Placing Normative Power Europe in a Global Context

Antje Wiener

University of Bath

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Author's Address

Antje Wiener
Professor of Politics & International Relations
Department of European Studies & Modern Languages
University of Bath
Bath BA2 7AY
United Kingdom
Tel: +44 (0)1225 38-4147
Fax: +44 (0)1225 38-6099
Email: aw309@bath.ac.uk
http://people.bath.ac.uk/aw309/

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Abstract

The possibilities of international law received a severe blow by the terrorist attacks in 2001 and the ensuing conflicts over the decision to intervene in Iraq. The immediate effect is reflected by institutional and policy changes. The long-term effect consists in changing sets of norms and institutions that have been regulating the interplay between politics and law on the global scale, so far. Both reframe the context of responses to terrorist threats. The article considers the debates on the future of international law and the potential for a normative power Europe as related. It places the concept of 'normative power Europe' in the global context of emerging constitutional quality (section 2), points out the three main theses in the debate on the future of international law (section 3), addresses the conceptual bias of normative power Europe (section 4), and draws conclusions with a view to future research on the cultural validation of norms (section 5).

Keywords: Norms, terrorism, constructivism, international law, culture, community

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[2] This article is the first step towards identifying a new larger research project; it therefore remains predominantly conceptual and can only sketch out forth-following research questions, rather than being able to draw on empirical research results. An earlier version of the article was presented at the editorial workshop for this special issue at Pembroke College, University of Cambridge on 21 April 2007. I would like to thank all participants for comments and am especially indebted to the workshop organisers and editors Geoffrey Edwards and Christoph Meyer. The responsibility for this version is my own.

Placing Normative Power Europe in a Global Context

> "Then came 1989 and all the enthusiasm about the global rule of law – human rights, trade, environment, criminal law, sanctions and a world police. The end of the Cold War was understood – especially in Europe – as the removal of obstacles on the way to history's natural progress towards a universal federation. Western statesmen even resorted to the (German) vocabulary of the 'international community' as they defended the NATO bombings of Serbia in 1999. Where American international relations analysts added footnotes to Hegel, Europeans fell back on Kant. Somehow, international law appeared to find its home in a (Germanic) language of universal reason."
>
> (Koskenniemi 2007, 3)

1 Introduction

Following the terrorist atrocities in 2001 deviations from international law have become routine. In the process, they have lowered the threshold of military interventions and respect for sovereignty in global politics. These practices have undermined the basic principles of interstate relations which had been settled with the Peace of Westphalia in 1648 as well as the fundamental norm of sovereign equality as a component of a community of "civilised nations" (Article 38(1)c, Statute of the International Court of Justice).[3] Accompanying these significant changes in international politics and law are, on the global level, debates about the future of international law, and on the regional level debates about the impact of 'normative power' (Manners 2002, 2006, Sjursen 2006). The former addresses the question of whether International Law is still appropriate in its current codification based on the United Nations Charter, especially when considering the changes in world politics related to globalisation, such as constitutionalisation, legalisation and transnationalisation of social practices worldwide?

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[3] For the Statues of the ICJ, see http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 <assessed on 6 August 2007>

The latter follows the question of whether there is/ought to be a role for regional actors such as the European Union (EU) as diffusers of civil norms such as, for example, the abolition of the death penalty which could be considered as powerful, notwithstanding requirements of military power (Manners 2002). Both issues, i.e. the future of international law, on the one hand, and the potential for regional actors' influence as 'normative powers', on the other are interrelated. Together they frame the context in which the European Union's responses to international terrorist threats are discussed. The argument places the concept of normative power Europe within a global context, paying particular attention to the debate over the future of international law. While the former builds on the potential to diffuse long established norms and values, the latter's object is a re-shuffling and re-weighing of norms.

This article situates that discussion within the context of these two debates. At this stage the article does not seek to generate policy choices but to probe the underlying assumptions of the concept of 'normative power' Europe based on recent research on contested normative meanings in the European Union (Wiener 2007b, 2008; Puetter and Wiener 2007). I argue that the potential of the normative power Europe concept is – perhaps unnecessarily – undermined by applying a modern universalistic concept of civilisation with implicit assumptions about constitutional quality, community, core principles, values and norms. The intention is therefore to facilitate a critical engagement with conceptual issues with a view to conducting empirical research on this basis. To that end, I juxtapose the normative power argument's own *universalistic* normative bias with a more *contextualised* approach to norms.[4] The article proceeds in four further sections. *Section two* recalls the concept of normative power Europe and points out its modern conceptual bias. *Section three* places this approach within the debate on the future of international law. *Section four* proposes an alternative more contextualised approach to norms in inter-national politics. And *section 5* draws some conclusions for further research on the European Union's responses to terrorist threats.

