

Anarchy, ordering principles and the constitutive regime of the international system

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Abstract: Anarchy is the conceptual cornerstone of international relations theory and international law scholarship. Anarchy is described as the ordering principle of the international system, it is used as a variable that explains state behaviour, and the international legal order is depicted as anarchic and decentralised. This article questions this privileged status of anarchy. It challenges the designation of anarchy as the ‘ordering principle’ of the international system, and proposes an alternative theoretical construct – the Constitutive Regime of the International System – that performs the functions of the ‘ordering principles’ of the international system. This Constitutive Regime consists of three components. The first is a principle of differentiation that identifies the constituent units of the international system. The second is a theory of world order that prescribes policies and principles that are necessary to maintain order within the system, and the third are the secondary rules of international law that generate the international law-making and law-enforcement processes. In short, the Constitutive Regime provides a novel theoretical vernacular to understand and conceptualise the normative foundations of the international system.

Keywords: anarchy; international law theory; international relations theory; neorealism; ordering principles

Introduction

Anarchy is a foundational concept in international relations theory. It is designated as the ordering principle of the international system, it is employed as a key variable in explaining and predicting state behaviour,¹ and is considered a ‘transhistorical fact of life’ in international politics.²

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¹ R Powell, ‘Review: Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate’ (1994) 48 *International Organization* 313–44.

² A Prichard, ‘Anarchy, Anarchism and International Relations’ in R Kinna (ed), *The Continuum Companion to Anarchism* (Continuum International Publishing, New York, NY, 2012) 96.

Anarchy is also a cornerstone of international law. The absence of a central authority that monopolises the global law-making and law-enforcement processes means that the international legal order is depicted as a decentralised, horizontal, and anarchic system.³

Despite its centrality to international relations and international law, the concept of anarchy remains undertheorised. Its definition is indeterminate, its content is uncertain, and its nature has not been adequately explored by scholarship in either international relations or international law.⁴ This article problematises anarchy and challenges the claim, originally made by Kenneth Waltz and widely accepted in international relations theory, that anarchy is the ‘ordering principle’ of the international system. Instead, this article argues that the ordering principles of the international system are embodied in what I call the Constitutive Regime of the International System. This regime constitutes the international system. It determines the composition of the system and identifies the units entitled to engage in international politics, it establishes the parameters of interaction between those units, and generates the mechanisms of international law-making and law enforcement. The Constitutive Regime of the International System is a theoretical construct that incorporates, streamlines, and builds on various strands of scholarship that investigate the normative foundation of the international system. It provides a holistic account of the background assumptions and political conventions that constitute the international system, shape its structure, and order relations between its constituent units.

In addition to identifying and conceptualising the ordering principles of the international system, the Constitutive Regime of the International System also provides a theoretical vernacular for describing and understanding different forms of change in world order. This is especially pertinent in an era in which the international system is undergoing a profound transformation caused by the combination of a shift in the global balance of power due to the rise of non-Western states, the expanding influence of non-state actors in global governance, and the emergence of populism in Western democracies, which are factors that have precipitated a crisis of world order.⁵

³ C Whytock, ‘Thinking beyond the Domestic-International Divide: Toward a Unified Concept of Public Law’ (2004) 36 *Georgetown Journal of International Law* 155, 157 (political science and international law accept a ‘structural/functional distinction’ between domestic and international law, wherein the latter is ‘an anarchic system relying on decentralized enforcement’).

⁴ J Havercroft and A Prichard, ‘Anarchy and International Relations Theory: A Reconsideration’ (2017) 13 *Journal of International Political Theory* 252, 262 (noting that the ‘nature of anarchy ends up being untheorized’).

⁵ See generally R Haass, *A World in Disarray* (Penguin Press, New York, NY, 2017); E Luce, *The Retreat of Western Liberalism* (Atlantic Monthly Press, New York, NY, 2017); R Müllerson, *Dawn of a New Order* (I.B. Tauris & Co. Ltd, New York, NY, 2017); J Welsh, *The Return of History* (Anasi, Canada, 2016).

This article consists of four parts. Part I presents the principal claim of this article. It challenges the assumption that anarchy is the ordering principle of the international system and outlines the contours of the Constitutive Regime of the International System. Part II highlights the contributions of this article by situating the Constitutive Regime within international relations and international law scholarship that has explored the normative foundations of the international system. Part III describes the content of the Constitutive Regime and explains the functions that it performs. Finally, Part IV explores the rise and fall of Constitutive Regimes and reflects on the origins of the current crisis of world order.

I. On the search for ‘a small number of big and important things’

Kenneth Waltz’s *Theory of International Politics* is often described, by its proponents and detractors alike, as an elegant and parsimonious representation of the operation of the international system.⁶ Waltz’s objective was not to design a theory that explains every event in international politics. Rather, his intention was to construct a *systemic* – as opposed to a *reductionist* – theory that identifies the effects of the structure of the international system on the behaviour of states.⁷ According to Waltz, the structure of the international system is composed of three elements. The first is the ordering principle of anarchy that is defined as the ‘absence of agents with system-wide authority’,⁸ which means that the units within the international system recognise no authority superior to themselves. The second element is the functional differentiation of those units that make up the system, while the third is the distribution of capabilities among those units.⁹ Since the constituent units of the system are states that, in Waltz’s view, perform identical functions, the second element of the structure is irrelevant, which leaves anarchy and the distribution of capabilities as the operative elements of the structure.¹⁰

⁶ K Topper, ‘The Theory of International Politics? An Analysis of Neorealist Theory’ (1998) 21 *Human Studies* 157, 170.

⁷ Reductionist theories ‘explain international outcomes through elements and combinations of elements located at national or subnational levels’, while a systemic theory ‘deals with the forces that are in play at the international, not at the national, level’. K Waltz, *Theory of International Politics* (Waveland Press Inc., Long Grove, IL, 1979) 60, 71.

⁸ *Ibid* 88.

⁹ *Ibid* 93, 97.

¹⁰ J Barkdull, ‘Waltz, Durkheim, and International Relations: The International System as an Abnormal Form’ (1995) 89 *American Political Science Review* 669, 670.

This tripartite conceptualisation of the structure of the international system was not intended as an accurate rendition of reality. Rather it is an idealised image of international politics that purges the complexities and richness of political history to isolate and highlight the structural features that influence state behaviour.¹¹ For Waltz and his progeny of neorealists, the power and potency of this abstract concept of structure, especially the ordering principle of anarchy, is that it explains the recurrent patterns of competition and conflict that pervade international politics across time and space. As long as the system remains anarchic, all states, whatever the identity or ideology of their leaders and regardless of their domestic politics, are subjected to the ‘constraining and disposing force’ of the structure of the international system.¹² The cumulative effect of the structure is that international affairs is a realm of *realpolitik* in which states selfishly pursue their individual interests, especially ‘preserving and strengthening the state’,¹³ even if to the detriment of other states.

Kenneth Waltz’s concept of ‘ordering principles’ and his identification of anarchy as the structural form of the international system are central tenets of international relations theory.¹⁴ Anarchy is ‘unthinkingly accepted as the structural ordering principle of international systems ... By the mid-1990s, anarchy had become “naturalised” across much of the discipline; treated as a taken-for-granted foundational assumption.’¹⁵ Similarly, across the academic aisle, international lawyers almost unanimously describe the international legal order as anarchic and decentralised.¹⁶ Contemporary international legal scholarship adopted the assumption of anarchy without engaging in the ‘great debates’ about the operation of the international system that dominated international relations.¹⁷ Instead, international

¹¹ R Devetak, *Critical International Theory: An Intellectual History* (Oxford University Press, Oxford, 2018) 41–5.

¹² Waltz (n 7) 69.

¹³ Ibid 117.

¹⁴ B Schmidt, *The Political Discourse of Anarchy* (State University of New York Press, New York, NY, 1998) 15 (noting that ‘today anarchy is the most important theoretical concept in the field ... This theme of anarchy is not an external category of historical description, but an idea that has served as a connecting discursive thread throughout the field’s evolution.’).

¹⁵ J Donnelly, ‘The Discourse of Anarchy in IR’ (2015) 7 *International Theory* 393, 401–2.

¹⁶ A Cassese, *International Law* (2nd edn, Oxford University Press, Oxford, 2005) 5 ([‘t]he relations between the States comprising the international community remain largely *horizontal*. No *vertical* structure has as yet crystallized’) (original emphasis).

¹⁷ D Lake, ‘Theory is Dead, Long Live Theory: The End of the Great Debates and the Rise of Eclecticism in International Relations’ (2013) 19 *European Journal of International Relations* 567.

lawyers have focused on describing, criticising, and developing the doctrinal content of the field.¹⁸ This abdication in favour of international relations specialists of theorising about international politics is surprising given the contributions of philosopher-lawyers such as Grotius, Pufendorf, Wolff, Vattel, Oppenheim and Schwarzenberger, to discussions about the nature of the international system. Therefore, in addition to examining what Richard Ashley called ‘the anarchy *problématique*’ that dominates international relations,¹⁹ this article hopes to highlight to international lawyers the importance of theorising about the international system to generate better understandings of the political context within which international law operates.

This article interrogates the concept of ‘ordering principles’ and challenges the designation of anarchy as the ordering principle of the international system. It also questions established definitions of the term ‘international system’ that are often depicted as anarchic. This article proposes an alternative theoretical construct – the Constitutive Regime of the International System – that functions as the ordering principles of the international system, which determines its structure and establishes the parameters within which the units of the system interact.

An ‘ordering principle’ determines ‘the arrangement of the parts of the system’.²⁰ It is an ‘organizational concept’ that establishes the pattern according to which the units within a system are juxtaposed and combined.²¹ Anarchy, however, does not and cannot perform that function. In fact, anarchy is not a *principle* at all.²² Rather, anarchy is a descriptor that denotes the absence of a central authority that monopolises law-making, law enforcement, and dispute resolution in the international system. To Waltz and most scholars of international relations and international law, ‘the parts of international-political systems stand in relations of coordination. Formally, each is the equal of all others.’²³ This means that the parts of the system, i.e., the states inhabiting the system, are juridically

¹⁸ AC Arend, *Legal Rules and International Society* (Oxford University Press, Oxford, 1999) 42 (works on international law ‘immediately delve into the international legislative process without first taking account of the nature of the international system itself’).

