short trial run of the theoretical claims constructed throughout the previous chapters and offer number of observation of how they can be advanced beyond this thesis. The following brief assessment of how my approach can contribute to thinking about the construction

and identification of higher-order norms in modern international society is necessarily preliminary, but I hope that it shows that there is substantial analytical leverage for studying specific aspects of the institutional architecture of international society.

How would one set about studying the nature and content of contemporary peremptory law in terms of the theoretical lens developed in this thesis? If we accept the argument that *jus cogens* is an institutional form that demarcates the normative boundaries of international society, then any attempt to get to grips with its nature, function and source has to begin with the normative character of the specific society in which it operates. Picking up from Chapter 3, and looking at how to 'operationalise' normative character, Reus-Smit's concept of 'constitutional structures' opens the way into *jus cogens* analysis: Which norms are foundational for membership in contemporary society of states? And, which norms embody the minimal normative requirements for permissible behaviour in this society? In this sense, the concept of 'constitutional structure' serves as what Kahn (2014: 6) called an 'entry point', a kind of fallback point that stipulates some didactic limits, guides our gaze and help to identify and define subjects of analysis.

Since the middle of the 20th century, global constitutional structures have routinely been understood in terms of ideologically liberal norms and principles, signifying a tentative acceptance of elements of solidarist values and principles, most notably those associated with individual rights, as a basis for membership in international society. This narrative, however, has started to change during the last two decades or so, most obviously as a result of the decline of US primacy. The old-fashioned image of an exclusive club of predominantly Western states defining and forging international society's rules and institutions, we are told, no longer reflects the way global affairs have changed. As inter-state power diffuses, inexorably shifting towards non-Western developing nations, normative weight is being re-distributed. To be sure, materially and normatively the US remains central to the constitutional structures that shape international relations. In fact, some commentators even argue that the liberal institutional model is so deeply enshrined in the societies of both Western states and developing nations that its fundamental norms and principles will endure, and with it the liberal normative character of global order (e.g. Ikenberry 2015). That said, it is hard to quarrel with the popular narrative advanced by Kupchan (2012) and other 'world order' theorists that China and other emerging powers will be able to challenge Western status, principles, values, and institutions more effectively as global power shifts proceeds.

The question about the nature and content of peremptory norms in contemporary international relations can now be formulated a little more precisely: what kind of

effects will shifts in the architecture of global order have on membership criteria and normative boundaries of international society? For existing justificatory theories of *jus cogens*, those developments have not been deemed relevant, because they are, and in my eyes falsely, understood as being external to the formal processes and channels through which treaty norms are made and changed. For the approach developed in this thesis, however, they are central for understanding the social, political and normative context which in which higher-norms are created and applied. To put the argument more succinctly, a sociological approach sees the debate about the nature and transformation of global order as a window onto deeper-seated dynamics in constitutional structures.

Of course, debates about global order are extremely broad. They sometimes cluster in particular topics, issues and actors, perhaps most obviously the demise of US power and the economic rise of China and other non-Western nations, but they do not focus on a central scheme, trajectory or concept. This is where my theory can perhaps offer some analytical guidance, because of the way in which it identifies certain specific processes as relevant to understanding effects will the emerging architecture of global order have on membership criteria and normative boundaries of international society, while excluding others. Two filters, I have suggested, should serve as an epistemological tool for approaching the nature and content of international society's constitutional structure.

The first is a social-structural analysis that focuses on questions of social order. The argument here is that the axiology of normative order is an emergent property of deeper social structures, prompting us to investigate how shift in structural constellations of social order affect the conditions against which the contemporary normative systems is developed. Note that this analysis is not about the sort of material dynamics in military power and economic resources realists identify as central proxies for changes in the global order. Instead, is about changes in social statuses and the way in which actors acquire *legitimacy* in international law and politics. Here we can see important structural shifts in the global system that are likely to have long-term implications for the normative character of international society. States such as China and India have not only started to make claims for leadership in many established global governance institutions, but also begun to set up alternative global governance arrangements such as the Asian Infrastructure Investment Bank. The assertion of leadership status and global authority through legitimate forms of institutional governance – rather than through the threat or exercise of coercion – will allow non-Western developing nations to shape discourses and practices surrounding higher-order norms in a much more

distinctive and effective fashion than at any time in the history of modern international society.