[4] For the distinction between these two approaches see Tully's work e.g. (Tully 1995), most explicitly the distinction of these approaches and their impact on the practices and possibilities of 'civil' vs. 'civic traditions' of citizenship (Tully 2007).

2 At a Critical Juncture: Reshuffling Normative Standards

The enthusiasm about the possibilities of the role of international law and the belief in the successful establishment of international organisations received a severe blow by the terrorist attacks in 2001 and the ensuing unresolved conflict regarding the 2003 military intervention in Iraq. The assessment of these events and their impact vary considerably. Thus, while some observers see a general 'break down' of the UN institutional network (Ikenberry and Slaughter 2006), others anticipate an impending paradigm change with regard to the future of international law (Wolf 2007). I argue that two aspects are crucial with respect to a European sense of actorness[5] in this scenario. First, a condition of crisis emerged in world politics. Second, and related to the first aspect, this crisis sets the stage for a critical juncture in the development of international law. The condition of crisis indicated two instances of potential contestation. It meant that decisions regarding appropriate reactions to terrorist atrocities and threats had to be taken (1) in a context of governance beyond the state and (2) under time constraints. Subsequently, rule following based on the shared interpretation of the norms and rules of international law was challenged significantly. Contestation ensued, first, on the interpretation of specific fundamental norms and, then, on the role of international law altogether.

The condition of crisis has short-term and long-term implications for decisions in the realm of inter-national relations. Its immediate effect is reflected by institutional and policy changes. It can hence be commented on and documented by research on foreign and security policy decision-making. The long-term effect will consist in changing sets of norms and institutions that have been regulating the interplay between politics and law on the global scale, so far. Both reframe the context of the EU's responses to terrorism. How the EU will play out in this changed setting will remain subject to the outcome of the debate on international law, and the EU's input

[5] The role of EU actorness is addressed in more detail elsewhere in this special issue, see e.g. the contribution by Meyer (tbc). See also the work by Whitman (tba), Manners (2002, 2006) and Smith (tba).

into this debate. The EU's own specific actorness therefore stands to play a key role at this critical juncture in inter-national politics. How this impact plays out will depend significantly on awareness of the EU's own normative diversity which undermines widely shared assumptions about the degree of constitutional quality.

Constitutional Quality in World Politics

When speaking of a constitution, we mean a set of norms, principles and provisions and the mandate to organise the political (Snyder 1990; Preuss 1994; Rosenfeld 1994; Tully 2000). In distinction from other agreements such as conventions or treaties, constitutions are expected to offer a 'civilised' and 'embedded' approach to settling conflicts while respecting the constituents' wishes and ways of life. Constitutions work within specific cultural contexts only. They represent an agreement (written or not) among representatives of the governed within a community to make sure that the governors proceed according to the wishes of the former (Tully 1995; McIlwain 1946). While this type of agreement has had a long-standing role in domestic politics in Europe starting with the Greek City States, a similar constitutional quality has emerged only much more recently in inter-national politics. Thus, the creation of international organisations such as the United Nations (UN), the European Union (EU and its predecessors), Mercosur,[6] the Association of South East Asian Nations (ASEAN)[7] and the African Union (AU)[8], to name but a few examples of organisations that attempt to move ahead with arrangements of an increasingly binding constitutional quality,[9] dates back to the past century only. Nonetheless, as

[6] *Mercosur* represents an agreement on economic collaboration between South American countries. It is a regional trade agreement signed in 1991 between Brazil, Argentina, Uruguay and Paraguay as full members and Bolivia, Chile, Columbia, Ecuador and Peru as associated members while Venezuela is awaiting the ratification of its membership agreement.

[7] ASEAN was founded on 8 August 1967 in Bangkok by the five original Member Countries, namely, Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, see: http://www.aseansec.org/64.htm <assessed on 20 July 2007>

[8] The African Union was founded in 2001; it consists of 53 African states and brings together the former Organisation of African Unity (OAU) and the African Economic Community (AEC). Like Mercosur, the AU's progress is inspired by the European integration process. See: http://www.africa-union.org/root/au/AboutAu/au_in_a_nutshell_en.htm <assessed on 21 July 2007>

[9] Thus, the debate about the EU's erstwhile rejected and now 'reformed' constitutional treaty is still on, now scrutinising the changes of the treaties after the German EU Presidency under Chancellor Angela Merkel's leadership. See, for example, the assessments by Giuliano Amato and Giscard d'Estaing,

Koskenniemi observes in the citation above, a “global enthusiasm” about the possibilities of the global rule of law had emerged with the beginning of the post-cold war era (Koskenniemi 2007). Subsequently, and taking the stable normative structure in world politics at the time into account, many spoke of a process of ‘constitutionalisation’ in beyond the state contexts.[10]

