INNATE COSMOPOLITANISM

Mapping a latent theory of world norms in international law

Dedicated to
my parents and my wife. Thank you.
Special thanks also
to Wouter Werner and Roland Pierik,
for your guidance and your patience.
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Innate cosmopolitanism: Mapping a latent theory of world norms in international law

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1 Introduction 1
Cosmopolitanism 3
Innate cosmopolitanism 4
Liberal, constitutional and innate cosmopolitanism 7
General principles and innate cosmopolitanism 14
Critiquing innate cosmopolitanism 20
Questions raised 22
Political theory and international law 27

2 The innate cosmopolitan idea in international legal theory 29
Historical dimension 30
Revisiting canonical works 32
James Brown Scott and the renewal of innate cosmopolitan ideas 41
Hudson, Álvarez, Lansing & Madariaga 45
Lauterpacht 55
Kelsen’s opposition 59
Observational science and world policy 62
Continued theoretical import 72
Conclusion 79

3 Comparing innate cosmopolitanism with liberal & constitutional cosmopolitan doctrine 81
Liberal cosmopolitanism and innate cosmopolitanism 82
Historical and ahistorical foundations 82
Normative individualism and public authority 87
Interdependence and natural rights 90
Departing from Rawls 94
Law of Peoples 98
Different structures, different orientations 100
4 Cosmopolitan norms in the jurisprudence of the International Court of Justice 125

The alternative jurisprudence of Judge Álvarez 130
- Interdependence and a new normative scheme 131
- The role of the court 133
- Objectivity and autonomy displace individuality 135

Cases involving the recourse to force 138
- Corfu Channel 139
- Fisheries Jurisdiction 141
- United States Diplomatic and Consular Staff in Tebran 143
- Military and Paramilitary Activities in and against Nicaragua 145
- Lockerbie 151
- Legality of the Threat or Use of Nuclear Weapons 153
- Oil Platforms 163
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 169
- Armed Activities on the Territory of the Congo 171

Conclusion 175

5 Conclusion 178

Mapping the cosmopolitan schools 180
- Innate cosmopolitanism and some criticism 185
- Criticism reflected 192
- Working with the intuition 197

Bibliography 200

Summary 208

Samenvatting 216
Table of Cases & Opinions


Corfu Channel Case, Judgment of 9 April 1949, [1949] I.C.J. Reports 4


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, [2004] I.C.J. Reports 136


Introduction

Cosmopolitanism 3
Innate cosmopolitanism 4
Liberal, constitutional and innate cosmopolitanism 7
General principles and innate cosmopolitanism 14
Critiquing innate cosmopolitanism 20
Questions raised 22
Political theory and international law 27

La communauté des États qui était demeurée jusqu'alors anarchique, est devenue une véritable société internationale organisée. Cette transformation est un fait ; il n'est pas nécessaire qu'un accord international le consacre. Cette société est composée non seulement d'États, parfois groupés, voire même associés, mais aussi d'autres entités internationales ; elle a une existence, une personnalité distinctes de celles des membres qui la composent ; elle a des fins qui lui sont propres. D'autre part, les rapports internationaux présentent divers aspects : politique, économique, psychologique, etc., ainsi qu'un grand dynamisme, une complexité et une variabilité qu'ils n'avaient pas autrefois.¹

The foregoing words, from 1950, were issued in a separate opinion by Judge Alejandro Álvarez from an early bench of the International Court of Justice. They enjoyed no binding force and were not part of the majority opinion in the case, the

¹ International Status of South-West Africa, Advisory Opinion, 11 July 1950, [1950] I.C.J. Reports 128, at 177 (Judge Álvarez, Dissenting Opinion) (“The commnunity of States, which had hitherto remained anarchical, has become in fact an organized international society. This transformation is a fact which does not require the consecration of an international agreement. This society consists not only of States, groups and even associations of States, but also of other international entities. It has an existence and a personality distinct from those of its members. It has its own purposes. On the other hand, international relations present various aspects: political, economic, psychological, etc., and today possess a dynamic character, complexity and variety which they did not show formerly.”) (emphasis in original).
International Status of South-West Africa Advisory Opinion. Coming from the bench of
the ICJ, however, they represented the modern ascendance of a distinct
cosmopolitan conception of international law. That cosmopolitan conception may
be observed throughout 20th century scholarship into the present, as well as in the
jurisprudence of the ICJ, among other areas of practice. Cosmopolitan ideas in
international law, however, have generally been treated without sufficient regard to
differentiation among distinct schools of cosmopolitan thought. Moreover, the
particular cosmopolitan conception at issue has never been expressly developed as a
doctrine in its own right, and thus lacks the consolidated vocabulary and critical
engagement enjoyed by clear doctrinal movements, cosmopolitan and otherwise. I
propose to recognize the school of thought reflected in Judge Álvarez’s words as a
discrete theoretical construct, and refer to it as 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 – *des fins qui lui sont propres*, to
borrow Álvarez’s phrase – and is capable of establishing a foundation for universal
norms under international law.

The failure adequately to differentiate in the treatment and appreciation of different
cosmopolitan schools of thought has impeded both the clarity and adequacy of
arguments for cosmopolitanism, as well as criticism of cosmopolitanism in
international law. In this book, I will distinguish between three broad schools of
cosmopolitan thought, namely liberal cosmopolitanism, constitutional
cosmopolitanism and innate cosmopolitanism, and trace the bounds of the domain
of each, including the method, substance and ends attributable to them. Liberal
cosmopolitanism is the dominant school of cosmopolitan thought in political
theory, largely to the exclusion of other cosmopolitan theory. Constitutional
cosmopolitanism represents a prevalent means of conceiving of universal norms in
international law today. Innate cosmopolitanism, however, represents still another
means of conceiving of universal norms, which may helpfully be contrasted with the
method and substance of liberal and constitutional cosmopolitanism. Moreover,
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. Thus, in recognizing innate cosmopolitanism as a distinct theoretical construct,
I propose as well in this work to look more closely and critically at the role of innate
cosmopolitan ideas in the discourse and development of international law.
Cosmopolitanism

While international law and international lawyers have regularly been described as cosmopolitan, the term in this context has remained elusive, or has been taken as self-evident, and is rarely explained with any thoroughness. In the meantime, international law is increasingly occupied with still more terms that may also be described as cosmopolitan, including the "interest of all mankind" and "the province of all mankind", or the "common bonds" and "delicate mosaic" described by the Rome Statute, or certain universal values attributed to international economic law or recognized by regional regimes in their extra-regional relations, or the normative authority attributed to world public opinion as a matter of law. With the failure of an adequate definition comes an insufficient comprehension of the normative scope and purpose of these developments and other discrete cosmopolitan terms in legal arguments and resolutions arising out of international controversies. While cosmopolitan terms continue to multiply in the documents and discourse of international law, their effect continues to be underappreciated.

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 universal order. The cosmopolitan system calls for universal order, whereas the consensual system 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

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4 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979), Art. 4(1).
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.\(^8\) 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 can be crucial to appreciating the historical project of international law,\(^9\) 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.

Innate cosmopolitanism

As a sentiment or sympathy, innate cosmopolitanism is largely taken for granted, but in its scope and particulars, it is not properly recognized, and as a result, its role and effect in international law have gone underappreciated and unchallenged. 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 cosmopolitanism.