This kind analysis can also accommodate non-state actors and the way in which they have come to affect the normative significance of specific international norms. Theoretically, it is entirely plausible to envision a framework in which authority can flow freely between ontologically different types of actors. Authority is an intersubjective variable working through social relationships. As we have seen in Chapter 4, at the ontological level, authority exists entirely in the view of others, conferred and taken away by them; it is not a property of the actor. Actors may be authoritative because of their control over valued resources, their expertise, their social rank, or because of their moral standing. But authority structures are inherently dynamic, and we can see how actors lose their ability to influence certain issues due to bad performance or lack of trust. The International Criminal Court's authority, for example, has been questioned on multiple fronts based on geopolitical bias and inconsistent investigation procedures. Determining how changes in status and authority across different communities, institutions and regions will affect their ability to forge and define the axiology of the global normative order is challenging, demanding, among other things, in-depth case study work. However, only by teasing out the relationship between social and normative order can we generate valid assumptions about the identity and future of peremptory law.

The second filter for approaching the issue of constitutional structures is a normative one. What kind of ideas, beliefs and ethical visions will characterise the emerging global system? Every political community brings with its own identity, cultural baggage and historically grown and geographically bounded practices. However, the values and principles that constitute the core constitutional complexes of post-1945 international society have largely been formed in terms of the normative visions of an ideologically more or less coherent group of Western states, and under the leadership of American hegemony. The rise of non-Western nations as leading members of international society will booster ideas and beliefs about the nature and purpose of international life at the global level that rest of a different bases than those typically associated with liberal forms of order.

If we want to formulate claims about the content and potential transformations of international society's foundational norms, then we need to engage with those normative visions, how they differ from and interact with liberal understandings of rights, autonomy and political participation. Such an engagement needs to go deeper than simply assessing the way in which non-Western interpretations of familiar principles such as sovereignty and self-determination play out in global governance institutions. Instead, we need to understand the historically evolved

normative visions from which claims about rightful state conduct and the purpose of the state are ultimately drawn. Chinese political theorising, to pick just one example, has produced quite different understandings of fundamental concepts such as order, identity, rationality and territory than those found in European Enlightenment and classical Western philosophy, respectively (Schneider 2014, Qin 2010). These non-Western concepts will play an increasingly important role in charting the contours of modern global order, and investigating their history, rationale and internal logic is an integral part of understanding the way in which foundational norms may evolve.

Some nuts and bolts for interdisciplinary research

Of course, this thesis only serves a first attempt in producing a social theory of peremptory norms. Above all such a theory would have to provide further clarification as to the nature of a sociological account of *jus cogens* in relation to the theory and practice of international law. Which forms of legal normativity (e.g. treaty, custom or even general principles) do a better job at institutionalising the constitutional functions of peremptory norms? If *jus cogens* is constructed and sustained through social interaction, providing a social-constitutive role in international society, what difference does its inclusion into international law make?

As I have sought to show, constructivist accounts of law are likely to open up space for inquiry here, because of the way in which they help to disentangle the complex conceptual relationship between legal normativity and social forms of practice. This attention to the social nature of law is helpful for thinking about *jus cogens*, because of the way in which it draws connections between the different types of normativity at work. Whereas the codification of *jus cogens* through the VCLT, understood as a social process, seems to be the product of the ideational realm of international society, customary law grounds the identity and substance of peremptory norms in context, meaning and practice.