While the communities that were part of quasi-constitutional arrangements such as e.g. the European Union’s various treaties, or the United Nations Charter, were much less defined by the boundaries of a Hegelian state than by inter-national agreements negotiated among government representatives, the language of ‘civilisation,’ ‘constitutionalisation,’ and, more generally, ‘the rule of law’ did create an over-arching framework of reference for practicing international law. The addressees of this framework were the ‘civilised nations’ which had signed the United Nations Charter (Article 38(1)c ICJ) and/or the Treaty of European Union (Article 6 TEU, Article 11 TEU), respectively.[11] The emerging constitutional quality beyond the state includes international and regional organisations as well as a wide-ranging network of international organisations within and related with the United Nations (UN) such as for example the World Trade Organisation (WTO) and the International Criminal Court (ICC) which are undergoing enhanced scrutiny with regard to the potential and limits of constitutional quality to be established under international law. Despite their formal differences, both types of institutions – regional and international – share the issue of *contested constitutional quality*. The norms, principles and rules that guide politics within these contexts provide the substance of this quality. It is their input, i.e. the way they ‘work,’ which establishes the “invisible constitution of politics” (Wiener 2008, forthcoming). Given the necessity of social recognition for the interpretation of any kind of legal document, this invisible constitution of politics is crucial for both the interpretation and the construction of international law.

EUobserver.com 16 July 2007 at http://euobserver.com/9/24481 and 18 July 2007 at http://euobserver.com/9/24498, respectively. <assessed 19 July 2007>

[10] For an expanding literature, see e.g. Fischer-Lescano (2005), Albert and Schmalz-Bruns (2007), Slaughter and Burke-White (2002), Koskenniemi (2007), Weiler and De Burca (2003) and Jackson (2005), Cass (2001).

[11] See http://europa.eu.int/eur-lex/en/treaties/selected/livre106.html <accessed on 4 August 2007>

3: The Future of International Law: A Changing Structure of Meaning-in-Use

Global politics has become regulated by a set of norms which have been evolving over centuries (Bull 1977, Jackson 2005), in addition a number of regional and global organisations which have been formalised within the past five decades within the United nations (Wolf 2005, Ikenberry and Slaughter 2006, Zürn et al 2007). It is argued that the debate about the 'future of international law' (Wolf 2007, Koskenniemi 2007) creates a new discursive space during a period of *critical juncture* following the terrorist attacks and conflicts over appropriate and just reactions to terrorism and threats to security. The following addresses the long-term effect of these changes from a conceptual standpoint to demonstrate how the current condition of crisis has opened a *discursive space* which is shaped by the interplay between politics and law. That space is both constituted by and constructive for strategic interventions from academics, lawyers and politicians. It is best conceptualised as a normative "structure of meaning-in-use" (Weldes and Saco 1996, Milliken 1999). This structure of meaning-in-use allows for empirical access and evaluation of discursive interventions. It therefore is considered as central for studies that seek to empirically establish the reference frame for decision-making in world politics. In this environment, the interrelation between law and politics is much less regulated than in modern nation-states. International law is interactive rather than dogmatic, it is flexible rather than fixed (Brunnee and Toope 2002; Finnemore and Toope 2001). In this context, individuals act according to their respective "normative baggage" (Puetter and Wiener 2007). A reference frame such as the structure of meaning-in-use matters in particular in inter-national contexts where members of a given community (of states) do not share a common identity, yet, where processes of transnationalisation[12] have created arenas of enhanced inter-national interaction.

[12] Note that much of the common IR literature defines the 'transnational' with reference to the *type of actor*. That is, once at least one non-state actor is involved in addition to states, it is suggested to speak of transnational actors, networks and so on (Risse-Kappen 1995). In turn, I use the term to indicate a *type of activity* such as frequent and repeated inter-national interaction. That is, transnationalisation is the outcome of a process of interaction among actors of different national socialisation.

A Contextualised Approach to Norms

Norms – and their meanings – evolve through interaction in context. They are therefore contested by default. This is particularly important in beyond-the-state contexts where "no 'categorical imperatives' are in practice, and where "the context, or situation, within which activities take place is extremely important." (Jackson 2003, 19-20) While norms may acquire stability over extended periods of time, they remain flexible by definition. We can therefore hypothesise that the contested meaning of norms is enhanced under three conditions. First, a situation of crisis raises stakes for understanding meanings based on social institutions, the social feedback factor is reduced. Second, the change of governance processes *i.e.* the extension of governance practices beyond modern political and societal boundaries changes the social environment and hence the reference frame of social institutions; the social feedback factor is reduced. And thirdly, the historical contingency of normative meaning indicates a change of constitutive social practices both cultural and organisational, and hence normative meaning over time (see **Box 1**).

Box 1 Enhanced Contestation of Norms: Three Conditions

Steps	Type	Condition
1	**Contingency**	Historical *contingency* means that norm interpretation depends on context.
1 + 2	**Social Practices**	Moving selected *social practices* (i.e. organisational practices only) beyond a given social context reduces the social feedback factor when interpreting norms.
1+2+3	**Crisis**	A situation of *crisis* raises the stakes for norm interpretation as time constraints enhance the reduced social feedback factor.