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 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 that define the consistent substance of the innate cosmopolitan idea are reflected in the words of Judge Álvarez, cited at the outset. 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 social or political whole capable of exhibiting a unified will or unified interests. Moreover, 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. As Álvarez’s words indicate, the autonomous world phenomenon is attributed something like personality, *elle a une existence, une personnalité distinctes de celles des membres qui la composent* – it is ‘subjectivized’, to use a term to which I return in Chapter 2. The subjective and independent world phenomenon, then, becomes a source of normative authority in the international system. Moreover, it becomes a preeminent source: as Chapter 2 makes clear, the world as a whole is taken to represent the objective foundation of normativity for international law, capable of escaping the contradictions of a system of law established according to consent.

Another characteristic of innate cosmopolitanism reflected in the quote from Judge Álvarez is the 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, as I will explore in Chapter 2, 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. Álvarez’s unbounded list of attributes associated with the phenomenon of the world as a whole – including, but not limited to, political, economic and psychological attributes – partially reflects the scope of the observational analysis argued to be necessary to comprehend the normative mandate represented by the world as a whole under innate cosmopolitanism. From those observed attributes, 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 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 law; I return to the point below and in various contexts in all of the remaining chapters. Additionally, there exists under the innate cosmopolitan model a close link between law and policy. As Chapters 2 and 4 will make clear, the normative potential attributed to the autonomous world as a whole becomes, in the work of theorists and practitioners, synonymous with policy tailored to the perceived attributes particular to the world complex. The incorporation of a policy mandate, especially as it may be observed in the jurisprudence of the ICJ, reflects the expansive scope of legal argumentation and legal authority under innate cosmopolitanism. That scope is not constrained by traditional terms of positive law and political contestation, to which points I return in the Conclusion of this work.
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, as Chapter 4 demonstrates, the innate cosmopolitan model is used by 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 by 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 source of normativity that exists independent of positive international law.

Liberal, constitutional and innate cosmopolitanism

The scope and architecture of innate cosmopolitanism, as well as the ends to which it is put, can only fully be appreciated in comparison with other forms of cosmopolitanism at work in international law. I consider here liberal and constitutional cosmopolitanism: two forms of cosmopolitan doctrine predominantly recognized in political theory and the body and discourse of international law. Liberal cosmopolitanism is the dominant theory of cosmopolitanism in political theory, and it is regularly applied to international law for purposes of critique or innovation. Constitutional cosmopolitanism is discernible in international legal scholarship, and examines the possibility or reality of a world constitution, lately also incorporating basic tenets of liberal cosmopolitanism, including normative individualism. I propose to contrast an innate cosmopolitan model of international law with liberal and constitutional cosmopolitanism, for the purpose of distinguishing tenets of innate cosmopolitanism, the particular conceptual domain it occupies and the role for which it is invoked, and thereby further to explore the

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actual normative influence enjoyed by innate cosmopolitan ideas in international legal practice and argumentation.

Liberal cosmopolitanism is a well-developed ethical doctrine in political theory, lately represented by figures such as Simon Caney, Kok-Chor Tan, Allen Buchanan and Thomas Pogge, among others, and develops norms out of what are taken to be universally-acceptable moral premises, independent of the powers of states and other actors in the international system. Liberal cosmopolitanism is expressive of normative individualism, and bound up with the core norms and values of human rights doctrine. Constitutional cosmopolitanism, on the other hand, is closely related to international constitutionalism, and accordingly has received increasing attention in international legal scholarship as theories of world constitution have enjoyed renewed interest. Constitutional cosmopolitans differ from liberal cosmopolitans insofar as the former 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. One branch of constitutional cosmopolitanism takes the UN Charter for a discrete international constitution; others are founded on some hierarchical arrangement of generally-applicable norms, however rudimentary. Lately, scholars such as Erica de Wet and Anne Peters have posited a nascent world constitution according to hierarchically-superior, universal norms, incorporating principles of normative individualism, drawing the liberal and constitutional models of cosmopolitanism closer together.

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,

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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 – insofar 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, as noted, 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 different appreciation of sources exhibited by each cosmopolitan school of thought.14

Liberal cosmopolitanism ascertains law – or the need for legal change – by a deductive, or special constructivist method, the source of which is identical with the substance of select moral premises. Constitutional cosmopolitanism, on the other hand, adheres by comparison to a typically legal, formal means of law-ascertainment, locating constitutional development in traditionally-acknowledged sources of international law. Innate cosmopolitanism, falling between the two, maintains the posture of legal discourse, but nonetheless goes outside the limits of modern international law. In maintaining the posture of legal discourse, innate cosmopolitanism exhibits a framework for law-ascertainment by which law is discerned as a discrete historical product, not according to any fixed substance. In going outside the limits of modern international law, innate cosmopolitanism allows for the ascertainment of legal norms independent of convention and custom, according to a source not otherwise acknowledged in the positive law of the modern international system: namely, the will or interest of the world as a whole, the normative expression of which is entirely independent of its affirmation – or

14 In this discussion, here and where it reappears throughout this work, I am guided by the work of Jean d’Aspremont, Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules (Oxford: Oxford University Press, 2011).
rejection – by any one or several of the subjective constituents (such as states) that it comprises.

Where liberal cosmopolitanism presents a well-articulated ethical theory, and constitutional cosmopolitanism observes more closely the traditional constraints of international law, innate cosmopolitanism is roughly predicated on an intuition that is basically sociological in character: the world as a whole represents a discrete social or political collective capable of exhibiting subjective characteristics, including discrete interests and a will of its own, like other individuals and collectives. Moreover, where liberal cosmopolitanism functions primarily to measure existing institutions against an ethical cosmopolitan standard, and where constitutional cosmopolitanism functions primarily to articulate or identify formal standards by which a cosmopolitan constitution may be recognized, innate cosmopolitanism function primarily like a heuristic device. Never expressly developed as a discrete doctrine, innate cosmopolitanism has served as an implicit model to guide the development of the international system towards certain normative ends associated with the interests or will or the world as a whole, discerned in roughly sociological and historical terms. In its expression by tribunals such as the ICJ, the innate cosmopolitan heuristic function has taken an ad hoc character, facilitating the extension of jurisdiction or norms to particular issues raised in given cases. That ad hoc character is in contrast with the more systematic development of liberal and constitutional cosmopolitanism.

The normative ends of the innate cosmopolitan heuristic model include the objective ends of an interdependent world, and an affirmation of its interests above and beyond the politics of sovereign states and all other exercises of subjective interest. Moreover, those ends are taken to be not only desirable, but necessary to make a coherent doctrine out of modern international law: where the cooperative venture that a strictly subjective system represents is perceived as not rising in theory to the level of a binding system of law, innate cosmopolitanism establishes an objective authority, in the form of the world as a whole, capable of grounding the normativity of international law. Alpheus Snow captured the idea at the beginning of the last century: “the term ‘international law’ is self-contradictory.... That which is international cannot be law; or, what is the same thing, that which is law cannot be international. Agreements, relationships, commerce may exist between nations and thus be international;
but law can never so exist. Law always and inevitably comes from above.” 15 This is the gist of the central historical narrative of modern international law that innate cosmopolitanism represents, running from Vitoria forward. The narrative includes the efforts of international scholars and practitioners to strengthen, in the words of J.L. Brierly, the “frail moorings” that bind international law “to any sound principle of obligation”. 16

In other words, international law is, in part, constructed around a constantly evolving answer to the question of what, if anything, gives effect to rules among subjective actors who are nominally sovereign. Innate cosmopolitanism responds to the question with a perhaps deceptively straightforward argument: the world itself also represents a subjective actor in the sum of its interdependent social conditions. As the sole all-inclusive subjective actor, the world represents an objective actor vis-à-vis every other subjective actor – every other political collective – within its parameters. This does not necessarily elevate the world normatively above other, smaller political collectives: local and regional attachments may in fact be stronger in terms of immediacy. The global collective, however, does enjoy an exclusive claim to objectivity as against all of those other collectives and particular attachments. Accordingly, the world society represents the primary level of social or political order, though not the most immediate.