One needs to be careful, however, not to equate state practice and *opinio juris* – the two principal epistemological markers for custom in international legal theory – with the notion of social practice found in the IR theory literature. For constructivists, practice is a wider social activity that includes *inter alia* historically evolved institutions and traditions, tacit understandings of silent rules, shared points of reference, and the construction of cognitive-symbolic structures. The international legal system is a key institutional site in the evolution of practice, but, as Navari (2011: 623) argues, ‘both practical understandings – the knowing how to prompt and respond – and the teleoaffectivities lie beyond law’. Indeed, courts,

cases and the articulation of legal obligation via *opinio juris* are undoubtedly important empirical manifestations of and proxies for the existence and working of peremptory norms, but as a social form, their nature, legitimacy and validity is first and foremost constituted by meaningful participation in the (re-)production of international society, not by some specific act or will.

I have hopefully gone a long way by now to establish the claim that there is no radical discontinuity between social and legal forms of normativity. Law is created and applied in a distinctive manner, but rules and other express agreements are ultimately manifestations of, rather than external to, the more implicit social and normative fabric that structure international society. This is because the legitimacy of law is deeply rooted in the social context against which legal subjects interpret norms. Brunnee and Toope (2000: 51) make this point nicely: 'it is largely through institutionally shaped rhetorical practices, and acceptances of reasoned argument, that law emerges from broader social practice'. This is an important claim for any interdisciplinary effort, because it leads one to analytically separate the rhetorical practice of law from the social practice that constitutes the background against which law is (re)-produced, without erecting hard boundaries between the two.

Another avenue for interdisciplinary inquiry concerns the normative content of peremptory law: how can sovereignty norms and human rights be reconciled in a coherent theory of *jus cogens*? This is an instance where further research on variations in and interactions between solidarist and pluralist logics might be helpful. It seems that the most significant conceptual clash within the current global order is between the inherited norms of the Westphalian state system, which privilege particularistic values and principles, and more recently established norms seeking to protect universally shared values and principles (Brown 2002: 76). The debate about *jus cogens* sits at the heart of this problem in that any solution has to organise these competing norms in a predictable and systematic manner. The current international society has found no solution yet, and it seems that its members simply do not know how to deal with the complex normative environment that has emerged since 1945. Both fundamental human rights norms such as the prohibition of genocide as well as Westphalian norms such as the non-use of force and the right of self-determination are said to have peremptory status – and international political practice in cases such as Kosovo, Libya and Syria demonstrates that there is anything but a clear consensus around the ranking of those norms.

The interaction between different discourses and institutions is not an entirely random process, however. It is an increasingly systematic one in which particular value systems cultivate within the boundaries of a hierarchical, increasingly

institutionalised international public space. Ideas from European constitutionalism, for example, have generated some interesting theoretical arguments about the processes through which vying political communities structure a shared normative system (e.g. Berman 2014, Jaklic 2014, Krisch 2010). Like the global normative order, the EU's public order is constituted by a multiplicity of legal systems and normative sources. Applying a similar pluralist logic to theorising the interaction between different discourses and value systems and the overarching global normative grid in which they are embedded can shed some fresh light on some key questions of the modern normative hybrid-order. Jean Cohen (2012), for example, has produced a fascinating account of the modern sovereignty regime in which she demonstrates how constitutional pluralism can be used to reconcile competing conceptions of sovereignty, justice and individual rights within an overarching institutional order that involves both statist and cosmopolitan elements. It is impossible to do full justice to her argument here, but what is perhaps most interesting, certainly from the perspective developed in the preceding pages, is the way in which Cohen manages to combine legal and political theory with empirical analysis to construct a global institutional structure flexible enough to moderate between principles of political autonomy and obligations towards the protection of human rights.

The broader engagement by scholars from various disciplines with diverse structures of authority and competing forms of normativity in global affairs is a welcome development. We have only recently started to think more systematically about how to realise certain transnational baseline values, norms and practices within a multipolar, cultural heterogeneous international society, and our understanding of the political and institutional solutions to these problems is still rudimentary. Of course, the thesis only broached some of these issues. Working out the relationship between the social, ethical and legal dimension of *jus cogens* should be a fruitful task for both IR theorist and international lawyers, touching on some of the most interesting axes of interdisciplinary scholarship on norms and normative order in international relations.

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