¹⁹ R Ashley, ‘Untying the Sovereign State: A Double Reading of the Anarchy Problematic’ (1988) 17 *Millennium: Journal of International Studies* 227.

²⁰ Waltz (n 7) 88.

²¹ *Ibid* 89.

²² A principle is ‘a basic rule, law, or doctrine; esp., one of the fundamental tenets of a system’. B Garner (ed), *Black’s Law Dictionary* (10th edn, Thomson West, 2014) 1386.

²³ This is distinguished from the hierarchical relations of super- and sub-ordination that, according to Waltz, are the hallmark of domestic political systems. Waltz (n 7) 88.

equal and, therefore, arranged horizontally. Anarchy, however, cannot be the source of either the equality of states or their horizontal alignment. It is tautological to posit that the origin of the horizontality of the system and the formal equality of states, and thus, the reason that the international system is anarchic, is anarchy itself. The horizontal distribution of authority, which generates the anarchic structure of the system, must, therefore, result from some deeper, broader norm or principle.

Definitions of the 'international system' that is described as being anarchic are also fundamentally flawed. International relations scholars from various theoretical traditions have developed strikingly similar and equally inadequate definitions of the international system. To Waltz, 'international-political systems, like economic markets, are formed by the coercion of self-regarding units ... No state intends to participate in the formation of a structure by which it and others will be constrained. International political-systems, like economic markets, are individualist in origin, spontaneously generated, and unintended.'²⁴ Hedley Bull, a leader of the English School of International Relations and a critic of neorealism,²⁵ similarly describes the international system as being created when 'two or more states have sufficient contact between them, and have sufficient impact on one another's decisions, to cause them to behave – at least in some measure – as parts of a whole'.²⁶ Recent definitions of the international system that recognise the role of non-state actors also assume that systems are spontaneously created by combining previously separate units: 'taken collectively, states and non-state actors co-existing and interacting at any point in history form an international system'.²⁷

These definitions of the international system are incomplete and intellectually anemic. The existence of the states (and/or non-state actors) that constitute the system is simply assumed; the designation of states (and/or non-state actors) as the constituent units of the system is similarly accepted as a given; there is no explanation for why interactions between states, but not other types of actors, count towards the creation of a system; and the nature and intensity of the interactions that are required to create the system are also undefined.²⁸ Moreover, describing the system

²⁴ Ibid 91.

²⁵ S Hoffman, 'Hedley Bull and His Contribution to International Relations' (1986) 62 *International Affairs* 179.

²⁶ H Bull, *The Anarchical Society* (Columbia University Press, New York, NY, 1977) 9–10.

²⁷ J Grieco, J Ikenberry and M Mastanduno, *Introduction to International Relations* (Palgrave, London, 2015) 10.

²⁸ Barry Buzan has theorised about the type and intensity of contacts among political units that justify describing these units as constituting a system. B Buzan, 'From International System to International Society: Structural Realism and Regime Theory Meet the English School' (1993) 47 *International Organization* 327.

as ‘anarchic’ does not identify the origin of the juridical equality of states, which generates the anarchic nature of the system. This is especially perplexing in light of the differences in the capabilities of states. Why the power differentials between states do not upend the equality of states and overturn the anarchic structure of the system is left unconsidered.²⁹

In short, anarchy cannot, as some scholars describe it, be the ‘deep structure’ of the system.³⁰ Nor can other structural forms, such as hierarchy and heterarchy that scholars have proposed as alternatives to anarchy,³¹ serve as the ordering principles of the system. Like anarchy, these terms are descriptive labels that express either the centralisation of authority – i.e. hierarchy, or, the uneven distribution of authority among entities that are neither super- nor sub-ordinate to each other – i.e. heterarchy. In either case, the anarchic, hierarchic, or heterarchic arrangement of the parts of a system must emanate from elsewhere.

The answer, this article posits, is that the international system is predicated on a set of intersubjective assumptions that provide the ordering principles of the system and that constitute its ‘deep structure’. I call these assumptions the Constitutive Regime of the International System. This regime is composed of three elements. The first is the *principle of differentiation*, which identifies the constituent units of the system – i.e. the actors authorised to engage in international affairs, and determines the distribution of authority between those units. By determining the distribution of authority, the principle of differentiation generates the structure of the system. If authority is decentralised and the units are considered co-equals, the system is anarchic, but if authority is concentrated with some actors that are entitled to dominate other actors, the system becomes hierarchic or imperial, while if authority is shared and multilayered the system becomes heterarchic. The principle of differentiation could also generate systems that exhibit combinations of these patterns of authority. The second component is the *theory of world order*, which is a world view that prescribes principles and policies that are considered necessary for maintaining order in the system and that determine the parameters governing the interactions of the units operating within the system. The third component

²⁹ Curiously, Waltz recognises that ‘although states are like units functionally, they differ vastly in their capabilities’, but then does not explain why these differences in capabilities have not been transformed into system-wide authority. See Waltz (n 7) 88.

³⁰ JG Ruggie, ‘Review: Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis’ (1983) 35 *World Politics* 261, 281.

³¹ D Lake, *Hierarchy in International Relations* (Cornell University Press, New York, NY, 2009) is an example of the use of hierarchy as an ordering principle, while Jack Donnelly, ‘Rethinking Political Structures: From Ordering Principles to Vertical Differentiation – and Beyond’ (2009) 1 *International Theory* 49, proposes using heterarchy as an ordering principle.

is the *secondary rules of international law*, which are the rules and processes of law-making and law enforcement in the international system. The Constitutive Regime, to borrow Stanley Hoffmann's phrase, is the 'law of the political framework'.³² It is the normative foundation that structures the system and establishes the ground rules for interaction between its members.

Before proceeding, it is necessary to outline the intellectual ambitions of this article. In response to criticism that the *Theory of International Politics* failed to explain a wide range of events in international affairs, Kenneth Waltz clarified that his objective was to identify 'a small number of big and important things' that shape state behaviour.³³ The Constitutive Regime of the International System is not dissimilar. It is not a theory of everything. It does not explain the content of every rule of international law, or the structure of every international institution, or every event in international politics. It is, however, 'one big thing that explains a small number of important things'. The Constitutive Regime is an heuristic instrument that explains the structure of the international system. It provides an account of how the structure of the international system is determined by intersubjective assumptions that allocate authority between the constituent units of the system. It shows that the structure of the international system is not static, but a historically contingent construct that is determined by deeper intersubjective assumptions.³⁴ The Constitutive Regime is also an instrument of systematisation. It uncovers the background world view that shapes and justifies the rules, institutions, and practices of international politics. It shows that underlying these rules, institutions, and practices that often appear unrelated and fragmented are coherent (or, at times, competing) world views. The Constitutive Regime, therefore, functions like DNA; it embodies the genetic code of the international system.

The Constitutive Regime is not, however, a *normative theory* of the international system.³⁵ It does not espouse specific substantive values nor does it advocate a preferred vision of world order or any particular

³² S Hoffmann, 'International Systems and International Law' (1961) 14 *World Politics* 205, 212.

³³ K Waltz, 'Reflections on Theory of International Politics' in R Keohane (ed), *Neorealism and Its Critics* (Columbia University Press, New York, NY, 1986) 322, 329.

³⁴ Ashley (n 19) 229 (anarchy is 'not as a necessary condition that the realistic conduct of politics must take to be beyond question, but as an arbitrary political construction that is always in the process of being imposed').

³⁵ A normative theory, as Mervyn Frost explains, asks 'one central question: "What in general is a *good reason* for action by or with regard to states?"' (original emphasis). In other words, a normative theory problematises the *ethical justifications* for state (or non-state) policy. See M Frost, *Towards a Normative Theory of International Relations* (Cambridge University Press, Cambridge, 1986) 86. This article neither asks that question nor does it posit ethical justifications for policy.

conception of justice. It is an ethically neutral construct. It is flexible enough to encompass systems as diverse as the hierarchic Sino-centric system of the seventeenth century,³⁶ Napoleon's revolutionary, republican, and imperial systems, and the post-Napoleonic reactionary system,³⁷ and the post-World War II Liberal World Order. The Constitutive Regime identifies and describes the ordering principles of international systems without passing normative judgment on those principles. This is because a morally pernicious system predicated on racialised or colonial principles of differentiation or that operates on the bases of an ethically reprehensible world view is no less 'systemic' than a morally laudable system.

II. Of systems, structures and constitutions: Surveying the scholarly terrain

The claim that the international system operates on the bases of foundational or constitutive norms is not entirely novel. Therefore, it is necessary to highlight how this article contributes to, builds on, and differs from scholarship that has investigated the normative foundations of the international system. After all, in proposing the Constitutive Regime of the International System, my intention is not to contribute to the conceptual congestion that often afflicts international law and international relations scholarship, but to offer a theoretical construct that synthesises and simplifies existing scholarship and introduces unexplored elements of the normative substructure of the international system.

This article builds on two core contributions of constructivist scholarship. The first is the claim that the structure within which international affairs occurs is the product of shared meanings and social understandings, while the second is the importance of problematising the constitutive, as opposed to the causal, impact of rules and norms in international affairs.³⁸ Constructivists, however, generally accept the neorealist presumption of anarchy as the ordering principle of the international system;³⁹ a

³⁶ See E Ringmar, 'Performing International Systems: Two East-Asian Alternatives to the Westphalian Order' (2012) 66 *International Organization* 1.

³⁷ See P Schroeder, 'The 19th-Century International System: Changes in Structure' (1986) 39 *World Politics* 1.

³⁸ A Wendt, 'On Constitution and Causation in International Relations' (1998) 24 *Review of International Studies* 101 (constitutive theories 'account for the properties of things by reference to the structure in virtue of which they exist'); A Wendt, 'Anarchy Is What States Make of It: The Social Construction of Power Politics' (1992) 46 *International Organization* 391, 397 ('it is collective meanings that constitute the structures which organize our actions').