Jens Bartelson, writing about world community as a matter of international relations theory, captures the point as part of a proposal to reinvigorate a Kantian tradition allowing for a diversity of collectives within a harmonious totality of world relations. 17 Following Bartelson, “Kant’s concept of a world community includes all human communities ... and regards them as indispensable parts of the same overarching community”, with the consequence that “the different levels at which political rights could manifest themselves are actually inseparable”. 18 Bartelson’s Kantian theory tracks the innate cosmopolitanism of Judge Alejandro Álvarez from years prior: local and regional collectives enjoy normative status as part of the public order arising out of a

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18 Ibid., pp. 155, 162 (emphasis in the original).
world social phenomenon, and they are all co-constitutive of one another. For Bartelson and for Álvarez, as for thinkers before them going back to Vitoria and beyond, the capacity for social interaction is the essential condition from which world norms will arise in a situation of global interdependence. Because the essential condition is uniform, certain bedrock norms ordering the proper expression of the common social capacity will inhere across the whole of the interdependent sphere. But while the bedrock norms will be common across the interdependent sphere, social interaction will also give rise to diverse norms across time and space. Norms will vary with historical, material and cultural conditions in the world, while the basic phenomenon of a unified world unit with normative consequences will not. Accordingly, affirming the proper expression of normative authority enjoyed by the world as a whole becomes a matter of proper observation or discernment.

Bartelson suggests that his reading of Kant’s cosmopolitanism, founded on the appeal to capacity, reverses a Kantian tradition that has made the unified global phenomenon more difficult of realization, rather than less. By this tradition, after Kant, “the basic ontological commitments underpinning the concept of world community became increasingly hard to sustain, and it became equally difficult to make coherent sense of that concept in a world of sovereign and secular nation-states.” In part, this is because Kant himself suggests a cartographic explanation of political history that couples a sense of the globe as a physical space to a competition among divided political communities. Likewise, Kant’s preeminent contributions to normative individualism conflict with the holistic ontology of innate cosmopolitanism – meaningfully underscoring the distinction between innate and liberal cosmopolitanism. The effect of focusing on these aspects of the Kantian tradition is an irreconcilable tension between particular and universal political aspirations, such that any concept of world community becomes a “dream incapable of realization” at best, and an “ideology of empire” at worst.

Where liberal cosmopolitanism, in the liberal Kantian tradition of normative individualism, affirms the individual and particular, innate cosmopolitanism attempts to redeem the whole. The world itself is the essential unit for normative purposes, an independent and sui generis sociological phenomenon.

19 Ibid., pp. 3-4.
21 Bartelson, supra note 17, pp. 2-3.
Accordingly, the method is largely inductive: the world represents a complex but unified social phenomenon exhibiting certain historically-contingent but generally-applicable norms, which are discoverable with sufficient observation and reflection. The generally-applicable norms associated with the world collective may alike be seen to underlie or arise out of the diversity of particular norms in sub-global collectives. In either case, the norms that flow from the innate cosmopolitan model must be discerned by reference to the sum total of normative behavior bearing on interdependence in the world collective.

Predicated on the observation and expression of global interests and global will, innate cosmopolitanism vindicates the subjectivity of the world itself. Consider Judge Weeramatry’s reading of the UN Charter, in his dissent from the Court’s advisory opinion in *The Threat or Use of Nuclear Weapons* case:

> The Charter’s very first words are "We, the peoples of the United Nations" - thereby showing that all that ensues is the will of the peoples of the world. Their collective will and desire is the very source of the United Nations Charter and that truth should never be permitted to recede from view. In the matter before the Court, the peoples of the world have a vital interest, and global public opinion has an important influence on the development of the principles of public international law.\(^{22}\)

Judge Weeramatry’s statement of the Charter regime captures the basic thrust of innate cosmopolitanism: a mandate in the name of world society or community, and a vision of the world with a social and political interest of its own on which new authority will be based and from which it will draw. Moreover, Judge Weeramatry nowhere in his opinion suggests that the Charter rises to the level of a formal constitutional document, though it reflects the related idea of a constituted collective – and here the relative closeness of innate cosmopolitanism and some constitutional cosmopolitan theory is clear. In positing the constituted world collective capable of normative authority, Judge Weeramatry turns to its vital interests, as well as an expression of public opinion in its name, to discern the norms available to the Court in its treatment of the matter before it. As such, he employs devices typical of innate cosmopolitanism in application. The attribution of interest and will to a world collective represents an extraordinary legal authority where none might otherwise be available, such that international law may be established by reference to the vital

\(^{22}\) *Legality of the Threat or Use of Nuclear Weapons* (Judge Weeramatry, Dissenting Opinion), *supra* note 7, at 441-42.
interests of the world collective, as well as global public opinion, in addition to other sources. In this manner, his opinion reflects perhaps the central purpose for which the innate cosmopolitan model is invoked: as a means around positive law limitations in international law.

General principles and innate cosmopolitanism

In practice, the ICJ has relied on the innate cosmopolitan model to sustain jurisdiction or apply a norm on the basis of the authority of the will or interest of the world where conventional or customary law have failed to empower the court in like measure. In this manner innate cosmopolitanism represents a challenge to or avoidance of limitations bound up with traditionally-recognized sources. There remains, of course, the third primary source of international law identified in Arts. 38(1)(3) of the Statute of the PCIJ and 38(1)(c) of the Statute of the ICJ, namely “the general principles of law recognized by civilized nations”. In some respects, the general principles of law identified as a source of law in the World Court’s statutes approximate the innate cosmopolitan idea, especially since the category of “civilized nations” has become effectively universal, applying in any event to all member-states of the United Nations. But general principles as they are identified in the World Court’s statutes are not identical with innate cosmopolitanism, and have not sufficed to make appeal to innate cosmopolitanism redundant. Tracing briefly the areas of overlap and points of distinction between innate cosmopolitanism and the general principles of Art. 38(1)(c) will help take further this preliminary sketch of the domain and function of innate cosmopolitanism.

The innate cosmopolitan model represents an idea of an interconnected and interdependent world that exists as a social or political whole. By virtue of that collective unity, the world as a whole enjoys a will and interests of its own, and together with them a discrete normative authority upon which judges of international tribunals, among others, may draw in their determination of

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23 For what remains perhaps the fullest treatment of general principles under Arts. 38(1)(3) and 38(1)(c), see Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 1953).


25 Hereafter, I will refer to the general principles of Art. 38(1)(c) simply as “general principles”; any other use of the term “general principles” will be expressly indicated.
international law. A tribunal such as the ICJ is thereby empowered in its adjudication of questions of international law to give expression to norms reflective of the public interest of the world, despite an absence of any corresponding legal norm in the body of positive international law. In similar measure, general principles may be argued to represent universal principles of public order, upon which, under Art. 38(1)(c), the ICJ is entitled to rely for normative authority, despite the absence otherwise of any corresponding legal norm under positive international law. There are two reasons, however, that general principles of law have never meaningfully represented a practicable innate cosmopolitan source of law, at least as concerns the ICJ. First, general principles as a source of international law have been subjected to wildly different interpretations; though some of those interpretations exhibit an innate cosmopolitan character, not all of them do, and indeed the most commonly accepted interpretations do not.\textsuperscript{26} Second, even where general principles might be taken to represent a source of law in keeping with the innate cosmopolitan model, the ICJ still has declined to rely on them as a court to resolve cases before it, perhaps due to the uncertainty and controversy that remains associated with general principles as a source of international law.\textsuperscript{27} Examining for a moment longer each of the foregoing distinctions between general principles and innate cosmopolitanism helps to demonstrate what innate cosmopolitanism is not. Thereafter, I will return to revealing grounds of commonality that persist after the first two distinctions are cleared away, before moving on to introduce other aspects of the innate cosmopolitan model.

