Summary

This book is an inquiry into cosmopolitanism in the discourse of international law, with particular attention to a specific stream of cosmopolitan thinking, which I call innate cosmopolitanism. Innate cosmopolitanism stands for the proposition that the world as a whole represents a phenomenon with interests and even a will of its own, and is capable of establishing a foundation for universal norms under international law. Innate cosmopolitanism has never been expressly developed as a doctrine in its own right, and thus lacks the consolidated vocabulary and critical engagement enjoyed by other schools of cosmopolitan thought, such as liberal cosmopolitanism and cosmopolitan constitutional theory. But despite the relative neglect of innate cosmopolitan ideas as part of a distinct theoretical construct, the innate cosmopolitan conception, in a variety of terms and contexts, has been central to the narrative and development of modern international law. In observing innate cosmopolitanism to be a distinct theoretical construct, this work establishes the tradition of innate cosmopolitan thought in the discourse of international law, including its central concepts, terms and principles; maps out the distinct domain of different streams of cosmopolitan thought in international law; and engages in a close and critical evaluation of the role of innate cosmopolitan ideas, once recognized, in the discourse and development of international law.

It bears noting that international law and international lawyers have regularly been described as cosmopolitan, but the term in this context has remained elusive, or has been taken as self-evident, and is rarely explained with any thoroughness. What does cosmopolitanism generally mean in international law? It does not properly refer to any narrowly orthodox theory or practice of international law, which presumes a consensual system of relations among equal and independent sovereign states. Rather, at its most broad, the cosmopolitan obtains to the cosmopolis: a harmonious and inclusive, universal order. That order stands in opposition to the consensual system, which allows for a cooperative (or uncooperative) anarchy of normative relations.

When international lawyers are described as cosmopolitan, the association invokes aspirations to a system of law capable of purposefully sustaining order in the world on unified terms. Their cosmopolitan order is an objective one, pretending to a normative authority that is superior to its subjects in principle and defined independently of them. In contrast with the subjective system of international law as it is classically described, cosmopolitanism represents a normative condition that
is neither definable nor revocable by state subjects individually, nor by any other subjective actors in their individual capacities. Cosmopolitanism replaces the political authority of sovereign states (and their analogs) with the authority of universal norms.

Cosmopolitan aspirations at law to world order, independent of the political will of states and other subjective interests, have lately received critical attention. Scholarship has shed critical light on progressive aspirations to the would-be greater good of a unified cosmopolis of world relations, not mediated by subjective attachments. This critical scholarship makes clear that cosmopolitan doctrine, despite its apparent antinomy with orthodox ideas of a consensual system of law among states, is neither wholly oppositional nor exactly subversive in its relationship to international law and international legal discourse. Rather, the cosmopolitan ethos runs like a leitmotif throughout the work of diverse scholars and practitioners in modern international law. Appreciating the cosmopolitan undercurrent of international law – and especially, as I argue here, appreciating the innate cosmopolitan undercurrent of international law – can be crucial to appreciating the historical project of international law, a project that is bound up with the tension between aspirations to objective international norms, and a subjective international system. The critical attention to cosmopolitanism generally, however, has not adequately distinguished among distinct cosmopolitan doctrines, methods and norms.

Liberal cosmopolitanism is a well-developed ethical doctrine in political theory. By means of a specific constructivist process – a particular deductive method – liberal cosmopolitanism comprehends norms developed out of what are taken to be universally-acceptable moral premises. Liberal cosmopolitanism is expressive of normative individualism, and bound up with the core norms and values of human rights doctrine. Constitutional cosmopolitans, on the other hand, identify world norms with the formal establishment of a global political settlement among actors in the international system, creating a new world order independent of its constitutive parts. Constitutional cosmopolitanism is particularly bound up with the method of international law, as it turns on questions of formal sufficiency derived from positive terms of international law. Innate cosmopolitanism broadly shares the legal method of constitutional cosmopolitanism, insofar as it seeks to ascertain law from a historical source, rather than moral premises in the first instance, but distinguishes itself by reference to a historical source, the phenomenon that is the world as a whole,
which precedes – and, for its normativity, is not dependent upon – its acknowledgment as a matter of positive international law.

Despite differences among liberal, constitutional and innate cosmopolitanism, each seeks to establish some autonomous normative power, an objective normativity for the world as a whole, as against the system of subjective authority identified with the relations of equal and independent states. In aspiring to objective world norms exhibiting autonomous bases of legitimacy, each of the three aspires to world norms superior to international politics. Liberal and innate cosmopolitanism, however, emphasize different aspects of cosmopolitan thought: liberal cosmopolitanism emphasizes individuals in the world; innate cosmopolitanism emphasizes the individuality of the world. Constitutional cosmopolitanism, by contrast, is relatively agnostic as between the two: the potential constitutional settlement is open in its terms, and – so long as the constitution is a cosmopolitan one – either cosmopolitan vision, liberal or innate, might yield a constitutional arrangement provided it is satisfies a certain formal baseline of constitutional legitimacy.