³⁹ A Beers Sampson, 'Tropical Anarchy: Waltz, Wendt, and the Way We Imagine International Politics' (2002) 27 *Alternatives: Global, Local, Political* 439 (on their acceptance of anarchy as an ordering principle, 'Waltz and Wendt present flip sides of the same coin').

proposition that I reject. Where constructivists diverge from realists on anarchy is in their powerful and persuasive critique of the realist claim that ‘international anarchy is the principal force shaping the motives and actions of states’.⁴⁰ Instead, Alexander Wendt argues that ‘political culture is the most fundamental fact about the structure of an international system, giving meaning to power and content to interests, and thus the thing we need most to know to explain a “small number of big and important things”’.⁴¹ I disagree. Before identifying the prevalent ‘political culture’ among the units of an anarchic system, it is necessary to determine why those particular units are the principal actors of the system whose culture and preferences matter and to trace how the allocation of authority among those units created an anarchic (or hierarchic or heterarchic, etc.) system in the first place. These are the ‘most fundamental fact(s)’ about the international system that the Constitutive Regime of the International System embodies.

This article is also influenced by the English School of International Studies which, as Andrew Hurrell explains, generated a large body of scholarship based on the insight that ‘central to the “system” is a historically created, and evolving, structure of common understandings, rules, norms, and mutual expectations’.⁴² English School theorists have not, however, contested the neorealist assumption that anarchy is the fundamental structural feature of the system. Indeed, the English School’s canonical tome, Hedley Bull’s *magnum opus*, is titled *The Anarchical Society*. Instead, the ‘central motif’ of the English School is the claim that, despite its anarchic structure, order is maintained in the system because its units are organised into what has been alternately called the ‘society of states’, the ‘international society’, or the ‘system of states’.⁴³ What makes the system a society is, first, that states share ‘common interests in the elementary goals of social life’,⁴⁴ and second, the existence of ‘primary institutions’ (war, diplomacy, the Great Powers, balance of power, international law) that facilitate relations between states and contribute to maintaining order.⁴⁵

⁴⁰ J Grieco, ‘Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism’ (1998) 42 *International Organization* 485, 488.

⁴¹ A Wendt, *Social Theory of International Politics* (Cambridge University Press, Cambridge, 1999) 249.

⁴² A Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford University Press, Oxford, 2007) 16.

⁴³ B Vigezzi, ‘The British Committee and International Society’ in C Navari and D Green (eds), *Guide to the English School in International Studies* (Wiley-Blackwell, Chichester, 2014) 37, 43.

⁴⁴ Bull (n 26) 67.

⁴⁵ L Schouenborg, ‘The English School and Institutions: British Institutionalists?’ in C Navari and D Green (eds), *Guide to the English School in International Studies* (Wiley-Blackwell, Chichester, 2014) 77, 81.

This article builds on these English School insights by taking a theoretical step-back. It argues that preceding any consensus on elementary goals and underlying the primary institutions of society are a set of constitutive norms, which are embodied in the Constitutive Regime of the International System. These norms are essential for the existence and operation of an international society because they identify the members that constitute the society, determine the distribution of authority amongst those members, and establish the law-making and law-enforcement mechanisms. These constitutive norms, in other words, empower actors to engage in international politics, partake in diplomacy, act as great powers, wage war, and make international law. In a sense, therefore, the Constitutive Regime is, to use English School terminology, *the* primary institution of international society. This constitutive dimension of the normative architecture of the international system is largely ignored by the English School. Indeed, Hedley Bull merely alludes, virtually *en passant*, to ‘the complex of rules that states what may be called the fundamental or constitutional normative principle’ which he identified as ‘the idea of a society of states ... as the supreme normative principle of the political organisation of mankind’.⁴⁶ Neither Bull nor later English School theorists expanded on or elaborated this insight. This article addresses this blind spot by constructing a theoretical account of those constitutive norms.

This article also builds on the work of scholars of both international law and international relations who have theorised that the international system is based on constitutive or foundational norms. Some scholars have hinted at the existence of background principles that constitute the normative foundation of the international system without exploring the matter further. For instance, Jeffrey Dunoff and Joel Trachtman noted that certain norms exist at a ‘meta-constitutional’ level that constitute ‘the basic decisions about the fundamental structure of society [which] precede and determine the structuring of legal constitutions’.⁴⁷ Similarly, Jack Donnelly discussed the ‘constitutional structure of an international society’, which is ‘an ensemble of fundamental, society-wide rules, practices, and roles that enable, prohibit, constrain, permit, facilitate, or encourage particular kinds of action and interaction among the participants in international relations’.⁴⁸ Writing in this journal, Thomas Müller used terms similar to

⁴⁶ Bull (n 26) 67–8.

⁴⁷ J Dunoff and J Trachtman, ‘A Functional Approach to International Constitutionalism’ in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge 2009) 18.

⁴⁸ J Donnelly, ‘The Constitutional Structure of International Societies’ (13 July 2006) 5 (unpublished manuscript).

Donnelly's to define 'constitutional structures' as a 'set of fundamental and prioritised principles and rules that serves as a framework for the self-ordering of international societies, or more abstractly relations between polities'.⁴⁹

John Ikenberry further contributed to theorising about constitutional foundations of the international system.⁵⁰ Writing on the political and historical circumstances in which constitutional norms are formed, Ikenberry categorised constitutional norms as a form of *institutional*, as opposed to *substantive*, bargaining. The latter involves bargaining 'over distributive outcomes, where states struggle over the distribution of benefits in specific relationships'.⁵¹ Constitutional norms, however, are not issue-specific agreements. Rather, they are agreements on 'the rules of the game – that is the parameters within which states will compete and settle disputes over specific issues'.⁵²

These definitions and descriptions of norms that are labelled as 'constitutional', 'meta-constitutional', or 'fundamental and prioritised' are underdeveloped. The existence of these norms is presented as a general theoretical insight without expanding on their nature or content, and their functions are described in broad, generic terms. For example, the ability to 'enable, prohibit, constrain, permit, facilitate, or encourage particular kinds of action', which Donnelly attributes to constitutional norms, are functions that apply to all of international law. This fails to distinguish with sufficient precision the distinctive *constitutive* nature of these norms. In particular, these definitions overlook the principal functions that the Constitutive Regime of the International System performs; namely, the identification of the constituent units of the system, the articulation of their basic rights and competences, the elaboration of a theory of world order that governs interactions between them, and the creation of law-making and law-enforcement rules.

Christian Reus-Smit partially remedied these omissions by arguing that the international system is based on 'meta-values defining legitimate statehood and rightful state action'.⁵³ Similarly, Ian Clark suggested that 'core principles of legitimacy *constitute international society* ... legitimacy

⁴⁹ T Müller, 'Global Constitutionalism in Historical Perspective: Towards Refined Tools for International Constitutional Histories' (2014) 3 *Global Constitutionalism* 71, 79.

⁵⁰ See GJ Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton University Press, Princeton, NJ, 2000); GJ Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, Princeton, NJ, 2011).

⁵¹ GJ Ikenberry, *Liberal Order and Imperial Ambition* (Polity Press, London, 2008) 118.

⁵² *Ibid* 119.

⁵³ C Reus-Smit, 'Constitutional Structure of International Society' (1997) 51 *International Organization* 555, 559.

defines both rightful membership and rightful conduct, it specifies the key requirements for international society'.⁵⁴ Writing separately, Alec Stone and Samantha Besson highlighted another function of constitutional norms in the international system which Reus-Smit and Clark do not discuss. According to Stone, '*a constitution denotes a body of metanorms, rules that specify how legal norms are to be produced, applied, and interpreted*'. Metanorms are thus not only higher-order but prior, organic norms – they *constitute* a polity.⁵⁵ Similarly, Besson defined a 'thin constitution' as an 'ensemble of secondary rules that organize the law-making institutions and processes in a given legal order'.⁵⁶

The Constitutive Regime of the International System proposed in this article refines, develops, and expands on these understandings of the constitutional or foundational norms of the international system.

First, as a semantic matter, referring to these norms, as Reus-Smit does, as determining 'legitimate *statehood*' creates the misimpression that states are the only conceivable constituent unit of international systems. Instead, I prefer the theoretically capacious concept of the principle of differentiation as an instrument that could identify states or any other form of organising human communities as the constituent units of the international system.

Second, one weakness of existing discussions of constitutional or foundational norms is that different types of constitutive norms are examined separately. Reus-Smit and Ian Clark, for instance, focused on the norms of 'rightful membership' and 'rightful conduct' in the international system, while Stone and Besson explored the law-making rules of the international system. A main contribution of the concept of the Constitutive Regime is that it combines these constitutive functions into a single, holistic theoretical construct. It highlights the connection, symbiotic relationship, and causal priority between identifying the members of the system and elaborating the rules of international law-making and law enforcement. It also clarifies the role of the theory of world order in shaping the rules of international law-making and law enforcement. As discussed below, I argue that the principle of differentiation, which identifies the constituent units of the international system, and the theory of world order, which prescribes the policies and principles necessary for order within the system, ultimately determine the content of the secondary rules of international law.

⁵⁴ I Clark, *Legitimacy in International Society* (Oxford University Press, Oxford, 2007) 6 (original emphasis).

⁵⁵ A Stone, 'What is a Supranational Constitution? An Essay on International Relations Theory' (1994) 56 *Review of Politics* 441, 444 (original emphasis).

⁵⁶ S Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Dunoff and Trachtman (n 47) 381, 385.

Third, this article highlights the role of ‘authority’ in determining the composition of the international system and shaping its structure. The composition of an international system and its structure are, in essence, determined by decisions about the allocation and distribution of authority. Any international system is populated by various types of actors and entities that engage, to varying degrees, in international affairs. The principle of differentiation, which is one of three components of the Constitutive Regime of the International System, codifies a social consensus regarding the types of actors or entities that are endowed with the authority to engage in international affairs. The principle of differentiation also determines the structure of the international system by codifying a social consensus about the distribution of authority among the units authorised to engage in international affairs. If it adopts a centralised distribution of authority between the actors or entities entitled to engage in international affairs, the system becomes hierarchic, while if it adopts a decentralised distribution of authority, the system becomes anarchic.

Fourth, Donnelly’s claim that the constitutional norms of the international system ‘enable, prohibit, constrain, permit, facilitate, or encourage particular kinds of action and interaction among the participants in international relations’ and Müller’s argument that ‘constitutional structures’ serve as a ‘framework for the self-ordering of international societies’ are unduly broad. All international law and all international regimes can be described in these terms. Therefore, this article argues that, in addition to a principle of differentiation, the Constitutive Regime of the International System includes a theory of world order. This theory of world order regulates state behaviour, not by prescribing or proscribing policy in specific areas, such as security or trade, but by articulating a coherent world view or an overarching ideological vision that provides a justificatory narrative for policies and practices in the various areas of global governance.