The first distinction concerns the myriad interpretations to which general principles as a source of international law have been subject. One primary interpretation reinforces a subjective voluntarism that is largely at odds with the innate cosmopolitan model. The authority enjoyed as a matter of general principles remains in the final analysis a matter of state consent, such that the innate cosmopolitan model of a world authority enjoys no purchase. By this so-called voluntarist interpretation, general principles include those rules or legal mechanisms that all or nearly all individual states already and uniformly exhibit in their municipal

\textsuperscript{26} Jaye Ellis notes that positivist and voluntarist interpretations of general principles as a source of international law have largely prevailed, though “an approach tinged with natural law thinking” has also been generally employed. Jaye Ellis, General Principles and Comparative Law, 22 Eur. J. Int’l L. 949 (2011), p. 954.

\textsuperscript{27} Perhaps the most commonly cited treatment of general principles in ICJ jurisprudence may be found in Judge McNair’s separate opinion in the International Status of South West Africa Advisory Opinion. International Status of South-West Africa, Advisory Opinion, 11 July 1950, [1950] I.C.J. Reports 128, at 148-49 [Judge McNair].
legal code.28 Each state’s adoption of an identical rule or mechanism is taken constructively to represent consent to that rule or mechanism, such that the near-universal and uniform affirmation by each state municipally represents a tacit agreement under Art. 38(1)(c) to allow the municipal rule to stand for international purposes where no positive law is available to resolve a given controversy. By this understanding, no authority is acknowledged in or ceded to the world as a whole in the allowance for general principles under the Court’s statute; rather, authority is retained by states by identification of tacit consent in the terms of 38(1)(c).

A second interpretation of general principles inclines towards what has been described as a naturalist character.29 By this interpretation, general principles represent abstractions drawn from the nature of law itself. They include that which is necessary or intrinsic to law generally as a discrete endeavor: that which is fundamental to all and any law in theory represents a general principle available to the ICJ as a source of law under Art. 38(1)(c). But in referring to theoretical constructs that derive from the law as a discrete phenomenon, this so-called naturalist interpretation of 38(1)(c) is distinguishable from innate cosmopolitanism, precisely by virtue of the phenomenon from which normative authority is drawn. The naturalist interpretation makes the theoretical enterprise of law itself that which underlies the Court’s normative authority for the purposes of 38(1)(c), rather than turning for the source of normative authority to the sociological reality of a social or political collective representing the world as a whole. Frances Jalet, rejecting comparativist method for determining general principles under article 38(1)(c), roughly captures the naturalist interpretation as follows: “It is not because rules or legal principles exist in most, or even in every, legal system that they constitute general principles, but because they are so basic and fundamental as to compose the substratum from which positive rules may be derived. They comprise an unformulated law which should not be confined but left pliant and expandable.”30

Each of the foregoing interpretations, “voluntarist” and “naturalist”, demonstrates something that innate cosmopolitanism is not. Innate cosmopolitanism is not a mere coincidence of norms shared by subjective powers. Nor is it a theoretical abstraction drawn from the nature of law itself. Rather, innate cosmopolitanism is a model of historical normative authority vested in a social or political collective

28 Ellis, supra note 26, p. 953.
29 Ibid., p. 954.
coterminous with the whole of humanity in the world at any point in time. The method is neither strictly comparative, as per the voluntarist inquiry into the diverse legal arrangements entertained by states, nor is it deductive, as per the naturalist inquiry into that which is fundamental to the concept or theory of law. Rather, innate cosmopolitan method is roughly sociological, an inquiry into the norms exhibited in the sum total of acts, experiences and expectations bearing on interdependence in the world.

There remains, however, an important point of overlap between innate cosmopolitanism and general principles, which may be observed in a conflation of both of the foregoing interpretations of general principles. This conflation occurs when the comparative technique of the voluntarist interpretation is married to the deep structure argument of the “naturalist” interpretation, but does not do so in the name of subjective consent, nor in the name of pure legal theory. By this interpretation, conflating each of the prior two, general principles come to resemble an innate cosmopolitan idea insofar as the comparative technique reveals a deep structure of social or political collective enterprise, rather than anything else. Thus the comparative technique is marshaled to show that which all or nearly all states or collectives adopt in the normative exercise associated with forming and sustaining the collective body – not for the purposes of establishing tacit consent, but for the purpose of revealing some normative characteristic also attributable to the world collective. General principles, by this interpretation, approach the innate cosmopolitan model by virtue of being taken to represent evidence of that which is historically universal as a matter of collective enterprise.

The overlap is significant because innate cosmopolitanism, as will be shown, assumes a mutually-constitutive relationship between particular collectives and the universal or world collective. As such, that which is essential to the local and regional levels may also be essential to the world collective. Art. 38(1)(c), by this last interpretation, allows the possibility of discovering that which is universal to the collective enterprise at any given point in time to serve as a source of international law, by virtue of what it reveals about the presumptive normativity of the world collective. Brierly hints at this possibility when he refers to general principles, in a notably brief treatment, as a rejection of positivism, and “an authoritative recognition of a dynamic element in international law, and of the creative function of the courts which administer it.”31 Rudolf Schlesinger went farther, as part of a

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31 Brierly, supra note 16, p. 63.
comparative law project of at Cornell University in the 1950s and ’60s with the aim of determining a common core to legal systems internationally, to which project I will return in the next chapter. Publicizing that project, Schlesinger largely encapsulated the innate cosmopolitan idea as it was then popular, noting that “appeal to the laws and basic principles of justice which are recognized by all civilized nations may carry weight where political arguments fail” insofar as “the general principles of law recognized by civilized nations” might be “translated into the pressure of world opinion”.32 According to Schlesinger, sufficient empirical research would reveal universally-applicable norms that exist beyond the subjective politics of states, reflecting the interest or will of the world, and validated by reference to world public opinion.

Despite, however, the possibility of overlap between innate cosmopolitanism and general principles as represented by Brierly and Schlesinger, the ICJ, as noted, has not meaningfully adopted general principles in its resolution of cases and controversies,33 even as the Court has otherwise turned to innate cosmopolitanism. In part, this is reflected by the noted brevity of Brierly’s treatment of general principles, as though the topic would be consigned to a footnote at best were it not formally included in Art. 38. Despite its inclusion in Art. 38, however, the general principles clause has never enjoyed a sufficiently clear, robust interpretation capable of supporting meaningful reliance norms outside of the positive law available to the Court. As Jaye Ellis has noted, general principles remain “highly controversial and largely neglected. One obvious reason for both the controversy and the neglect lies in difficulties with the underlying sources of validity of general principles: how can judges justify reliance on rules or concepts taken from other systems of law without arrogating to themselves law-making power?”34 As will be seen in Chapter 4, the ICJ has made regular reference to principles – including general, fundamental and cardinal – but the reference rarely rises to the level of invoking the formal authority conferred according to Art. 38. Instead, the Court for the most part has treated general principles in more abstract fashion, often as a rhetorical support to other innate cosmopolitan arguments, rather than as a formal expression of authority enabled by Art. 38.