Three types of norms allow for a transdisciplinary reference to norms. They include first, fundamental norms, second, organising principles and third, standardised procedures. The types of norms are distinguished according to their degree of generalisation, specification as well as their moral and ethical scope.[13]

[13] For details see Box 4.2 in Wiener (2008, forthcoming Ch 4).

The first generic norm-type of *fundamental norms* includes core constitutional norms which are commonly applied with reference modern constitutionalism and basic procedural norms which are commonly applied in international relations theory (Jackson 2003). The second generic norm-type includes *organising principles* which are considered as more closely linked with processes of policy or political processes. They inform political procedures and guide policy practices. The third generic norm-type of *standardised procedures* is identified as prescriptions, rules and regulations. This norm-type is the least likely to be contested on moral or ethical grounds. It is not contingent and entails directions that are specified as clearly as possible, such as for example the instructions to assemble a flat-pack piece of furniture (Kratochwil 1989). The first norm-type of fundamental norms matters most for the discussion of the possibilities and limits of EU actorness and forging a specific EU role in the politics of fighting terrorism inter-nationally. After all, fundamental norms are at stake in the current debate over the future of international law which involves the highly contested issue of replacing the principle of sovereignty with the principle of human rights as the core of international law.

In sum, the contextualised approach of critical constructivists[14] works with two assumptions, first, the interactive relationship between structure and agency and the dual quality of norms (Giddens 1979; Wiener 2007a) and secondly, the necessary contestedness of fundamental norms in any democratic order (Tully 2002). This leads to the important role of the concept of structure of meaning-in-use which allows for an empirical assessment of particular interpretations of meaning. These are usually revealed by situations of contestation or conflict. That is, the contestation over norms is revealed by discursive interventions, as "discourses do not exist 'out there' in the world; rather, they are structures that are actualized in their regular use by people of discursively ordered relationships." (Milliken, 1999, 231) The following summarises the discursive interventions on the debate about the future of international law.

[14] Note that the term 'critical' is not used in a the nominal sense that lumps together all post-positivist work in international relations (Prise and Reus-Smit 1998). It is rather applied in a substantive sense of critically engaging with social practices, normative structures, institutionalised principles and procedures as the core of fair and democratic governance in beyond-the-state contexts. For literature on the various strands of constructivism see for example the recent contributions offered by Reus-Smit (2003), Fierke (2006), or, Checkel and Zürn (2006).

Three Theses on the Future of International Law

The following summarises the main theses that evolved within the debate about the future of international law. Three perspectives stand out in this debate. They are distinguished as the instrumentalisation thesis, the global constitution thesis and the democratisation thesis, respectively.[15] The instrumentalisation thesis is based on the observation of the "legalisation" of institutions in international politics (Abbott et al 2000; Goldstein et al. 2000; Slaughter 2004). The global constitution thesis observes the "constitutionalisation" of world politics (Fischer-Lescano and Teubner 2004; Fischer-Lescano 2005). And the democratisation thesis is based on the normative observation that the UN system while in need to be reformed, must not be overthrown (Cohen 2004). The question of whether the UN may prevail as the basis of a world politics that functions on the basis of sovereign and equal states is the key question around which the debate about the quality of international law evolves. More specifically, the discursive interventions into this debate argue either in favour of the sovereignty principle (equal sovereignty of all member states as codified with Article 2(1) UN Charter)[16] or in favour of the human rights principle (equal rights for civilians on the basis of the human rights regime)? In the debate, the two positions have been distinguished as "human rights fundamentalists" (Cohen 2004, 4) vs. "international law optimists" (Binder 2007). Not surprisingly, the former tend to develop their thoughts from a US American basis (with some European allies) while the latter live up to Koskenniemi's observation of a 'German' paradigmatic vision (Koskenniemi 2007).[17] A question the normative power Europe concept would want to debate is whether the EU's actorness thus fit in with the latter normative vision?[18]

In detail, as Jean Cohen succinctly argues (Cohen 2004), there are three main positions to this debate, and within the debate, the contributions that focus on human rights differ among an academic spectrum entailing politically quite distinctively

[15] For details, see Kaleck and Wiener (2007, in press).
[16] See in detail http://www.un.org/aboutun/charter/ <assessed 14 January 2007>.
[17] Whether such distinctions will hold, remains to be empirically sustained by further research which lies beyond the scope of this particular article.
[18] Note that for analytical purposes the distinction is a "derived opposition" based on the method which identifies a pair of opposite meanings derived from the literature under observation, i.e. the large pool of discursive interventions in this debate generated in the post 9/11 period. On the methodology of 'deriving oppositions' see Milliken (1999); and, for an application to the case of comparing associative meaning of fundamental norms in Europe see Wiener (2008, forthcoming).

different and often controversially discussed positions. These hold on the hand, that disaggregated sovereignty is an already observable consequence of network governance in an environment of thick institutionalisation. On the other hand, they support the idea of a new global constitution based on a strong political impact of the courts in world society. The question is here, in how far, these scenarios still provide options for reform as the democratisation supporters would hold (Cohen 2004), or whether the dices are cast, and the *jeux sont faites* – either by legalisation or by constitutionalisation – as others would argue, if from different analytical and political standpoints (see e.g. Slaughter 2005; Fischer-Lescano and Teubner 2004).