Fifth, the Constitutive Regime of the International System provides a theoretical vocabulary to conceptualise the different forms of change in international systems. This article distinguishes between change *within* a system and change *of* a system. The latter occurs when the constituent unit of an international system – which, as discussed below, is the dominant method of organising human societies and controlling territory – is replaced. On the other hand, change *within* a system occurs when the extant theory of world order is challenged or when new units and actors exercise authority within a system without replacing the established constituent units of an international system. This is particularly relevant given current developments in the contemporary international system. Today’s world is witnessing a confluence of phenomena that challenge the structure and operation of the international system. These include the shifting balance of

global power, the appearance of novel law-making processes, and the rise of various actors that exercise different forms of authority within a system that continues to be dominated by territorial states. The Constitutive Regime provides an intellectual tool that conceptualises and explains how these developments affect the structure and operation of the international system.

III. The constitutive regime of the international system

The Constitutive Regime of the International System is *a set of intersubjective assumptions that provide the normative foundation of the international system. It is composed of a principle of differentiation, a theory of world order, and the secondary rules of international law.*⁵⁷ The Constitutive Regime, thus, consists of three components. The first two are the principle of differentiation and the theory of world order, while the third is the secondary rules of international law.

The Constitutive Regime of the International System is analogous to what Mark Tushnet calls ‘constitutional regimes’. These regimes, which govern domestic political systems, are broader than the written Constitution and the corpus of constitutional doctrine and precedent. A constitutional regime consists of ‘a reasonably stable set of institutions through which a nation makes its fundamental decisions over a sustained period, and the principles that guide those decisions’.⁵⁸ In other words, constitutional regimes establish the normative parameters of politics. As Tushnet explains, ‘these institutions and principles provide the structure within which ordinary political contention occurs’.⁵⁹

Like a domestic constitutional regime, the Constitutive Regime of the International System provides the normative framework within which international politics is exercised by embodying elementary assumptions about the structure of the international system. Unlike Tushnet, however, I employ the term ‘*constitutive*’ as opposed to ‘*constitutional*’ to describe this regime. This terminological choice is driven, first, by a recognition of the difficulty of defining terms like constitution, constitutional, constitutionalism and constitutionalisation with clarity and concision,⁶⁰ and second, it

⁵⁷ This part draws on and develops the claims made in the following article: MS Helal, ‘The Crisis of World Order and the Constitutive Regime of the International System’ (2019) 46 *Florida State University Law Review*.

⁵⁸ M Tushnet, *The New Constitutional Order* (Princeton University Press, Princeton, NJ, 2003) 1. See also M Tushnet, ‘Forward: The New Constitutional Order and the Chastening of Constitutional Aspiration’ (1999) 113 *Harvard Law Review* 29, 31.

⁵⁹ *Ibid* 1.

⁶⁰ C Möllers, ‘Pouvoir Constituant – Constitution – Constitutionalism’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing, 2009) 169 ([t]he ambiguity of the term “constitution” is notorious’).

reflects an appreciation of the normative-weightiness of these terms. Especially when used in the literature on Global Constitutionalism, these terms express a normative agenda that seeks to promote individual autonomy, human rights, and the rule of law in a globalised, interdependent, and institutionally fragmented international system.⁶¹ The Constitutive Regime of the International System, however, is a theoretical construct that makes no such normative prescriptions. Rather, the term ‘constitutive’ is intended to communicate the ethical neutrality of the Constitutive Regime of the International System.⁶²

The term *regime* should be readily recognisable. It is borrowed from international relations Regime Theory, which explains how certain areas of transnational relations, such as trade, security, or environmental protection, are regulated by a set of rules, principles, and decision-making procedures.⁶³ A Constitutive Regime functions like a regime. It is a set of principles, norms, and rules that are broadly accepted and that perform a governing function. In this case, however, the function of this regime is constitutive not regulative, and its scope is systemic not issue-specific.⁶⁴

The Constitutive Regime is logically antecedent to the international system.⁶⁵ Without background norms that identify the members of the system, determine their rights and competences, and establish the mechanisms of international law-making, any examination of the system would be incomplete and incomprehensible. In other words, underlying the flags,

⁶¹ M Kumm *et al.*, ‘Editorial: How Large Is the World of Global Constitutionalism?’ (2014) 3 *Global Constitutionalism* (2014) 1, 3 (explaining that the ‘trinitarian mantra of the constitutionalist faith’ is to reorient international law towards a ‘commitment to human rights, democracy, and the rule of law’).

⁶² The Constitutive Regime is not, therefore, a *constitutive theory* or a *normative theory* as the term is used by some political theorists to mean a moral narrative that promotes a particular approach to governing the international system that can be used to justify or critique specific policies or practices in international relations. See A O’Loughlin, *Overcoming Poststructuralism* (Palgrave MacMillan, Basingstoke, 2014) 72–89.

⁶³ S Krasner (ed), *International Regimes* (Cornell University Press, New York, NY, 1983) 2.

⁶⁴ A general theme underlying the concept of the Constitutive Regime proposed here is the distinction between regulatory and constitutive rules, which is associated with John Searle. See B Smith (ed), *John Searle* (Cambridge University Press, Cambridge, 2003). As Searle and others explained, regulatory rules take the form of prescriptions or proscriptions, while constitutive rules define identities and roles, assign authority, and empower actors. See C Cherry, ‘Regulative Rules and Constitutive Rules’ (1973) 23 *The Philosophical Quarterly* 301. Regulative rules have been the subject of intense study by theorists of international law and international relations, while constitutive rules have received relatively lesser attention. This is a theoretical blind spot that this article seeks to address.

⁶⁵ Dunoff and Trachtman (n 47) 18 (the ‘basic decisions about the fundamental structure of society precede and determine the structure of legal constitutions’).

anthems, embassies, and the pomp and pageantry of statehood, is an intersubjective assumption that designates states – as opposed to empires, tribes, the Catholic Church, the Islamic *Ummah*, or some other form of organising human societies – as the constituent units of the international system. It is the Constitutive Regime of the International System that endows Germany, Gambia, and Georgia, but not Google, Greenpeace or the US State of Georgia, with the authority to establish embassies, issue passports, fly ensigns on airplanes and ships, wage war, make peace, achieve détente and maintain entente, and practice the balance of power. Moreover, the elementary rule that international law emanates from state consent, is merely an expression of the intersubjective assumption that states, and not, for instance, international organisations, NGOs, corporations, or individuals, are the primary lawmakers of the international system and that their consent is necessary for the creation of valid rules of international law.

Constitutive Regimes are creations of Great Powers. Throughout history, every power that succeeded in establishing hegemony over an international system has configured the basic norms that govern that system – i.e. the Constitutive Regime of that system – in a manner that served the values and interests of that hegemonic power.⁶⁶ Therefore, while every international system is predicated on a Constitutive Regime, the normative content and ethical orientation of Constitutive Regimes will vary depending on the interests and values of the Great Powers of that particular system. The concept of the Constitutive Regime, therefore, is purely functional.⁶⁷ Once its content is articulated by the Great Powers and accepted, either by acquiescence or coercion, by the other actors in the system, it performs the function of constituting the international system and becomes the dominant approach to governing the system.

Constitutive Regimes are not static constructs. As the balance of power shifts and as new participants engage in international affairs, the content of the Constitutive Regime is revisited to reflect new realities in international politics. New actors and new entities periodically emerge and challenge

⁶⁶ R Kagan, *The World America Made* (Vintage Books, New York, NY, 2012) 5 ('[e]very international order in history has reflected the beliefs and interests of its strongest powers').

⁶⁷ Jeffrey Dunoff and Joel Trachtman highlighted the utility of a functionalist approach to global constitutionalism, which 'has the virtue of directing attention to the appropriate inquiry: the purposes that international constitutional norms are intended to serve' (n 47) 10. Dunoff and Trachtman identified three functions of constitutional norms: (1) enabling the formation of international law, (2) constraining the formation of international law, and (3) filling gaps in domestic constitutional law. The functions of the Constitutive Regime proposed here are significantly broader. It is not limited to providing norms for the creation and operation of international law. Rather, it provides a foundation for the entire international system, including international law.

the established configuration of the international system. As these actors and entities acquire more power and exercise more influence, they could gradually be accepted as centres of legitimate authority in the international system thereby reconfiguring its structure. International organisations, corporations, NGOs, actors engaged in ‘private ordering’,⁶⁸ global governance networks,⁶⁹ and even terrorist organisations like ISIS,⁷⁰ all, to varying degrees, challenged the state-centric Constitutive Regime of the twentieth century. Eventually, some of these actors were endowed with different forms and degrees of authority to participate in an international system in which states remain the primary actors.

The next three sections define and discuss the three components of the Constitutive Regime of the International System.

The principle of differentiation

International politics is often imagined as a ceaseless competition for power.⁷¹ That is not entirely inaccurate. Before the pursuit of power can commence, however, the actors that are engaged in power politics must be identified. As John Ruggie presciently notes, this involves determining who is the ‘constitutive unit of the new collective political order. The issue here is not who has how much power, but who could be designated as a power.’⁷² That is the function of the principle of differentiation.⁷³ It determines *who* the members of the system are, *how* these units qualify for membership, and *what* rights and competences are entailed by virtue of membership in the system.

⁶⁸ Private ordering is the exercise of regulatory authority by non-governmental entities. See SL Schwarcz, ‘Private Ordering’ (2002) 97 *Northwestern University Law Review* 319.

⁶⁹ See A-M Slaughter, ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’ (2003) 24 *Michigan Journal of International Law* 1041.

⁷⁰ O Hathaway and S Shapiro, *The Internationalists* (Simon & Schuster, New York, NY, 2017) 413 (arguing that ISIS ‘is committed to nothing less than the modification of the fundamental nature of the world order’).

⁷¹ See J Donnelly, *Realism and International Relations* (Cambridge University Press, Cambridge 2000) 48–50.

⁷² J Ruggie, *Constructing the World Polity* (Routledge, New York, NY, 2002) 188 (emphasis in original).