34 Ellis, supra note 26, pp. 949-50.
In sum, when it has chosen to assume an innate cosmopolitan authority to make or develop international law outside of orthodox consensual and positive law constraints, the Court has preferred to do so by direct appeal to the will and interests of the world – as captured by the innate cosmopolitan model itself – without mediating that appeal by way of Art. 38(1)(c), with its attendant substantive and methodological controversies. Where principles have been incorporated into the argument, they have been incorporated in a loose sense and as a support, rather than as a formal source of authority in accordance with Art. 38. As a result, innate cosmopolitanism lacks the systematic expression or grounding in international law that more clear engagement of Art. 38(1)(c) might have provided. Indeed, however, it may be the lack of systematic expression that makes the innate cosmopolitan argument a more appealing one: as Chapter 4 will make clear, innate cosmopolitan elements are discernible in the Court’s ruling on cases including (but not limited to) Nicaragua (which furthermore eschew square reliance on general principles in favor of reference to “fundamental or cardinal principles”), the Lockerbie preliminary judgment, and Oil Platforms, but the innate cosmopolitan element is treated with a shifting legal vocabulary and without express acknowledgment of the common appeal to innate cosmopolitanism.35

In other words, the innate cosmopolitan argument allows the court to maintain a typically legal means of law-ascertainment by reference to a discrete source, but one that is not sanctioned by Art. 28, and instead resembles something of a moving target in the ad hoc exercise of otherwise novel authority. Consequently, it appears the innate cosmopolitan model has remained consigned, though perhaps strategically, to ad hoc expression as a means of capturing a discrete source of normative authority in international law. Notably, this failure to achieve the systemic grounding that Art. 38(1)(c) might have offered also underscores a significant distinction between innate and constitutional cosmopolitanism: the latter offers an integrated, system-wide cosmopolitan solution to questions of international law, while innate cosmopolitanism offers international tribunals an ad

hoc means of realizing select cosmopolitan goals raised in the context of a given case or controversy.36

Critiquing innate cosmopolitanism

Because the reliance on innate cosmopolitanism has been underappreciated, together with the effects it has enjoyed in legal argumentation, innate cosmopolitanism in international law is not readily confronted, supported or adequately considered in express terms. The failure to appreciate or understand innate cosmopolitanism has resulted in an absence of direct, tailored critique.

A primary grounds of critique that I will explore is, in brief, as follows. In envisioning a world phenomenon with subjective interests and normative potential of its own, innate cosmopolitanism exhibits a monolithic potential. Moreover, 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 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 instrument. 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

36 Liberal cosmopolitanism also presents a more systematically-developed normative complex, established according to a constructivist method, though, as I will discuss in Chapter 3, the liberal cosmopolitan system notably does so from without the international system, rather than within, to allow for ethical challenge to the norms and institutions represented by international law.
of international law. With variability comes manipulability, and the association of law and policy, touched on in the words of Judge Álvarez, quoted at the outset, take on a less sanguine character. Moreover, 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 a world normative authority under innate cosmopolitanism can appear quixotic, or worse, because there is no obvious allowance for political contestation in the development of the norm, and no clear assumption of responsibility for the norm that is announced or assumed. 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 combination with the historical contingency of innate cosmopolitan norms, identified with sociological observation, the innate cosmopolitan model begins to look like a strategy favoring policies supportive of status quo conditions, despite a traditional association of innate cosmopolitan ideas with progressive legal scholarship.

I will take the critique farther in the conclusion of this work. Here, I note that, in response, 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. Innate cosmopolitan phenomena, such as world public opinion, have historically founded – and continue to found – unique arguments for the jurisdiction of international tribunals and other institutions. Currently, appeal to innate cosmopolitan phenomena continues to drive calls for normative innovation and changes in the rules and very grammar of international law.

Moreover, the innate cosmopolitan insistence on the historical validity of its central intuition represents a particular challenge to its most demanding critics. Most of the foregoing criticism is drawn from the field of critical legal studies. But, as will be shown in the conclusion, prominent examples of the critical legal studies deconstruction of cosmopolitanism generally in international law resolve into an intuition or faith capable of redeeming the normativity of international law. With that intuition, even the most trenchant critic appears to adopt the fundamental intuition that drives the innate cosmopolitan model in the first place, as a heuristic device applied for the purpose of sustaining and perfecting the normativity of international law.

The critical debate, as noted, will be explored in the conclusion. It will suffice here to mention that 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 they are applied call for more consistency, and more consistent recognition. Doing so will allow for a clearer and more comprehensive critical treatment both of innate cosmopolitan argumentation generally – the means by which it innate cosmopolitan arguments are made and the ends to which they are put – and in its particular instantiations. This book represents a first step in that project, with emphasis on the theory of innate cosmopolitanism and its use by the ICJ as an ad hoc device for extending jurisdiction and norms to cases where the positive law might not allow the same.

Questions raised

This study, then, explores the theory and use of innate cosmopolitanism in international law, its foundations and effects, with special attention to the pretension to an autonomous world society or community exhibiting objective normative potential beyond the political. Two main questions will be addressed: first, what is the substance and structure of the innate cosmopolitan model, and how does it correspond with other cosmopolitan ideas in international legal theory; and second, how is the innate cosmopolitan model articulated, and to what effect, in the practice and discourse of international law?

The first question, concerning the substance and structure of the innate cosmopolitan model, and its relationship with other cosmopolitan ideas, will be dealt with in Chapters 2 and 3. In Chapter 2, innate cosmopolitanism will be
examined as a matter of legal theory. As noted, the history of innate cosmopolitan ideas remains unusually important to contemporary articulations of innate cosmopolitanism. For that reason, I begin with an examination of Vitoria, Suárez and Grotius, who have been central to the development of innate cosmopolitan ideas in international law. Additionally, in keeping with Bartelson’s reconstruction of the history of international political theory, touched on above, I consider as well the legal theory of Immanuel Kant. Though Kant is a central figure to the tradition of liberal cosmopolitanism, Bartelson suggests that Kant’s work represents as well the end point of a lost tradition of innate cosmopolitan thought, and Kant’s legal theory may be seen to correspond with and support aspects of an innate cosmopolitan tradition.

Following an examination of the early scholarship that remains central to the development of innate cosmopolitanism, I will proceed to 20th century legal theorists, beginning with James Brown Scott, who was instrumental in popularizing the innate cosmopolitan aspects of historical figures such as Vitoria, Suárez and Grotius. Other scholars from the first half of the 20th century include Manley Hudson, judge of the Permanent Court of International Justice, Alejandro Álvarez, judge of the International Court of Justice, Robert Lansing, US Secretary of State under Woodrow Wilson, and Salvador de Madariaga, Spanish ambassador to the UN. Scholars from the latter half of the 20th century include prominent thinkers such as Hersch Lauterpacht and Wilfred Jenks, as well as Quincy Wright, an academic who worked prominently at the intersection of international politics and international law, and Myres McDougal and his work in the name of the New Haven School. I consider as well the work of Hans Kelsen, particularly in contrast with Lauterpacht, for Kelsen’s opposition to the innate cosmopolitan idea, though Kelsen might feasibly be considered cosmopolitan by other measures. Following the inquiry into select 20th century theory, I turn to two examples of contemporary theory, namely transnational legal process and interactional legal theory.

The selection of theorists in Chapter 2 is not intended to be comprehensive, nor is it intended to suggest that innate cosmopolitanism represented or represents a dominant mode of legal theory and legal reasoning in international law. Rather, it is intended to be sufficiently diverse to be representative of a spectrum of legal theory varying between mainstream and progressive contributions to international legal theory and discourse. Because innate cosmopolitanism has never achieved the level of a recognized doctrine, it does not offer the benefit of
a discrete set of terms or topics, and does not come with a ready list of theorists self-identifying with one another or with innate cosmopolitan theory generally. For that reason, the selection of figures and scholarship is intended to capture and demonstrate a consistent core of innate cosmopolitan ideas applied in a variety of terms in the changing context of international legal discourse. In so doing, Chapter 2 reflects a reasonably full articulation of innate cosmopolitan theory as a discrete set of ideas variously adopted by diverse figures to address a consistent *problematique* in international law, namely the perceived need to achieve some unified, objective authority under law, capable of maintaining rules of conduct over and above the subjective authorities enjoyed by individual political collectivities in the world.