The human rights position is represented by both the system theoretic as well as the social institutionalist approaches to legalisation. Both positions do, however, not overlap with regard to their normative assumptions, and both argue on a politically diametrically opposed ticket. Thus, the institutional approach is based on political agency. It assumes that legalisation has contributed to the gradual desegregation of government institutions in favour of an emerging "network governance" (Slaughter and Burke-White 2002, Slaughter 2004; Abbott et al. 2000; Zangl 2001, see critically Finnemore and Toope 2001). These create a context of "desegregated network governance" in a world politics which is no longer rooted in the *grundnorm* of sovereign equality of states but which focuses increasingly on the protection of human rights and considers the principle of "civilian inviolability" as fundamental (Slaughter 2004).

As Slaughter and Burke-White emphasise "[T]o address this new generation of threats, international law must move beyond general prohibitions on war and develop a regime to protect civilian lives. We must embrace and elevate the *principle of civilian inviolability* to an absolute prohibition on the deliberate targeting or killing of civilians in armed conflict of any kind, by states or individuals, for any purpose. *This principle must become a foundational principle of the international order, equivalent to and parallel with the prohibition on interstate war in Article 2(4) of the UN Charter*."[19] The system theoretic Luhmanian approach, in turn, identifies the gradual constitutionalisation of world politics which is drive by the law, i.e. the power of

[19] See http://hir.harvard.edu/articles/973/ <assessed 19 April 2007> [emphasis added AW].

agency lies with the courts (Fischer-Lescano 2002, Fischer-Lescano and Teubner 2004). By contrast, the sovereignty principle is held up by academics who argue in favour of reform based on the constitutional principles of democracy, the rule of law, and equal rights which have been constitutive for the long process of creating the normative structure of international law over the centuries (Jackson 2005, Cohen 2004). Here, however, a neo-Kantian universalist conception of democratic constitutional quality remains to be carefully distinguished from a critical multiversal approach. Yet it would share the call for maintaining the sovereignty principle as the *grundnorm* of international law because it functions as the pre-condition for keeping the political terrain on which contestations about the normative rules of a democratic constitutionalism beyond the state might unfold can take place (Reus-Smit 2001).

The Modern Dilemma: Protecting by Curtailing Fundamental Norms

Counter-terrorist measures of liberal states in the international society of states operate under the conditions of 'civilisation' and 'protection.' That is, on the one hand, as members of the international community of civilised nations (Article 38 (1) ICJ) democratic governments are expected to *respect* fundamental norms. On the other hand, and at the same time, states have the "affirmative obligation to protect" their citizens (Heyman 2005, 738). This obligation involves protection against domestic violence as well the violation of the "norms with *ius cogens* character" under international law.[20] The latter has been put more firmly onto the international agenda with the Report of the International Commission on Intervention and State Sovereignty (ICISS).[21] Subsequently, domestic policy responses to international terrorism in Europe have traditionally involved *curtailing* fundamental norms such as the freedom of speech, the right to association and the right to remain innocent unless

[20] *Ius cogens* has an obligatory effect on all members of the international community. Currently, such norms include the abstention from the use of force and intervention as well as the respect for fundamental human rights. It is important to note that "international norms with *ius cogens* character are defined as those norms which derive their existence from the interest of the entire community of states and which are deeply rooted in the general sense of law […]. Which legal norms are considered as *ius cogens* depends on the structure and goal of the system of international law of a particular era" (Hobe and Kimminich, 2004, 172-175) [translation from the German original, AW]

[21] Report of the International Commission on Intervention and State Sovereignty (ICISS), 2001, *The Responsibility to Protect*, http://www.iciss.ca/report2-en.asp <assessed 19 April 2007>.

proven guilty before the law based on counter terrorist measures such as for example Terrorism Acts.[22] These measures of protection have to be designed and implemented under conditions of crisis which enhance the probability of norm contestation (see **Box 1**).