In terms of discourse, each of the three cosmopolitan streams is differently situated. The differences may be conceived as points along a line: at one end, liberal cosmopolitanism represents an ethical discourse applied to law; at the other end, constitutional cosmopolitanism represents a legal discourse largely congruent with traditional terms of international law, however radical its use of those terms. Between the two, innate cosmopolitanism represents a legal discourse that eschews some of the traditional terms of international law. The differences are discernible by reference to the different allowance for ascertaining law and the different appreciation of sources exhibited by each cosmopolitan school of thought.

Notably, though innate cosmopolitanism has not been recognized as a discrete school of thought even by its adherents, scholars and practitioners referring to innate cosmopolitan ideas tend regularly to invoke a long history of innate cosmopolitan ideas, in each case largely as though for the first time. The vocabulary has never been sufficiently conformed or consolidated, such that the same historical lessons are repeated in various contexts, and scholars and practitioners regularly refer for a variety of purposes and in a variety of ways to a common history. That history is a history of ideas in support of a normative potential vested in the world as a whole, capable of serving as a source of law under international law. Because the innate cosmopolitan premise of a world social or political collective capable of
establishing norms and normative authority is so difficult to establish empirically, the history of innate cosmopolitan ideas plays an unusually significant role in the argument for innate cosmopolitan normativity. The history of the idea, captured and recaptured in repetitious exercises, serves as a pedigree and bona fides where other support is lacking. Furthermore, the regular recourse to an intellectual history of innate cosmopolitanism has bound application of the innate cosmopolitan model to the historical narrative of cosmopolitanism in international law more closely than other, better recognized forms of cosmopolitanism.

Several characteristics define the consistent substance of the innate cosmopolitan idea. For one, innate cosmopolitanism founds a bedrock normativity in international law on the will and interests of the world as a collective whole. To found normativity on the will and interests of the world as a whole means to assume as a central premise that the world of people and peoples represents a collectivity capable of exhibiting a unified will or unified interests. By conceiving of the world in terms of a discrete collective capable of exhibiting and sustaining an exercise of normative authority in its own interests or according to its own will, the world is made an autonomous phenomenon. It is conceived to be independent of the smaller collectives and entities, including states, which it comprises. Moreover, the autonomous world phenomenon is typically attributed something like personality – it is ‘subjectivized’, and thereby enjoys a special sort of political agency, expressed according to terms such as world public opinion. The subjective and independent world phenomenon, then, becomes a crucial foundation for normativity in the international system: the world as a whole is taken to represent the only objective foundation of international norms, capable of escaping the contradictions of a system of law established according to consent.

Another characteristic of innate cosmopolitanism is an appreciation of the world phenomenon as a fact. The world as a social or political whole is perceived to exist as a function of comprehensive interdependence in the world. Moreover, because the subjective personality of the world as a whole is understood as a fact or phenomenon, the world phenomenon precedes and is independent of any positive expression – or lack thereof – as a matter of international law. Its recognition is joined to an emphasis on observational method, as opposed to formal legal method. Likewise, its normative potential flows from the fact of its existence, rather than any positive law affirmation. The nature of the subjective personality manifested by the world unit will be discernible as a matter of proper observation. Accordingly, innate cosmopolitanism has typically relied on assertions of roughly sociological
observation – if not simple intuition – to describe characteristics of the interdependent world as a whole at any given point in time. From observed attributes in wide-ranging fields that encompass economic, political, cultural and psychological study, the norms adhered to by the world as a whole at any given point in time may be discerned, and from those norms law and policy may be determined.

The premise that the world as a whole represents a viable – even fundamental – normative potential in international law, independent of any positive law affirmation, represents a challenge to the limitations of voluntary positivism, and particularly a challenge to the limited list of traditionally-recognized sources of international law, such as are recognized by Art. 38 of the World Court’s statute. This is one of the crucial and most controversial aspects of innate cosmopolitanism as it is employed in international legal discourse. Also controversial, there exists under the innate cosmopolitan model a close link between law and policy: the normative potential attributed to the autonomous world as a whole becomes, in the work of theorists and practitioners, synonymous with policy tailored to guide that potential towards certain ends, or at least to constrain it from arriving at others. The incorporation of a policy mandate, which may be observed as well in a stream of innate cosmopolitan discourse in the jurisprudence of the ICJ, reflects the expansive scope of legal argumentation and legal authority under innate cosmopolitanism. That scope is constrained neither by traditional terms of positive law, nor traditional channels of political contestation.