Chapter 3 contrasts innate cosmopolitanism with liberal and constitutional theory. In so doing, Chapter 3 serves two primary functions: first, to map the various domains in international legal discourse of the separate schools of cosmopolitan thought, and, second, to demonstrate the particular structure of innate cosmopolitanism as it may be contrasted with the more systematically and comprehensively developed theories of liberal and constitutional cosmopolitanism. Both functions address a matter central to the purpose of this project as a whole: the relative lack of sophistication and differentiation in the treatment and appreciation of cosmopolitanism generally in international law. Liberal cosmopolitanism has been the near-exclusive focus of cosmopolitan political philosophy, while global constitutionalism remains the dominant means of conceiving universal norms as a matter of international legal doctrine. As a result, liberal cosmopolitanism largely fails to account for the possibility of a conflicting vision of cosmopolitanism, as represented by innate cosmopolitanism, while constitutional cosmopolitanism tends to conflate – or, at least, fail to distinguish – between arguments, on the one hand, about a world constitution under law with, on the other hand, arguments about a community or collective that might precede the formal constitutional achievement, as posited by innate cosmopolitanism. In both cases, the distinction of innate cosmopolitanism makes clearer the scope and substance of all three cosmopolitan schools of thought, and thereby serves to differentiate the particular roles each plays or may play in international legal argumentation.

Thus innate, liberal and constitutional cosmopolitanism will be charted and analyzed for their varying frameworks and varying effects at law, together with their points of distinction and overlap with one another and with innate
cosmopolitanism. To do so, I will not attempt to reproduce the fullness of liberal and constitutional cosmopolitan doctrine, which is not the intent of this project. Rather, I will treat core aspects of liberal and constitutional cosmopolitanism, and will further raise special attributes of each school that serve to distinguish the three from one another. Relative to the vast body of literature that exists for both liberal and constitutional cosmopolitanism, I will rely on a narrow selection of authors and literature, chosen as representative of main streams of thought within each school, and chosen as well for having addressed matters especially pertinent to the distinctions among the three cosmopolitan schools. For liberal cosmopolitanism, this includes the political theorists Charles Beitz, Thomas Pogge and Allen Buchanan, among others, as well as the international legal theorist Fernando Tesón. For constitutional cosmopolitanism, this includes Bardo Fassbender, among others, as representative of a school of thought tending to elevate the UN Charter as a constitutional document, and Erica de Wet and Anne Peters, among others, as representative of international legal scholars who observe formal constitutional development in a hierarchy of norms, largely predicated on substantive values, arguably recognized under international law.

In sum, establishing the different architecture and application of liberal and constitutional cosmopolitanism, in contrast with innate cosmopolitanism, will establish a clearer map of cosmopolitan argumentation in international law, and will likewise establish the discrete contribution to legal and political discourse of innate cosmopolitanism. Thus, Chapter 3 establishes the bounds of innate cosmopolitan theory, together with the bounds of liberal and constitutional cosmopolitanism in international legal discourse, by contrasting the three schools of thought. Taking Chapters 2 and 3 together, the particular premises, methods, conclusions and ends of innate cosmopolitanism will be identified and investigated for their distinction as a discrete set of terms. Ultimately, doing so allows, in the Conclusion of this work, for a more thorough and more sophisticated critique of cosmopolitan argumentation in international law, and especially innate cosmopolitan argumentation, than has heretofore been achieved.

The second question, concerning the articulation of innate cosmopolitanism in the practice and discourse of international law, will be addressed in Chapter 4 on the basis of an analysis of jurisprudence of the ICJ concerning *jus ad bellum*. I look specifically at the ICJ’s treatment of the *jus ad bellum* as an area of law that
would seem at once both the least likely site of cosmopolitan development, and the most compelling. The most compelling because it represents the basic rule of public order understood to underlie any meaningful expression of a world social or political phenomenon. The least likely for being the most clearly in conflict with the interests of subjective powers that enjoy a foundational role in modern international law. As the Nuclear Weapons Advisory Opinion makes clear, the prerogative of states to use force at least in the interest of survival remains the seemingly-ineradicable bedrock of subjective right in the international system.

There are other topic areas where innate cosmopolitanism may be found to exist in the theory and practice of international law. Foremost among these other areas might be international environmental law and international criminal law. International environmental law is well suited to innate cosmopolitanism for the former’s central problematique pertaining to the proper treatment of a global commons, insofar as a commons presupposes a common interest in a shared resource, such as might establish the joined concern of an overarching community.38 Likewise, international criminal law is well suited to innate cosmopolitanism for presupposing on a world scale the unique authority of criminal law, namely the capacity to deprive individuals of life or liberty in the name of social, political or moral community. Both international environmental and criminal law, however, represent specific applications of the innate cosmopolitan model to issue areas where it might be expected to enjoy special traction. The jus ad bellum, by contrast, represents a more conflicted area of application for innate cosmopolitan ideas, and therefore a richer field of analysis, less congenial to characterization according to modus vivendi, a common exercise of self-interest, or speculative arguments of moral congruence.

Because the prohibition on the use of force defines both the basic rule of international organization, as well as one of its most controversial rules in terms of application to subjective authorities jealous to preserve a prerogative to resort to force, focusing on the jus ad bellum facilitates examination of the role of innate cosmopolitanism at the conflicted heart of modern international law. Moreover,

38 See, for example, the work Development Without Destruction, by Nico Schrijver, which takes for its objective “to demonstrate the role of international organizations, particularly the United Nations, in developing universal values about global natural resource management for sustainable development.” Nico Schrijver, Development Without Destruction: The UN and Global Resource Management (Bloomington: Indiana University Press, 2010), p.2.
restricting the inquiry to the prohibition on the use of force in international
relations facilitates not only the examination of innate cosmopolitanism in
international law, but also the examination of linked paradoxes that underlie the
international legal system in the tug between the universal and the particular, and
the tension between objective and subjective norms.

Political theory and international law

As a final preliminary note, in examining the work being done in international law
and discourse by reference to the world as a social or political whole, this project is
in part an inquiry into concepts of cosmopolitan political theory as they are relied on
or employed in international law. In examining cosmopolitan and innate
cosmopolitan ideas for the work they are doing in international law, the ultimate
object of this project is juridical in nature. I am not in the first place looking at
cosmopolitan political acts and ideas for their effect in the world at large. I am
looking for their effect on and in the law and legal reasoning. The project is not
without attention to consequences in the world flowing from the legal use of these
ideas: establishing their effect on and in the law means establishing their effect on
decision-making and legal resolutions, in addition to legal argumentation, in a
number of real cases and contexts. But the project remains primarily concerned
with how cosmopolitan ideas affect the form and function of international law and
legal discourse in the first instance. This project identifies a role for innate
cosmopolitanism in international legal discourse that reaches as far as the bounds of
traditionally-recognized sources of international law, but attempts no empirical
demonstration of law’s effects in the world.