That is, any response to terrorism must be considered as likely to be contested as it will always be set up under pressure. In the light of high probability for contestation under conditions of crisis which includes time constraints, contingency and the increasingly transnationalised character of terrorist threats, there is little space for identifying appropriate organising principles and procedures to implement counter-terrorist measures. That is, not only parliamentary scrutiny but also training, supervision and implementation of *law enforcement practices* cannot be guaranteed. As a result situations of crises are likely to generate considerable discretionary powers, especially at lower levels in the hierarchy of law enforcers (Campbell and Connolly 2006). Similarly, international responses to terrorist threats are always facing the 'intervention dilemma' as military intervention on humanitarian grounds stands to pass the three major principles including the 'just cause threshold', the 'precautionary principles', the 'right authority' condition, as well as the 'operational principles' which need to be established beyond reasonable doubt before a decision about military intervention can be taken (ICISS 2001, xii-xiii, 1). It follows that, responses to terrorism stand to deal with the dilemma of protecting by curtailing fundamental norms. In addition, and following the decision to intervene, the implementation of such trans-border law enforcement under international law would require specific guidance and scrutiny.

Modern universalistic approaches will always face the dilemma of having to protect liberal norms as the basic freedoms of their citizens on the one hand, and curtailing these norms for 'others' by doing so, on the other. The recent examples of terrorist atrocities and threats have put the dilemmatic situation on the spot with particular intensity, since the involved actors were operating not as 'others' coming 'in' from

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[22] For a recent review of such measures in a retrospective of forty years since the first terrorist attacks of the RAF in Germany, see *Süddeutsche Zeitung* 5/6 April 2007, 'Die Herrschaftsmaschine' by former Home Office Secretary Burkhard Hirsch (FDP). For the UK see Terrorism Acts 2000 and 2006; http://www.opsi.gov.uk/ACTS/acts2000/20000011.htm and http://www.opsi.gov.uk/acts/acts2006/20060011.htm , respectively both <assessed 12 April 2007>

the ‘outside’ of modern communities but as ‘insiders’ holding passports of the communities they attacked. This has, more generally raised questions of what type of legal framework was to be engaged in dealing with these actions. The practices applied with respect to these changes of the structure of meaning-in-use do always matter, as they are constitutive for the interpretation of the law in the future. They are even more crucial in areas where little or “no fixed meaning in international law” exists and “quasi-formal methods prevail, such as, for example, with regard to the concept of rendition (Fitzpatrick 2003, 475). For political scientists, it is important to note that this lack of clarity may imply quite dramatic changes indeed. For example, they may involve shifting from a formally routine reference to human rights law to a reference to criminal law when assessing the suitability of applying the concept of rendition. Thus, while the general purpose of rendition is “to accommodate the receiving state’s desire to place the individual on trial for recognizable criminal offences”, the actual practice of rendering suspected terrorists focuses on “security concerns of the rendering state and are sometimes the sole motivation” (Fitzpatrick 2003, 458).

To summarise, the dilemmatic situation raises important questions of both empirical and normative impact. *Empirically*, the situation raises questions about the exploration of law enforcement measures. Following from the two conditions that inform liberal state’s action to counter security challenges, i.e. first, ‘civilisation’ which is to be maintained in and by liberal states and their legal, political and cultural practices, and, secondly, the mandate to ‘protect’ the citizens of this state, the potential dilemma emerges that protection may actually contribute to radicalise individual citizens based on the perception of impinged fundamental norms. For example, under specific conditions, a situation of conflict with fundamental norms, a breach with the law will remain unnoticed unless it produces public reaction e.g. based on legal complaints, press reports, or, in fact, political mobilisation. *Normatively*, the situation has implications for the conception and application of “sovereignty” under international law (Cohen 2004) as the fundamental norms in question include the rule of law, democracy, human rights and fundamental freedoms as well as the principle of sovereign equality among states (Rosenfeld 1994; Jackson 2005). They are respected by all liberal states *qua* membership in the United Nations

(UN)[23]and are reconfirmed by additional memberships in international organisations such as the EU.

4: Normative Power Europe's Normative Bias

Ian Manners suggests "that conceptions of the EU as either a civilian power or a military power, both located in discussions of capabilities, need to be augmented with a focus on *normative power* of an ideational nature *characterised by common principles and a willingness to disregard Westphalian conventions*." (Manners 2002, 239, emphasis added AW) This observation is central with regard to locating the EU's actorness with regard to possible responses to terrorist threats as it speaks to both the normative bias and the conceptual potential of this approach. I will argue first, that grounding the concept of normative power on shared common principles runs the risk of making assumptions about commonality and convergence that may not stand empirical proof. That is, while members of a community may agree to sign up to a set of principles based on social recognition within their respective domestic contexts, this is however no guarantee for expecting the cultural validation of these principles to overlap as well. The latter will come to the fore once meanings are attached to social practices in their relation to the constitution of norms within a "structure of meaning-in-use" (Milliken 1999) rather than by deducing meanings from communities with a given identity (Katzenstein et al. 1996). Secondly, I will argue that the path of disregarding Westphalian conventions while important must be carefully trodden. For example, as the debate over the future of international law in *section 4* reveals, a modicum of the "culture of sovereignty" that has been established through practices in inter-national relations may be required in order to warrant equal access to participation as the basis of democracy (Cohen 2004). Both shall be addressed in their turn in the following.