⁷³ Differentiation is a theory of systems’ structure. It was developed by sociologists as a theoretical tool to identify and classify different forms of social organisation and to analyse how the structure of authority in human societies evolves. See J Alexander and P Colomy (eds), *Differentiation Theory and Social Change* (Columbia University Press, New York, NY, 1990); N Luhmann, ‘Globalization or World Society? How to Conceive of Modern Society’ (1997) 7 *International Review of Sociology* 67, 69. International relations scholars use differentiation theory as a heuristic instrument to describe the composition and structure of the international system and to analyse how its composition and structure change over time and space. See B Buzan and M Albert, ‘Differentiation: A Sociological Approach to International Relations Theory’ (2010) 16 *European Journal of International Relations* 315, 318.

The principle of differentiation fulfils this function by determining the distribution of authority in the international system.⁷⁴ It identifies the units that are endowed with the authority to participate in international affairs and establishes the extent of that authority. Accordingly, the principle of differentiation determines the structure of the system. If authority is decentralised and divided equally, the system is anarchic. If, on the other hand, authority is centralised and certain actors are endowed with the right to subordinate other actors, the system becomes hierarchic or imperial.⁷⁵ If, however, the system is composed of, not only many actors, but multiple *forms* of actors that are not subordinate to each other and that exercise different types and degrees of authority, the system becomes heterarchic.⁷⁶ In short, anarchy, hierarchy, heterarchy, or whatever other typology is employed to describe the structure of the international system, is generated by the principle of differentiation which establishes the distribution of authority in the system.⁷⁷

The principle of differentiation could also generate a system combining multiple structural forms. Europe of the Middle Ages, for instance, has long been recognised as an international system composed of multiple, competing structural forms.⁷⁸ The current international system also exhibits elements of anarchy, hierarchy, and heterarchy. Regardless of size or strength, the international system operates on the basis of the juridical

⁷⁴ The meaning of ‘authority’ is the subject of a voluminous literature spanning several disciplines. I will not attempt to define authority here, but suffice it to say that I use it to mean the legitimate and recognised right of individuals or political actors to rule over other individuals or political actors. See generally J Hall, ‘Authority and the Law’ (1958) 1 *NOMOS* 58.

⁷⁵ A Motyl, *Revolutions, Nations, Empires: Conceptual Limits and Theoretical Possibilities* (Columbia University Press, New York, NY, 1999) 126 (an imperial or hierarchical systems are ‘structurally centralized political systems within which core states and elites dominate peripheral societies’).

⁷⁶ S Khagram, ‘Possible Future Architectures of Global Governance: A Transnational Perspective/Prospective’ (2006) 12 *Global Governance* 97, 101 (heterarchy is ‘a world of multiple types, forms, and levels of authoritative political organizations and units and various types and levels of governance’).

⁷⁷ This argument challenges an assumption shared by some international relations scholars that, as Ian Hurd writes, ‘the traditional understanding of anarchy in international relations is the absence of “legitimate authority”’. This assumption leads him to assert that ‘to the extent that a state accepts some international rule or body as legitimate, that rule or body becomes an “authority”: and the characterisation of the international system as an anarchy is unsustainable’. I Hurd, ‘Legitimacy and Authority in International Politics’ (1999) 53 *International Organization* 379, 381. An anarchic realm is not devoid of authority. Rather, it is a system in which authority is decentralised and distributed evenly among co-equal units. Therefore, the determinant of the structure of an international system is not the presence or absence of authority, but the distribution of authority among the units inhabiting the system.

⁷⁸ P Halden, ‘Heteronymous Politics beyond Anarchy and Hierarchy: The Multiplication of Forms of Rule 750–1300’ (2017) 13 *Journal of International Political Theory* 266, 278.

equality of all states, which is a relatively recent innovation of the post-colonial era.⁷⁹ In other words, formally, anarchy prevails between states, which are the principal members of the international system. Other actors, such as international organisations are subordinate to states. The UN, AU, EU, OAS, OSCE and the other international organisations that populate the international system are creations of states, they are endowed with legal personality by states, and are granted the right to exercise varying degrees of authority by states.⁸⁰ The relationship between international organisations and states, therefore, is hierarchic. In parallel, heterarchic relations have emerged in recent years as a range of non-state and hybrid actors, such as private ordering entities, NGOs, and networks of experts and bureaucrats,⁸¹ have acquired and exercised increasing authority that is not directly delegated from states or any other super-ordinate actors.⁸²

Whatever the structure of the international system, a particular type of unit will constitute the principal participant in the system. The identity, nature, and authority of those units, which are the constitutive units of the international system, is expressed by the principle of differentiation. The constituent unit of an international system will be the dominant ‘conflict group’ of that particular historical era.⁸³ Conflict groups are modes of organising human society.⁸⁴ They are collectivities, such as tribes, clans, racial groups, religions, states, kingdoms or empires that establish and exercise political authority over individuals and territory. These collectivities are dubbed ‘conflict’ groups because human beings are loyal to these groups, organise their lives around membership in these groups, and are prepared to fight and die for these groups. As patently apparent from the historical record, the type of conflict groups that constitute

⁷⁹ See B Roth, *Sovereign Equality and Moral Disagreement* (Oxford University Press, Oxford, 2011) 55.

⁸⁰ J Klabbers, *Introduction to International Organizations Law* (Cambridge University Press, Cambridge 2015) 46 (discussing the ‘will theory’, which posits that ‘it is the will of the founders of the organization which decides on the organizations’ legal personality. Thus, if the founders intend to endow their creation with personality under international law, then such will be the case’).

⁸¹ For a typology of the diverse range of actors engaged in the current international system, see E Benvenisti, *The Law of Global Governance* (Hague Academy of International Law, The Hague, 2014).

⁸² See R Baumann and K Dingwerth, ‘Global Governance vs Empire: Why World Order Moves towards Heterarchy and Hierarchy’ (2015) 18 *Journal of International Relations and Development* 104.

⁸³ See R Dahrendorf, ‘Toward a Theory of Social Conflict’ (1958) 2 *Journal of Conflict Resolution* 170.

⁸⁴ Similar to the concept of ‘conflict groups,’ Jack Donnelly proposed the term ‘terminal polities’ to refer to ‘the most extensive standard political units in a system’ (n 31) 73.

international systems is variable.⁸⁵ A single international system may also be composed of multiple forms of conflict groups that exercise various degrees and different forms of authority.⁸⁶ Whatever their form, number, or nature of their authority, the signal characteristic of conflict groups is that they establish and exercise the authority to govern a human collectivity that inhabits a territorial space.⁸⁷ That authority need not be exclusive or complete; it could be shared among multiple layers and actors and various centers of authority that are functionally differentiated.⁸⁸ Ultimately, however, the dominant conflict groups that constitute an international system will represent a political arrangement that exercises authority over individuals occupying a territorial locale.⁸⁹

The emergence of a conflict group and its ascendance as the dominant mode of organising human society is rarely peaceful. In this process, which often occurs over an extended period, pre-existing modes of organising human society are challenged and dismantled, often by force. The history of statehood is a testament to the physical coercion and ideational compulsion that accompanies the creation of a conflict group and its consolidation of power.⁹⁰ As a particular type of conflict group amasses greater power over

⁸⁵ See B Buzan and R Little, *International Systems in World History* (Oxford University Press, Oxford, 2000).

⁸⁶ Medieval Europe with its 'plurality of hierarchical bonds' is the most cited example of a system composed of multiple actors and overlapping centres of authority. See J Agnew, 'The Territoriality Trap: The Geographical Assumptions of International Relations Theory' (1994) 1 *Review of International Political Economy* 53, 60.

⁸⁷ As Mervyn Frost explains:

[C]onsider the following different types of basic political arrangements: a nomadic tribe, a dynasty, a republic, a kingdom, an empire, a federation, a confederation, a communist society, a socialist state. (The list could easily be extended). Any of the above mentioned social orders, if it is to be an order at all ... must provide ways of coping with violence, contract and property. The precise way in which the different social arrangements deal with these common concerns will obviously vary, but what is not open to doubt is that they must provide *some* solution to the problems mentioned.

M Frost, *Ethics in International Relations* (Cambridge University Press, Cambridge, 1996) 116.

⁸⁸ See Ruggie (n 30).

⁸⁹ As Alexander Murphy argues, 'territory is so important to political governance in part because it provides a locus for the exercise of political authority over a range of interests and initiatives ... Political authority can be exerted over sets of issues or institutions, but it is difficult to construct an enduring system without a territorial base.' A Murphy, 'The Sovereign State System as Political Territorial Ideal: Historical and Contemporary Considerations' in T Biersteker and C Weber (eds), *State Sovereignty as a Social Construct* (Cambridge University Press, Cambridge, 1996) 81, 110.

⁹⁰ See K Dyson, *The State Tradition in Western Europe* (ECPR Press, Oxford, 2009) 29–30.

other types of conflict groups, the most powerful of these ascendant conflict groups will formulate the principle of differentiation that will govern the international system. These leading powers will design the principle of differentiation in their own image, thereby legitimising their new-found power and securing their status as the principal participants in international affairs, and denying their competitors the ability to legitimately engage in international relations.⁹¹ The principle of differentiation, in other words, ratifies the realities of power. It consecrates the victory of a particular *type* of conflict group and legitimises its position as the dominant mode of organising human society.⁹²

The principle of differentiation also furnishes the justification for exclusion, subordination, or even oppression within an international system. Because it identifies the constituent units of an international system, the principle of differentiation creates insiders and outsiders.⁹³ The former are those units that fit the model designed by the dominant conflict groups. These insiders are accepted as full members of the system and are endowed with the rights and capacities appertaining thereto. The outsiders, on the other hand, are different types of conflict groups that do not meet the prerequisites of membership in the system, and accordingly, are denied the rights and capacities enjoyed by the constituent units of the system. Conflict groups that do not qualify for membership of an international system may, especially if they possess sufficient material capabilities, retain their independence and avoid being incorporated or subordinated into the system. Those conflict groups may even constitute a system that exists separately from other systems. Indeed, history provides numerous examples of parallel coexisting regional systems composed of a wide variety of conflict groups.⁹⁴ On the other hand, as the history of colonialism and the expansion of the European international system demonstrate, conflict groups that are brought into an

⁹¹ See J Donnelly, 'Differentiation: Type and Dimension' in M Albert, B Buzan and M Zürn (eds), *Bringing Sociology to International Relations: World Politics as Differentiation Theory* (Cambridge University Press, Cambridge, 2013) 97–9.