Likewise, I make no attempt to prove or disprove the political-theoretical concepts
that I am considering. Whether or not the moral premises of liberal
cosmopolitanism are universally valid; whether or not the UN Charter actually
represents a world constitution, as certain international constitutionalists have
claimed; or whether or not the world represents a unified phenomenon, the distinct
premise of innate cosmopolitan, is not my concern here. That these concepts are
relied upon in the practice and discourse of international law is enough. Similarly,
whether or not they may be construed as good or bad, desirable or dangerous, or
even feasible or impossible, is a matter for normative critique, which I have taken
up in limited manner, but not grounds for ignoring or diminishing the role of these
concepts in the workings of international law. This project is not about the ultimate
validity of innate – or any other – cosmopolitan theory, but about its contingent validity, including its contents and discontents, as a facet of modern and contemporary international legal discourse. In sum, I am looking at the way in which these concepts have been, and continue to be employed and deployed in international legal discourse to help conceive or reconceive the norms and structures of the international system, with particular attention hereafter to scholarship and select examples from the jurisprudence of the ICJ.
The innate cosmopolitan idea in international legal theory

Because innate cosmopolitanism represents a body of cosmopolitan principles that together make up a coherent doctrine in themselves, but have not been comprehended as such, the first task is to demonstrate its manifestation in the discourse of international law, and to identify the common core of innate cosmopolitan theory in the same. Lacking the character of a self-referential doctrine, innate cosmopolitanism is not amenable to systematic treatment as might be applied to scholarship expressly engaged with a common vocabulary, idea set or agenda. But part of the significance of the innate cosmopolitan idea is its appeal over time and the common function it serves with respect to an effort to achieve objective normative authority in the international legal system. Thus I will proceed by reference to varied examples of the innate cosmopolitan idea articulated or embraced in a variety of terms by diverse figures who have all enjoyed an impact on international legal discourse, as well as the common doctrinal ends they would achieve following the innate cosmopolitan idea in whatever form.

The first set of references are drawn from canonical works. The history of the innate cosmopolitan idea is unusually critical to its present. Contemporary legal scholars consistently return to historical instantiations of the innate cosmopolitan idea to establish a presumptive authority where none other is available as a matter of law or legal principle. The second set of references are drawn from throughout the 20th century, when innate cosmopolitan principle achieved inroads against the
subjective system of international law, and thereby became foundational for contemporary development of the innate cosmopolitan model in international law. I conclude, then, with select examples of current scholarship to demonstrate ongoing engagement with the innate cosmopolitan model in the discourse of international law.

Historical dimension

Compared with liberal and constitutional cosmopolitanism, innate cosmopolitanism is the most speculative of the three schools of cosmopolitan thought, but enjoys the longest tradition. It remains speculative because the basic premise on which it relies defies proof. But the innate cosmopolitan model can be discerned in canonical works of international legal doctrine, especially the work of the Spanish School from Vitoria through Grotius, reflecting the role of the innate cosmopolitan idea as an enduring supposition in support of a coherent system of international law.

Accordingly, the history of the innate cosmopolitan idea plays a multi-faceted role in its current instantiation. Scholars and practitioners throughout the 20th century forward have relied on the history of the idea for descriptive and normative purposes. Descriptively, the history of the innate cosmopolitan idea has been relied on to make clear perceived doctrinal complexities and paradoxes underlying the otherwise subjective system of modern international legal relations, and to adumbrate an alternative model. Normatively, the history of the idea is relied on for its persuasive force to establish a measure of objective cosmopolitan potential within the international system. Additionally, the history of the idea has been appealed to as something like an alternative source of legal authority, suggesting an intellectual pedigree to challenge the formal pedigree that distinguishes positive law scholarship and practice.

As should be clear, the descriptive and normative uses of the history of the idea are conjoined. Modern and contemporary publicists, from Hersch Lauterpacht to Harold Koh, continue to refer back to foundational figures, such as Vitoria, Suárez and Grotius, effectively to establish the bona fides of the innate cosmopolitan model. The descriptive analysis of innate cosmopolitanism’s historical role in canonical works founds its normative potential. Likewise, political and legal scholars alike return with regularity to Kant to understand or promote a contemporary doctrine of cosmopolitan relations. For the most part, Kant is taken
as the father of liberal cosmopolitanism; his depiction of a contractual move away from a state of nature also resembles constitutional cosmopolitanism; lately, however, his work has been reconstructed by Jens Bartelson to establish an innate cosmopolitan argument as well. I return to that point, below. For the present, the point is to observe that, from Vitoria to Kant, the attention to ancient scholarship is more than a genealogy: it often purports at once to establish the historical architecture, historical persuasion and historical political and legal authority of the innate cosmopolitan idea.

In part, the normative reliance on the history of the idea follows on the failure of definitive proof of the perceived sociological phenomenon. Bound up with the innate cosmopolitan model since its inception, together with the assumption that the unitary world collective exists, is the premise that world norms must be discovered in historical acts, experiences and expectations occurring in the world as a whole. But the vastness of the empirical field and methodological conflicts among scholars and practitioners have compromised the promise of any observational science. In lieu of empirical demonstration, then, the innate cosmopolitan heuristic device has been joined to the narrative of its own intellectual and doctrinal history, such that the pedigree of the idea provides persuasive force where other evidence is lacking. Though it relies on an empirical premise, innate cosmopolitanism addresses the inefficacies of subjective juridical relations firstly with appeals to logic and intuition drawn from the narrative of its own history.

Below, I will first briefly explicate the historical architecture, beginning with Vitoria, with attention to those aspects of the canonical scholarship that have been relied on and reconstructed by recent scholars. I will limit my early historical examination to only a small selection of canonical works showing the most sustained engagement with and development of innate cosmopolitan ideas, namely the Spanish School of the 16th and 17th centuries, including the figures of Vitoria, Suárez and Grotius. Innate cosmopolitanism can be found throughout canonical works associated with international law, but the intent here is not a comprehensive work of historical scholarship. Instead, I rely on a small selection of canonical works in the interests of economy, chosen also for representative value: the figures of the Spanish School remain among those formative figures still most associated by contemporary writers in their various invocations of innate cosmopolitan ideas.39

In addition to the Spanish School, I include, as mentioned, the work of Immanuel Kant, who, as noted, has long been canonical to the liberal cosmopolitan tradition, and may arguably be foundational to constitutional cosmopolitan as well, but whose work has lately also been reconstructed to substantiate and serve as a keystone for innate cosmopolitan theory. In this light, Kant’s work serves a slightly different role from the other early works considered here. Kant is treated less for being foundational to the body of recent innate cosmopolitan work, and more as an example of the continued possibility of development on that idea, including by reference to previously untapped, historical sources of authority.

Following Kant, I will proceed directly to 20th century scholarship, beginning with the work of James Brown Scott, who was instrumental in publicizing and reinforcing an appreciation of the Spanish School and innate cosmopolitanism in international legal theory. In later sections I will further consider the persuasion and authority that continues to flow from the history of the idea in contemporary international legal doctrine and discourse.

Revisiting canonical works

Francisco de Vitoria, working at the University of Salamanca in the early 16th century, developed his ideas in a period of radically disintegrating religious and social cohesion among the peoples of Europe, against which lingering normative cohesion was devolved from the Roman Empire and ecclesiastical authority. At the same time, the world was expanding as a function of the exploration and exploitation of the new world, further stretching the viability of norms and bonds that had historically anchored rules of conduct among peoples in the old world. Vitoria’s contributions to international law were delivered in the form of lectures at the University of Salamanca, and especially a series of lectures dedicated to the propriety and legality of the exploitation of native populations in the newly-discovered Americas. Vitoria defied the authority of prince and pope in denying legal and religious grounds for the forcible subjugation of the native populations, but posited an inalienable right among Spanish adventurers and missionaries – together with anyone else – to travel, trade and preach anywhere in the world,
provided they were not at the same time on other grounds “doing harm” to native populations.\textsuperscript{40}

To substantiate normative cohesion in the face of revolutionary social disintegration, coupled with the expansion of the known world, Vitoria posited a normative potential vested in a comprehensive phenomenon of human collectivity, not identified with imperialist authorities, and also distinct from – but inclusive of – new and independent peoples. The comprehensive phenomenon that he perceived enjoyed the “force of law” sufficient to make its norms “binding upon nations” and “capable of conferring rights” and “creating obligations”.\textsuperscript{41} The phenomenon that Vitoria described would represent, by virtue of being comprehensive, an objective foundation for international law, capable of sustaining international rules over increasingly independent peoples, but without subjecting them to imperial control. He supported this objective foundation by positing an interdependent relationship among the peoples of the world to counter the rise of political independence, an interdependent relationship founded neither in imperial nor ecclesiastical community.