[23] See International Court of Justice, 'Statutes of the Court' Article 38 (1): http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II <assessed 11 April 2007>

Constituting Meanings: Downwards and Upwards

Studies on security communities hold that membership in a community is likely to enhance norm convergence (Adler and Haas 1992; Adler 1997; Adler and Barnett 1998; Koh 1997; Checkel 2001; Schimmelfennig 2000; Tonra 2001). Accordingly, liberal norms translate into specific behaviour in the area of foreign and security policy. The normative structure is interpreted to entail particular norms, principles and standards including e.g. the non-proliferation norm, standards of prisoner of war treatment according to the Geneva Convention, and the principle of non-intervention according to the UN charter. However, persistent divergences in the interpretation of the normative structure of world politics contradict the literature which expects community members of a given identity to consider the same norms, principles, and values as appropriate (Jepperson et al. 1996), the so-called "liberal community hypothesis" (Schimmelfennig 2003). By contrast, the "rule in practice" assumption focuses on the variation of the meaning of norms (Puetter and Wiener 2007, forthcoming). It is based on three general theoretic insights. First, norms entail a dual quality, as both constructed and structuring (Giddens 1979). Second, the meaning of norms is embedded in a structure of meaning-in-use (Weldes and Saco 1996; Milliken 1999). And, third, meaning evolves through interactions in context; it is embedded in social practice and therefore subject to change (Taylor 1993; Tully 1995).

As constructivist analyses in international relations have demonstrated, the structuring quality of norms needs to be understood in the specific social, cultural and ideational context of norm application – a process which in itself involves norm construction and alteration (Guzzini 2000; Johnston 2001; Mueller 2004; Finnemore and Toope 2001; Wiener 2004). Such research has pointed out that the consensus required for the interpretation of international norms cannot warranted by law. As international law is based on treaty language which must remain sufficiently unspecific so as to warrant signature of the highest possible number of negotiating parties (Chayes and Chayes 1993). To generate insights into identifying conditions under which international norms generate a shared interpretation among the highest possible number, constructivists have therefore pointed to the importance of social recognition or a sense of 'appropriateness' (March and Olsen 1989). The stress on practice in context in the proceedings and development of international law have led Jutta Brunnee and

Stephen Toope to propose the concept of "international interactive law" (Brunnee and Toope 2002).[24] Since the power of international law depends on the social recognition of norms by a particular community of states three factors offer important pointers for analyses of compliance with or, indeed, contestation of international law. First, it is important to identify the community which has set up a particular set of norms and whose members are expected to recognise them. Second, and related, it is necessary to identify a sense of awareness and recognition of international law among the members of that community i.e. do all members indiscriminately share the same sense of appreciation? Third, any analysis must make sure to identify the structure and goal of international law so as to establish the core characteristics of a particular era in which these norms are considered as powerful by a significant majority in world politics.

The concept of normative power Europe implies reference to a limited community with, however fuzzy, boundaries, yet, with a given identity that allows for the recognition of shared fundamental norms as appropriate in order to diffuse them successfully to other regions of the world (Manners 2002, Sjursen 2006). This community may be based on shared organisational grounds i.e. based on the definition of values qua membership agreement, or it may be based on the neo-Kantian reconstitution of the democratic values of national states.[25] However, recent research found enhanced diversity rather than harmonisation when examining the interpretation of the meaning of fundamental norms such as democracy, human rights, citizenship and the rule of law among different elites and in different arenas of the EU. The assumption of 'normative power Europe' would imply that the EU be able to achieve diffusion without applying military power. Yet, in light of the identified degree of contestation about normative values within the EU, it would appear that the EU's own member states and their representatives would need to establish a shared meaning of norms before 'diffusing' norms 'to others'. The point of referring to normative diversity among European Union elites is not one of establishing degrees of contestation or harmonisation (Europeanization) of normative meaning. Instead, the

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[24] See Finnemore and Toope (2001, 743) '[L]aw is a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies. Customary international law displays this richer understanding of law's operation as does the increasingly large body of what has been termed 'interstitial law,' that is, the implicit rules operating in and around explicit normative frameworks.'

[25] For the latter see much of the conceptual contributions to the Oslo based RECON project, for details, see http://www.reconproject.eu/ <assessed on 6 August 2007>

issue of normative diversity points to 'cultural validation' as an invisible layer of normative meaning. In addition to the layers of 'legal validity' and 'social recognition', this third layer certainly has the ability to interfere with political decision-making. It puts a spanner in the works and its impact is most powerful when invisible. Once empirically highlighted, this layer demonstrates possibilities rather than constraints of diversity, yet, turning these conceptual possibilities into political opportunities requires taking a more contextualised approach.