In sum, a normative potential flows from the particular nature of the world as a whole, such that proper observation of social and political interrelationships that make up the phenomenon of the social or political world as a whole will yield universal norms, which norms will guide law and policy alike. In application, the innate cosmopolitan model has been invoked before a tribunal such as the ICJ to extend normative authority over a given matter, on the basis of what is held to be in the interest of the world as a whole, where positive law may not produce a comparable result. Furthermore, the extension of authority attributed to the ICJ typically takes an ad hoc character across cases, often invoked in a sui generis manner, in application to select issues as they arise. In part, that ad hoc character may be attributable to the lack of any developed vocabulary or established framework for a doctrine of innate cosmopolitanism, in part it may be attributable to the specific appeal of innate cosmopolitanism to a grounds for normativity that exists independent of positive international law.
Having traced the contours of innate cosmopolitanism, including the appeal of and to innate cosmopolitanism in scholarly and jurisprudential discourses of international law, I turn to critique. Innate cosmopolitanism suppresses political contestation in favor of assertions of observational science or intuition; it vests elite actors with an authority for norms even as it situates responsibility for the expression of those norms elsewhere, in the world as a whole as it may be properly observed or intuited; and it affirms status quo historical conditions by virtue of founding novel normative authority on the nature of the world as it exists at any point in time. Going further, the three grounds taken together suggest that innate cosmopolitan arguments may ultimately stand, intentionally or not, for policy interests that support the status quo.

In founding a world legal order on the aggregation of observed normative acts and expectations applicable to the world at any given point in time, the rule-making process prefigured by innate cosmopolitanism is emptied of responsibility: the rules appear to create and recreate themselves; they are merely discovered by constant scientific investigation, and announced by the presumptively proper person, body or instrument. The norm is observed, rather than deliberated or decided upon, or it is derived from world public opinion, rather than the reasoned determination of any legislator or judge. In light of the vast field contemplated to determine world norms sociologically at any point in time, however, the observational method itself reestablishes the contested field of politics in other terms. Any given set of methodological choices by which to comprehend world norms potentially represents a particular policy and discrete set of interests. The complexity of the research apparently necessary to make good on the innate cosmopolitan intuition suggests that it in fact cannot be substantiated or even meaningfully defined. Thus innate cosmopolitanism would suppress subjective international politics by an appeal to science, or sociological observation, but the science or method of observation becomes a new field of contestation, apparently incapable of resolution.

The variability of the innate cosmopolitan phenomenon undermines the guiding purpose to achieving an objective authority for international legal norms, namely, the ability to overcome the paradox and self-contradiction of a subjective system of international law. With variability comes manipulability, and the association of law and policy that also characterizes innate cosmopolitanism takes on a particularly controversial character. Furthermore, the limitations of sociological method also expose to critique the underlying premises of an interdependent
world collective, revealing a consistent limitation of innate cosmopolitan doctrine since Vitoria: the vision of a world social or political complex remains just that; it is still in the first place a vision or matter of intuition, rather than anything more substantial or precise. In consequence, the appeal to world normativity under innate cosmopolitanism can appear quixotic, or worse: political contestation is suppressed, but responsibility is diminished in an affirmation of unsubstantiated ends.

Moreover, innate cosmopolitanism expressly associates normativity with the perceived historical reality of the world. Because the proper observation of acts, experiences and expectations in the world is theoretically supposed to yield the interests and will of the world, the normativity of the world is discerned in terms of historical fact. Likewise, since the norms that flow from innate cosmopolitanism are effectively discovered by observation of historical acts and conditions of the world, innate cosmopolitan norms are supposed to represent the world as it is. To represent the world as it is, is to represent the status quo. Thereby the innate cosmopolitan model adopts a posture deeply tied to historical circumstance, likewise binding the norms to which the model would give rise to status quo historical conditions. As a consequence, the historical contingency of innate cosmopolitan norms suggests, at least in theory, a model that ultimately serves to affirm – even in its application for reform – status quo conditions, despite a traditional association of innate cosmopolitan ideas with progressive legal scholarship.

The story, however, does not end with the critique. Innate cosmopolitanism purports to offer a compelling account of a world phenomenon, which indeed appears to resonate with an internationally-conscious audience, be it diplomats, scholars, or a world public, loosely defined. The innate cosmopolitan account substantiates the international normative regime in a coherent way: there is a foundational normative potential that lends an authority to international law beyond the subjective authority of its subjects. Likewise, innate cosmopolitanism has indeed enjoyed a long history of appeal, which continues to represent arguably its greatest strength. It has been suggested, in other places and other words, that the persistent historical intuition of innate cosmopolitanism may be its best proof. In that light, innate cosmopolitanism functions like a heuristic model, or, to use another analogy, a sort of lodestar: a guide by which to orient the ends of international law, and thereby a means of affirming the normativity of the international legal system. In this context, even the most trenchant critic will often appear to share the fundamental intuition that drives the innate cosmopolitan
model, exhibiting a faith in the ends of international law even absent any more definitive or scientific exposition of the same.

If, ultimately, the innate cosmopolitan intuition will not be denied in international law, it must be better understood. The terms of its articulation and the ends to which those terms are applied in the discourse of international law call for more consistency, and more consistent recognition. Doing so will allow for a clearer and more comprehensive critical treatment of innate cosmopolitanism as a school of thought – including the method of innate cosmopolitan argumentation, its premises and the ends to which they are put – as well as its particular instantiations. This book represents a first step in that project.