⁹² As James Brierly recognised, 'the fundamental rights of states were born of the needs of a cause, rather than of reflection on the nature of the juridical relations of states. They were invented because the post-Renaissance prince, himself a successful rebel against the claims of pope and emperor, sought in a new juridical order a system to consecrate his hardly won independence.' J Brierly, *The Basis of Obligation in International Law* (*Lauterpacht and Waldock* (eds) 1958) 4.

⁹³ T Aalberts, 'Rethinking the Principle of (Sovereign) Equality as a Standard of Civilisation' (2014) 42 *Millennium: Journal of International Studies* 767, 769 ('[T]he politics of "legal subjecthood" have a productive power through inclusion and exclusion into the international system').

⁹⁴ B Buzan and R Little, 'The Idea of "International System": Theory Meets History' (1994) 15 *Revue Internationale de Science Politique* 231, 237–41.

international system, but that are denied full membership of the system, become shunned as illegitimate forms of political authority that may be conquered, controlled, governed, or simply allowed to exist beyond the pale of the international system.⁹⁵

As the element of the Constitutive Regime that determines the membership of the international system and the distribution of authority within the system, the principle of differentiation includes two axes of systemic change: change *of* a system, and change *within* a system.⁹⁶ The former – change *of* a system – refers to the transformation of a system that occurs when the dominant form of conflict group is replaced.⁹⁷ Decolonisation is an example of a change *of* a system. It marked the demise of one form of conflict group – Empire – that dominated the international system for several centuries and signalled the rise of the territorial state as the principal mode of organising human societies throughout the world. Decolonisation also restructured the international system: the hierarchic relationships between metropolises and colonies were replaced by an anarchic, horizontal relationship between coequal states. Change *within* a system, on the other hand, occurs when authority is redistributed among the units of the system without challenging the status of the dominant conflict group as the principal unit of the system. The contemporary allocation of different degrees of authority to international organisations and to non-state actors, such as corporations or civil society organisations, is an instance of change *within* a system. As long as states remain the dominant mode of controlling territory and governing human societies, the fundamental state-centric nature of the system remains unchanged and it retains its anarchic form. However, as authority is devolved to non-state actors, the system becomes multi-structural; while inter-state relations remain anarchic, relations between other non-state actors exhibit the features of hierarchy and heterarchy.

The identity of the conflict group chosen as the primary actor in the international system could be codified in a legal instrument or it could be

⁹⁵ W Grewe, *The Epochs of International Law* (Walter de Gruyter, Berlin, 2000) 548 (in the nineteenth century, ‘the application of the law of occupation to territories located outside Europe and inhabited by “savages” was founded on the assumption that “barbarians have no rights as a nation” as John Stuart Mill wrote’).

⁹⁶ This echoes the distinction between ‘changes within the framework of well-established conventions’ and ‘a more fundamental type of change occurs when the practices and constitutive conventions of a social system are altered’. R Koslowski and F Kratochwil, ‘Understanding Change in International Politics: The Soviet Empire’s Demise and the International System’ (1994) 48 *International Organization* 215, 222–3.

⁹⁷ As John Ruggie noted, ‘modes of differentiation are nothing less than the focus of the epochal study of rule’. J Ruggie, ‘Territoriality and Beyond: Problematising Modernity in International Relations’ (1993) 47 *International Organization* 139, 152.

manifested in political practices. Whether enshrined in a legal instrument or displayed in political practice, the principle of differentiation determines which actors or entities are endowed with international legal personality,⁹⁸ thereby identifying who has the right to have rights and the obligation to bear duties under international law.⁹⁹

The 1933 Montevideo Convention on the Rights and Duties of States is a prime example of the legal expression of the principle of differentiation.¹⁰⁰ It stipulates that states are the principal actors in international affairs, outlines the criteria of statehood, and enunciates their basic rights, obligations, and competences. It is logically implausible and historically inaccurate, however, to assume that the Montevideo Convention was the originator of the concept and criteria of statehood or that it established states as the main actor in international affairs. After all, the convention is a treaty that was concluded by states that already existed and enjoyed the full legal competence to contract treaties. It is similarly flawed to assume that the criteria for statehood originated in customary international law and that the Montevideo Convention merely codified pre-existing customary rules. This is because that necessarily presumes the pre-existence of states and presumes that these pre-existing states already enjoyed the capacity to create rules of customary international law, including criteria for statehood. In short, while the definition and criteria of statehood are codified in conventional and customary international law, the content of these rules emanates from pre-existing intersubjective assumptions that identify states as the constituent unit of the international system, establish the prerequisites for statehood, and endow states with legal personality.

The principle of differentiation also articulates the basic rights and obligations of the constituent units of the international system. By virtue of their membership in the system, states, or whichever actors are recognised as the constituent units of the system, enjoy fundamental rights and are bound by basic obligations. The words ‘rights’ and ‘obligations’ are, of course, ubiquitous in international law, which might create the misimpression that the Constitutive Regime of the International System includes the entire corpus of regulatory rules of international law. However, the adjectives ‘basic’ and ‘fundamental’ are intended to indicate that these rights and obligations are not simple regulatory rules that are generated by the normal law-making processes. Indeed, these rights and

⁹⁸ R Portmann, *Legal Personality in International Law* (Cambridge University Press, Cambridge, 2010) 1 (‘Legal personality is a concept ... employed to distinguish between those social entities relevant to the international legal system and those excluded from it.’).

⁹⁹ See J-M Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (Cambridge University Press, Cambridge, 2002) 234.

¹⁰⁰ Convention on the Rights and Duties of States (26 December 1933) 165 L.N.T.S. 19.

obligations precede international law. These rights and obligations are essential characteristics of the constituent units of the international system. They do not emanate from legal instruments; rather, these rights and obligations are inherent to the status of these entities as the constituent units of the system.

To clarify this claim, consider the current state-centric international system. States enjoy certain basic rights and obligations such as the independence of states, the exclusive competence of states in matters falling within their domestic jurisdiction, and the juridical equality of states.¹⁰¹ These rights and obligations are codified in instruments such as the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.¹⁰² These rights and obligations do not, however, owe their existence to these documents. Rather, these rights and obligations are part of the principle of differentiation. They express an intersubjective assumption regarding the nature of statehood and the basic rights and obligations of states that predates the legal instruments in which these rights and obligations are enunciated. Indeed, these basic rights and obligations are corollaries of statehood.¹⁰³ They are an intrinsic part of what it means to be a state and constitute an integral element of the concept of statehood.

The competences of states are similarly defined by the principle of differentiation. For instance, the principle codified in Article 6 of the Vienna Convention on the Law of Treaties (VCLT) that '[e]very State possesses capacity to conclude treaties'¹⁰⁴ is a legal expression of an intersubjective assumption that states, by virtue of their status as the constituent units of the international system, are empowered to participate in international affairs and have the legal capacity to generate international law. This is what James Crawford calls the 'plenary competence' that enables states to 'perform acts, make treaties, and so on, in the international sphere'.¹⁰⁵ This competence is *codified* in international legal instruments, but is not *derived* from these instruments. These competences, like the basic rights and obligations of states, are *a priori* to international law. The Vienna Convention could not have *created* that capacity of states to

¹⁰¹ M Shaw, *International Law* (7th edn, Cambridge University Press, Cambridge, 2014) 153–7.

¹⁰² UN General Assembly Res 2625 (XXV), A/Res/25/2625.

¹⁰³ See D Joyner and M Roscini, 'Is There Any Room for the Doctrine of Fundamental Rights of States in Today's International Law?' (2015) 4 *Cambridge Journal of International & Comparative Law* (2015) 467.

¹⁰⁴ 1969 Vienna Convention on the Law of Treaties, art 6.

¹⁰⁵ J Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2007) 40.

contract treaties, because the Vienna Convention is itself a treaty, which means that the capacity of states to contract treaties must have predated the Vienna Convention. Nor could the origin of the capacity to contract treaties be a rule of customary international law that was simply codified in the Vienna Convention. This is because, as a matter of logical necessity, that customary rule that endowed states with the capacity to contract treaties must be based on an antecedent rule that empowered states to create rules of customary international law, including the rule that states may contract treaties. Therefore, the next logical question becomes: what rule of international law bestowed upon states the capacity to create rules of customary international law.¹⁰⁶

The answer, this article posits, is the intersubjective assumptions that are constitutive of the entire international system, including international law. These assumptions are the Constitutive Regime of the International System, which includes the principle of differentiation that identifies the constituent units of the system and outlines the basic rights and competences of these units.

The theory of world order

The principle of differentiation generates ‘a positional picture, a general description of the ordered arrangement of a society written in terms of the placement of the units’.¹⁰⁷ The second component of the Constitutive Regime of the International System, which is the *theory of world order*, sets the parameters of how these units relate to and engage with each other. Without a theory of world order, an international system and the units inhabiting it remain lifeless, motionless. Anarchy, hierarchy, heterarchy, or however else the units of a system are arranged, does not determine how and on what terms these units interact. That is the function of the theory of world order. It is, to use a term coined by Adam Watson, the *raison de système*.¹⁰⁸ It outlines a set of principles and policies that are assumed necessary to maintain order within the system.

Therefore, even an anarchic international system that lacks a world government, is not a normative vacuum. As Laura Sjoberg explains, ‘within a formal anarchical structure of global politics, there are a number of ordering principles – often invisible, often unwritten – that constrain the

¹⁰⁶ This is a ‘validity regress’ which is ‘a series of questions along the lines of: “Why is a norm valid, what is its basis of validity?”’. J Kammerhofer, ‘Hans Kelsen in Today’s International Legal Scholarship’ in J Kammerhofer and J D’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press, Cambridge, 2014) 81, 95.

¹⁰⁷ Waltz (n 7) 99.

¹⁰⁸ A Watson, *The Evolution of International Society* (Routledge, London, 1992) 14.

identities and behaviours of actors as well as the processes of interaction between them'.¹⁰⁹ The theory of world order is the component of Constitutive Regime that embodies these deep substantive values underlying the international system.