For example, the core principles and values guiding the EU's Common Foreign and Security Policy (CFSP) according to Article 11 (1) TEU stipulate the objectives to "safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter."[26] In addition, the member states of the EU have confirmed their appreciation of the European Union's central constitutional norms of democracy, fundamental human rights and the rule of law in Article 6 [TEU]. These principles are common, insofar as they are all recognised within the respective domestic constitutional realm of each member state of the EU. They are therefore stipulated as 'common values' by supranational European law as the guiding legal framework of EU common foreign and security policy decision making. They therefore establish a link between core constitutional principles of regional and global politics as defined by UN Charter Article 2(4).

Yet, the point of contention, for example, in the case of the decision to intervene in Iraq emerged precisely with regard to these – presumably shared – community values. In fact, the fifteen EU members were not in agreement on how to interpret their respective reading of the UN Charter (Mayer 2003; Wiener 2004). As recent research has demonstrated, a key problem with the European Union's actorness in the international realm is that despite a strong overlap in legal validity, and often, social recognition, the EU's member state representatives from the 27 capital regions are unlikely to share the same cultural validation (Wiener 2008, forthcoming). This suggests that inter-nationally agreed fundamental norms remain contested among the very EU member states. Importantly, this adds another dimension of potential

[26] See Article 11 (1), Treaty of the European Union (TEU) [emphases added, AW].

contestedness to inter-national negotiations. It indicates that not only different security *interests* but also different *interpretations* of the meanings of fundamental norms matter.

5: Conclusion: Research on the Cultural Validation of Norms

This article places potential and specifically European responses to terrorist threats within the global context of contested international law that has created a critical juncture following the deviations from international law in the aftermath of the 9/11 events. While sympathetic to the idea of 'normative power Europe' it has also cautioned against a modernist conception of shared values and norms and the expectation of being able to diffuse these towards 'other' contexts. It has pointed out that emerging constitutional quality has been observed in both regional and global contexts. Yet, it has been demonstrated that this constitutional quality is flexible and contested. And it was argued that in the situation of crisis that emerges in any moment of terrorist threat, it is therefore key to resolve ways of reaching a shared understanding not only of the interests of the negotiators but also of their respective interpretations of the norms that are meant to bind their decision-making procedures. These norms may be codified in legal agreements thus presenting legal validity; in addition, they may enjoy a degree of shared social recognition among the negotiators; yet, they are most likely to spur conflictive cultural validation based on the normative baggage that individuals carry with them when moving between different political arenas to negotiate and decide.

Linking the three theses on the future of international law, i.e. instrumentalisation, global constitution and democratisation, with the EU's role implies discussing the appropriateness of the respective theses according to their normative contents. Thus, proposals that seek to enhance the possibility of trans-border law enforcement action on an international scale – while suitable in the eyes of the world's leading power may appear much less suitable from the standpoint of a normative power. For example, proposals which seek to put more weight on "civilian inviolability"

(Slaughter and Burke-White 2002) than on "sovereign equality" (Cohen 2004; Cryer 2005, 988) as the *grundnorm* of the international society of states (Bull 1977; Jackson 2005) signal a lacking sense of appropriateness with regard to the quality of international law. In light of such proposed radical changes of international law, on the one hand, and research on the 'radicalisation' effect which is generated by law enforcement operations in so-called legal grey zones, on the other, the question remains whether qualitative changes in international law that undermine the culture of sovereign equality among states offer appropriate measures in response to terrorist threats. For Europe, the focus is thus more likely to be on the normative issues arising in relation with anti-terrorist measures and trans-border law enforcement following terrorist threats. These issues include first, the implications brought about by the dilemmatic situation faced by liberal democratic EU member states, and, secondly, the implications for the debate about the future of International Law.

The article's discussion about Europe as a normative power, and the link of this discussion with the larger context of international norms and, more specifically, three theses on the future of international law suggests two further directions for future research on the EU's actorness at this moment of critical juncture. Normatively, research needs to explore the conceptual affinities and bridges between the constitutional quality achieved in the European Union and the future of international law. Empirically, future research will need to provide larger data-sets as well as more in-depth documentation of the impact of 'cultural validation' that is, individually held associative connotations with the norms that are meant to guide democratic governance both regionally and globally.

To sum up, the article made an argument for placing EU responses to terrorist threats within a global environment. More specifically, it argued that the emerging constitutionalised quality that remains in a continuous process of construction must be understood as a structure of meaning-in-use. The conceptual debate sought to frame the context in which European responses to terrorist threats are discussed. This was done with specific reference to Europe's role as a 'normative' power in world politics. The applied framework of analysis was more contextual than universalistic, thus drawing on the critical constructivist strand of international relations theory.

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