The theory of world order is analogous to what Laurence Tribe calls the 'dark matter' of the US Constitution.¹¹⁰ These are political axioms, fundamental postulates, and foundational propositions about the nature of the American republic that underlie the written Constitution and that shape the practice of politics and law in America.¹¹¹ Although they are echoed in the text and structure of the Constitution, in court decisions, and in political parlance, the ultimate source of these principles is a social consensus regarding the basic principles and values of America's body politic.¹¹² The international system operates on the bases of principles that perform a similar function. These principles – which I call a theory of world order – are articulated by the Great Powers of the international system and are assumed to be necessary for preserving stability in the system. These principles are, in essence, a world view; a lens through which the Great Powers understand the world, interpret history, and lay out a normative road map for how international life ought to be managed and governed.¹¹³

The theory of world order is an under-explored element of the normative foundations of the international system. Although some scholars have discussed concepts that approximate what I call the theory of world order, this aspect of the norms that govern the international system and structure the practice of politics within the system has not been the subject of systematic study. One scholar whose early writings indicate a recognition that the international system operates on the basis of norms that correspond to what I call the theory of world order is Henry Kissinger. In *A World*

¹⁰⁹ L Sjoberg, 'The Invisible Structures of Anarchy: Gender, Orders, and Global Politics' (2017) 13 *Journal of International Political Theory* 325, 329.

¹¹⁰ L Tribe, *The Invisible Constitution* (Oxford University Press, Oxford, 2008) 37–8.

¹¹¹ These include precepts such as that the US government is a 'government of the people, by the people, for the people', that it is 'a government of laws, not men', that the US society is 'committed to the rule of law', and that 'no state may secede from the Union'. Ibid 28.

¹¹² These are 'legal norms and principles that form fundamental underlying precepts for our polity – background norms that contribute to and result from the moral development of our community. Public values appeal to conceptions of justice and common good, not to the desires of one person or group.' W Eskridge Jr., 'Public Values in Statutory Interpretation' (1989) 137 *University of Pennsylvania Law Review* 1007, 1008.

¹¹³ M Griffiths, 'Worldviews and IR Theory: Conquest or Coexistence?' in M Griffiths (ed), *International Relations Theory for the Twenty-First Century* (Routledge, New York, NY, 2007) 1 ('A worldview is a broad interpretation of the world and an application to the way in which we judge and evaluate activities and structures that shape the world ... Worldviews contain fundamental assumptions and presuppositions about the constitutive nature of IR').

Restored he posited that a stable system is founded on the balance of power *and* an accepted ‘concept of legitimacy’, which is a political understanding among the Great Powers regarding ‘the nature of workable arrangements and about the permissible aims and methods of foreign policy’.¹¹⁴ Building on Kissinger’s insights, later scholars argued that relations between the constituent units of the international system are governed by widely shared definitions of legitimacy that determine the limits of rightful conduct.¹¹⁵

The theory of world order is similar, but not identical, to this notion of legitimacy. The theory of world order does not merely establish the permissible aims of foreign policy or set the limits of rightful conduct. The theory of world order is normatively denser. It is, as aforementioned, a holistic world view or ideology that formulates substantive policies and principles that are considered essential to maintaining order in an international system. The theory of world order, in other words, determines the normative orientation of the system, it embodies a vision for justice and provides a moral compass to guide the practice of politics. It articulates a ‘master narrative’ that justifies the means and methods of managing and governing the international system.¹¹⁶ The theory of world order, therefore, furnishes the ‘generative grammar of international authority’.¹¹⁷ It provides ideological justification for the rules and institutions of international law; it offers a moral vernacular that legitimises the political practices of the members of the international system, and rationalises the distributive outcomes that result from the operation of the rules, institutions, and policies of the system.

The theory of world order is, therefore, the source of adjectives like *liberal*, *neoliberal*, *illiberal*, *imperialist*, *communist*, *fascist*, *Islamist*, or *Sino-centric* that are used to describe international systems. Indeed, in many historical instances, the distinguishing feature of an international system was not the identity of its constituent units – i.e. whether those systems were composed of tribes, empires, or states – but the values underlying those systems and the policies that were implemented to govern relations between the constituent units. Hence, while Napoleon, Metternich, Lenin, and Hitler, all sought to establish European or worldwide orders, the distinguishing feature of these projects of continental or global hegemony was the world view (whether tyrannical or benevolent) that

¹¹⁴ H Kissinger, *A World Restored* (Houghton Mifflin, New York, NY, 1959).

¹¹⁵ For a review of the literature on legitimacy in international relations, see Clark (n 54) 1–30.

¹¹⁶ GJ Ikenberry, ‘The Plot against American Foreign Policy’ (2017) 96 *Foreign Affairs* 2, 8.

¹¹⁷ Ruggie (n 72) 64 and 66–7.

animated these projects – i.e. their theories of world order.¹¹⁸ Similarly, the designation of the post-World War II international system as a ‘liberal world order’ reflects a theory of world order adopted and propagated by the US that assumed that maintaining systemic order and stability required establishing a rules-based system that operated through multilateral organisations that were open to all states.¹¹⁹

Like the principle of differentiation, the theory of world order is determined by the Great Powers of each historical era. These powerful actors will articulate a theory of world order that reflects their normative commitments and their perceptions regarding the prerequisites of maintaining systemic order and stability. One factor that influences the content of the theory of world order is the domestic governance structure of the Great Powers.¹²⁰

The values that underlie social relations within the Great Powers – in other words, the ‘dark matter,’ ideology, philosophy, or religion animating their domestic polities – will supply the world view according to which the Great Powers will govern the international system. Great Powers, in other words, will seek to construct the international system in their own image. These powers may also articulate a theory of world order that reflects their formative national experiences, their geographic realities, their strategic interests, or the history of their engagement with the international system. As a theoretical construct, the Constitutive Regime of the International System has no predetermined moral orientation. Its normative content will vary depending on the interests and values of the Great Powers.

Also like the principle of differentiation, the theory of world order is an axis of systemic change. Changes in the theory of world order, which is caused either by a realignment of the systemic balance of power or by a shift in the values and interests of the established Great Powers, will lead to a change *within* an international system. Although the composition of a system may remain constant, changes in the theory of world order significantly affect the instruments of policy and the patterns of relations between the units within an international system. For instance, Metternich’s

¹¹⁸ R Gilpin, *War & Change in World Politics* (Cambridge University Press, Cambridge, 1985) 35–7 (‘Rome and Great Britain each created a world order, but the often oppressive rule of *Pax Romana* was in most respects different from the generally liberal rule of *Pax Britannia*. Napoleonic France and Hitlerite Germany gave very different governance to the Europe they each united.’).

¹¹⁹ As John Ruggie wrote in classic phrase: ‘it was less the fact of American *hegemony* that accounts for the explosion of multilateral arrangements than it was the fact of *American* hegemony.’ J Ruggie, ‘Multilateralism: The Anatomy of an Institution’ (1992) 46 *International Organization* 561, 568.

¹²⁰ See Ikenberry (n 50); P Bobbitt, *The Shield of Achilles* (Anchor Books, New York, NY, 2002).

theory of world order that posited that European stability required preserving conservative monarchical rule justified multiple interventions to abort popular uprisings.¹²¹ Similarly, as the influence of the papacy receded and the power of religion as an overarching world view waned in seventeenth century Europe, *raison d'état*, as opposed to religious affiliation, became a principal justification for the policies of states.¹²²

The incentive driving Great Powers to articulate a theory of world order is their desire to transform their preponderant power into legitimate authority. Legitimacy is a valuable commodity in both domestic and international politics.¹²³ All politically dominant actors seek to maintain their supremacy by ensuring that their dominance and exercise of power are perceived as legitimate. This is because controlling a polity solely by coercion is unsustainable. It 'imposes heavy costs on the controllers ... The efficiency advantages of authority probably motivate the commonly observed impulse of the powerful to try to legitimate their power.'¹²⁴ Therefore, like a domestic political elite that justifies its power and privilege by invoking broader moral principles, thereby perpetuating its dominance,¹²⁵ a hegemonic power will articulate a theory of world order that legitimises its leadership of the international system and justifies the policies and practices it implements, thus preserving its hegemony.¹²⁶

The secondary rules of international law

The third component of the Constitutive Regime of the International System is the secondary rules of international law. Legal systems, as HLA Hart wrote, are composed of primary rules of obligation and secondary rules.¹²⁷ The former are prescriptions and proscriptions, while the latter are rules about rules. They 'specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively ascertained'.¹²⁸ Secondary rules, therefore,

¹²¹ See M Jarrett, *The Congress of Vienna and Its Legacy* (I.B. Tauris, London, 2014).

¹²² Watson (n 108) 191 (arguing that '*raison d'état* replaced religion as the determining principle of alliances ... the alliance structures became secularized').

¹²³ D Beetham, *The Legitimation of Power* (MacMillan Education Ltd., London, 1991) 3.

¹²⁴ Hurd (n 77) 388.

¹²⁵ In his seminal work on legitimacy, Max Weber spoke of the 'generally observable need of any power, or even any advantage of life, to justify itself'. M Weber, *Economy and Society*, vol 3, (Bedminster Press, New York, NY, 1968) 953.

¹²⁶ See J Steffek, 'Legitimacy in International Relations: From State Compliance to Citizens Consensus' in A Hurrelmann, S Schneider and J Steffek (eds), *Legitimacy in the Age of Global Politics* (Palgrave MacMillan, Basingstoke, 2007) 175; M Lister, 'The Legitimising Role of Consent in International Law' (2011) 11 *Chicago Journal of International Law* 1, 5.

¹²⁷ HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford, 1997) 94.

¹²⁸ Ibid.

confer law-making authority, establish law-enforcement powers, and institute dispute resolution mechanisms.

Law is a social necessity. The coexistence and interaction of individuals in society, even the most primitive societies, generates a need to devise rules to govern relations among these individuals.¹²⁹ International systems are no different. As independent conflict groups engage in regular contact, it becomes necessary for these conflict groups to articulate rules to manage their manifold relations.¹³⁰ Indeed, as Arthur Nussbaum remarked in his seminal history of international law, the ‘phenomena of [international] law have been conspicuous since the dawn of documentary history, that is, from the fourth millennium B.C.’¹³¹ Obviously, the term ‘international law’ was not known in ancient international systems; that term is a European innovation of eighteenth century vintage. Nonetheless, even if not called ‘international law’, all international systems operated on the bases of rules that regulated relations between their constituent units.¹³² Historians of international law have shown that ancient civilisations, including in Egypt, Mesopotamia, Greece, the Indian subcontinent, and China, engaged in organised relations with allies and rival powers on the bases of a system of legal rules.¹³³ In short, all international systems, whatever the nature of their constituent units, function on the bases of some set of rules however substantively simple, rudimentary in nature, or religious in origin.

Secondary rules are essential for the existence and operation of the rules that regulate relations between the members of the international system. Any set of primary rules requires a set of secondary rules to enable the creation of the primary rules. The secondary rules determine how (and by whom) the primary rules of the system are made, how disputes are settled, and how the rules are enforced and by whom. Like the principle of differentiation and the theory of world order, the secondary rules of international law are designed by the Great Powers of the international system. These powers recognise a particular process as law-creating, agree to some method of dispute resolution, and accept some method of law enforcement. In other words, like HLA Hart’s rule of recognition, the

¹²⁹ A Clapham, *Brierly’s Law of Nations* (7th edn, Oxford University Press, Oxford, 2014) 1.

¹³⁰ C Focarelli, ‘In Quest of Order and Capturing the Complexity of International Law’ (2009) 11 *Journal of the History of International Law* 187, 191.

¹³¹ A Nussbaum, *A Concise History of the Law of Nations* (1st edn, Macmillan Co., New York, NY, 1947) 1.

¹³² H Steiger, ‘From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of International Law’ (2001) 3 *Journal of the History of International Law* 180, 181.

¹³³ W Preiser, ‘History of International Law, Ancient Times to 1648’ in R Bernhardt (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 1995) 722.

secondary rules of international law are a matter of social fact. They are articulated by the leading powers of each historical period and accepted as authoritative by the constituent units of the international system. The foundation of international law, in other words, is the broad acceptance by the constituent units of the international system of the secondary rules of international law. Secondary rules can take an infinite variety of forms.¹³⁴ They can be nothing more than the belief that the edicts of a Pharaoh, Emperor, or Czar shall count as law, or that a breach of a treaty shall be punished by the gods.¹³⁵ However simple or superstitious, the signal feature of the secondary rules of international law is that they provide a mechanism for the ‘conclusive identification of the primary rules’ in the international system.¹³⁶

The secondary rules of international law are ontologically subsequent to the principle of differentiation and the theory of world order. The identity of the lawmakers and the prerogatives of the law-enforcers of the international system are dependent on the principle of differentiation and the theory of world order.¹³⁷ The international system of the early-twentieth century illustrates this determinative relationship between the principle of differentiation and the theory of world order on one side and the secondary sources of international law on the other. Because states are the primary participants and beneficiaries of the international political process, the secondary rules of international law were designed with a heavy state-centric emphasis.¹³⁸ States were the primary authors of treaties, and it was up to states to grant other actors, such as international organisations, the power to contract treaties. The acts of states and the statements of state representatives carried more weight in generating customary international law than the positions and policies of other actors, even those wielding greater material power. The state-centric nature of the principle of differentiation also explains the crucial role of state consent in

¹³⁴ Hart (n 127) 100. (‘The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument’).

¹³⁵ Nussbaum (n 131) 3.

¹³⁶ Hart (n 127) 96.

¹³⁷ D Galligan and M Versteeg, ‘Theoretical Perspectives on the Social and Political Foundations of Constitutions’ in D Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, Cambridge, 2013) 3, 11 (noting that the broad normative commitments of a constitution will ‘permeate other, more substantive provisions concerning the nature and structure of government and institutions, the limits on their powers’).

¹³⁸ S Besson, ‘Theorizing the Sources of International Law’ in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 163, 164.

generating the primary rules of international law. A system composed of co-equal sovereign states that recognise no supreme authority generated the rule that the validity of legal rules is dependent on the consent of those sovereign states.¹³⁹ Thus, the President of Palau, a tiny Pacific island state, enjoys, at least formally, greater law-making authority, than the CEO of the vastly richer WalMart with its over two million employees. This capacity to engage in law-making, which is enjoyed by all states, regardless of power, size, or wealth, is a reflection of a statist principle of differentiation that accords plenary competences to states, and states alone.

The principle of differentiation and the theory of world order also determine the content of the concept of sovereignty, which is the cornerstone of international law.¹⁴⁰ By identifying the constituent units of the system, the Constitutive Regime determines the beneficiaries and bearers of sovereignty, and by articulating theory of world order, it generates the corollary prerogatives and powers of sovereignty. In other words, the Constitutive Regime tells us *who* is sovereign and *what* they can and cannot do with sovereignty. Without these background assumptions that are provided by the Constitutive Regime of the International System, sovereignty remains an inchoate concept; an empty shell.¹⁴¹

IV. Constitutive moments and constitutive crises

The Constitutive Regime of the International System is a living concept. Its content is articulated by the Great Powers of every historical era, but then those powers and units that inhabit a system are continuously constituted and reconstituted by the Constitutive Regime. As the units within the system continue to operate on the bases of the principle of differentiation, theory of world order, and secondary rules of international law underlying the system, the authoritativeness of the Constitutive Regime of that system is reasserted, which in turn, reconfirms the standing, rights, and competences of those units. Simultaneously, the adherence of the constituent units of an international system to the terms of a Constitutive Regime means that its content is constantly being reproduced by the activities of those units.¹⁴² In other words, as constructivist theorists

¹³⁹ R Lesaffer, 'Peace Treaties and the Formation of International Law' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 71, 93.

¹⁴⁰ I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, Oxford, 2008) ('Sovereignty ... represents the basic constitutional doctrine of the law of nations.').

¹⁴¹ C Reus-Smit, 'Constitutional Structure of International Society and the Nature of Fundamental Institutions' (1997) 51 *International Organization* 555, 565.

¹⁴² S Goddard and D Nexon, 'Paradigm Lost? Reassessing Theory of International Politics' 11 *European Journal of International Relations* (2005) 9, 35.

have insisted, the ordering principles of the international system and its constituent units are locked in a relationship of mutual dependence and constant reconstitution.¹⁴³

The success of a particular conflict group or specific power in dictating the content of the Constitutive Regime of the International System never spells the end of history. Every system includes the disenfranchised, the disenfranchised, and the dissatisfied. Every polity includes actors espousing alternative visions and competing world views that challenge the established orthodoxy. At certain historical junctures pressure mounts to revisit the normative foundations of the international system. This pressure may originate from the emergence of a new conflict group that seeks to establish itself as the dominant mode of organising human society. This pressure may also emanate from a shift in the balance of power among existing conflict groups. As the topography of power shifts and as normative winds change, opposition to the dominant Constitutive Regime will gain traction. These are periods of constitutional crises that can lead to change *within* a system or, if the standing of the constituent unit of the system is challenged, that can cause the total change *of* an international system. These are periods when global political contestation is not limited to specific issues or particular conflicts. Rather, the normative foundation of the entire international system becomes a site of contestation.

The contemporary international system is experiencing a period of constitutional crisis. The Constitutive Regime of the current international system was designed by the US in the post-Cold War years. The theory of world order of this Constitutive Regime was based on the Liberal Peace Theory. This theory, which is a mainstay of American foreign policy, is predicated on the presumption that democratic states that are economically interdependent are less likely to wage war against each other. Therefore, to preserve order and prevent war, Liberal Peace Theory prescribes promoting the democratisation of states and the liberalisation and integration of their economies.¹⁴⁴ Accordingly, the principle of differentiation of the post-Cold War Constitutive Regime was configured to identify liberal democratic states as the constituent units of the international system. The legitimacy of states increasingly depended on the democratic credentials and human rights record of their governments.¹⁴⁵ States that failed to

¹⁴³ A Wendt, 'The Agent-Structure Problem in International Relations Theory' (1987) 41 *International Organization* 335, 359.

¹⁴⁴ M Doyle, 'Three Pillars of the Liberal Peace' (2005) 99 *American Political Science Review* (2005) 463.

¹⁴⁵ See T Franck, *The Emerging Right to Democratic Governance* (1992) 86 *American Journal of International Law* (1992) 46. See also J Vidmar, *Democratic Statehood in International Law* (Hart Publishing, Oxford, 2013).

fulfil this standard of legitimate statehood risked losing the privileges of membership in the international system.¹⁴⁶

This Constitutive Regime of the post-Cold War years is currently in crisis. It is being challenged by a tectonic shift in the global balance of power the manifestations of which include China's re-emergence, Russia's resurgence, India's growing prosperity, and the economic success of states like Brazil, South Africa, South Korea and Turkey.¹⁴⁷ These non-Western powers do not adhere to the Liberal Peace Theory. These states espouse a traditional state-centric Westphalian image of the international system and reject attempts to adopt a principle of differentiation and a theory of world order that identifies liberal democratic states as the sole legitimate constituent units of the international system.¹⁴⁸ The Constitutive Regime of the post-Cold War order is also being challenged by the rise of nativist, pseudo-nationalist, and populist parties in Western societies. This populist revolt has demonstrated the depth of the discontent towards the ideas and values embodied in the post-Cold War Constitutive Regime, including free trade, environmental protection and combatting climate change, pro-immigration policies and multiculturalism, and multilateralism. The importance of this ongoing populist backlash is that it has afflicted the very heart of the Western world. Many within the societies that articulated the post-Cold War Constitutive Regime appear to be rejecting the normative foundation of the international system they sponsored and led.

Given the current state of world politics, it is reasonable to predict that the international system will experience an extended constitutional crisis. One of the principal arguments of this article is that determining the content of the Constitutive Regime of the International System is an act of elite engineering. Today's international system, however, is *No One's World*.¹⁴⁹ Power is dispersed to the extent that there is no clear centre of political gravity in the system. In this politically weightless world it is unlikely that any single state or coalition of states will wield sufficient power to wholly determine the content of the Constitutive Regime of the International System. Instead, for the foreseeable future, our world will be governed by a decaying Constitutive Regime that is no longer accepted by either its creators or consumers, but to which no clear constitutive alternative has emerged.

¹⁴⁶ A-M Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* (1995) 504.

¹⁴⁷ M Cox, 'Power Shifts, Economic Change, and the Decline of the West?' (2012) 26 *International Relations* (2012) 369, 371.

¹⁴⁸ See W Burke-White, 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism' (2015) 56 *Harvard International Law Journal* 1.

¹⁴⁹ C Kupchan, *No One's World* (Oxford University Press, Oxford 2012).

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