The interdependent foundation that Vitoria established encompassed the world as a whole, taking the entirety of the world of people as a discrete collective entity with interests of its own, capable of establishing an independent or autonomous normative potential. The vision of the interdependent world derives in the first instance from a concept of “natural society and fellowship”, but takes the political form, in the law of nations, of a constructive “consensus of the greater part of the whole world” capable of binding the entirety.\textsuperscript{42} The world as a whole represents a comprehensive collective with normative power by virtue of a capacity and inclination for communication that adheres universally, even if only in potentiality, across the whole of humanity.\textsuperscript{43} In keeping with the Aristotelian premise of a natural propensity for communication, Vitoria founds the normative authority behind international law in the idea that “[n]ature has established a bond of


\textsuperscript{41} Ibid., App. A, p. xxxviii.

\textsuperscript{42} Ibid., App. A, pp. xxxvi, xxxvii.

relationship between all men.”44 Thus there is a distinct, all-inclusive social
phenomenon, not to the exclusion of peoples and states, but different from them,
more expansive in scope, and not dependent on them. From the nature of this all-
inclusive phenomenon, Vitoria derives the foundations of world norms: world
norms represent right rules of conduct in world relations that are derived from
observation of the social nature of humankind in its broadest or most fundamental
manifestation.

The world norms, or universal norms that flow from the world phenomenon, are
not to the exclusion of local and particular norms: the same capacity and inclination
for social interaction that underlies some universal norms of conduct also give rise
to the differentiation of local norms. Hence Vitoria’s crucial distinction between
what was permitted and what was not permitted to Spanish adventurers in the new
world: universal norms affirmed a basic allowance for trade, for missionary
purposes, and for communication and interaction generally; but beyond the
inviolability of those basic allowances on the basis of universal norms, particular
norms were not be overthrown, and subjugation of local populations was
illegitimate (though ultimately achieved in part on the basis of what was already
allowed).45

The product is a normative order that is discrete for flowing from the thing itself,
namely the human world as a whole, rather than any subjective aspiration to control
or guide its present or future. Following Vitoria, international normative
prescription derives or may derive from the nature and will of the world as a whole,
rather than from the subjective positions of the actors who constitute it or would
dominate it; thereby world norms reflect an autonomous and objective foundation,
rather than any particular, subjective authority:

that international law has not only the force of a pact and agreement among
men but also the force of a law; for the world as a whole being in a way one
single State, has the power to create laws that are just and fitting for all
persons, as are the rules of international law. Consequently, it is clear that
they who violate these international rules, whether in peace or in war, commit
a mortal sin; moreover, in the gravest matters, such as the inviolability of
ambassadors, it is not permissible for one country to refuse to be bound by

international law, the latter having been established by the authority of the whole world.\textsuperscript{46}  

Thus Vitoria envisioned the world vested with its own authority to effect law, disassociated from the subjective position of any individual not speaking for the inclusive whole of the discrete world phenomenon. Thereby he affirmed an objective normative design intrinsic to the world as a whole, above and beyond the subjective normative designs of the separate states: the law of nations takes its authority in the first place “in behalf of the common good of all.”\textsuperscript{47} On this basis, “society at large”, encompassing the whole world, can do as a matter of law what “a State can do to its own citizens.”\textsuperscript{48} Once the nature or will of the world as a whole is determined, as identified with at least a majority of humankind, it may enjoy the force of law “even though the rest of mankind objected thereto”.\textsuperscript{49}

Vitoria’s juridical foundations for international law were developed by Francisco Suárez and Grotius, among others, after him. Thus Suárez, in the late 16\textsuperscript{th} into the early 17\textsuperscript{th} century, also at Salamanca for a time, writes of “true law” that has been “introduced by the usage and general conduct, not of one or another people, but of the whole world”.\textsuperscript{50} The law of nations, Suárez repeats after Vitoria, was “introduced by the free will and consent of mankind whether we refer to the whole human community or to the major portion thereof”.\textsuperscript{51} Suárez took further the radical interdependent underpinning of Vitoria’s objective and autonomous law of nations as follows: “although a given sovereign state, commonwealth, or kingdom, may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society”.\textsuperscript{52} No level of internal development and sophistication removes a people or nation from the ambit

\begin{footnotesize}
\begin{enumerate}
\item Vitoria, \textit{supra} note 43, App C, p. xc.
\item Vitoria, \textit{supra} note 40, App. A, p. xxxviii.
\item Vitoria, \textit{supra} note 40, App. A, p. xxxviii.
\item \textit{Ibid.}, pp. 348-49.
\end{enumerate}
\end{footnotesize}
of the single universal society, in Suárez’s terms. Moreover, the universal society is defined by the human race, rather than any other, less comprehensive bonds. The universal phenomenon to which Suárez refers, following Vitoria, is a function of the need for “mutual assistance, association, and intercourse”. In sum, the local or particular collective is acknowledged, and not overthrown, but there exists at the same time a collective that is universal in nature, in scope encompassing the whole world.

Suárez justified his assertion of universal society with a clear statement of underlying unity: “the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity”. The unity is social, moral and political, and enjoys global normativity as a matter of necessity. Suárez’s famous passage is worth quoting in its length:

The human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also as a moral and political unity … enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation.

Therefore, although a given sovereign state, commonwealth, or kingdom may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.

Thus, the universal society is a comprehensive political phenomenon founded in human nature. From that political phenomenon flows the normative authority that gives validity and effect to international law. International law represents those rules and principles identified with the nature and interests of humanity, or the world as a whole, distinct from the political authority and interests that remain vested in particular collectives, including sovereign states.

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53 Ibid., pp. 348-49.
54 Ibid., p. 348.
55 Ibid., pp. 348-49.
After Suárez, Grotius has been described as the culminating member of the Spanish School. Like Vitoria and Suárez before him, he subscribed to an idea of a “society of mankind” that encompasses the world as a whole. Grotius founded his society of mankind, derived from the world phenomenon observed by Vitoria and Suárez, in both natural and empirical roots. The society of mankind, according to Grotius, arises naturally out of a universal capacity for and inclination to sociability and communication among humans; from that capacity and inclination, norms of universal human society may be discerned, which in turn establish the terms of universal law. Grotius describes the natural wellspring of universal norms as follows: “This Sociability, which we have now described in general, or this Care of maintaining Society in a Manner conformable to the Light of human Understanding, is the Fountain of Right, properly so called”. The empirical grounds for affirming the society of mankind are vested in interdependence, according to which no nation is able to exist in isolation, and from which interdependence the need for society and law arises:

there is no State so strong or well provided, but what may sometimes stand in need of Foreign Assistance, either in the Business of Commerce, or to repel the joint Forces of several Foreign Nations Conferiate against it.… So true is it, that the Moment we recede from Right, we can depend upon nothing. If there is no Community which can be preserved without some Sort of Right … certainly the Society of Mankind, or of several Nations, cannot be without it.

Notably, among the universal rules flowing from the society of mankind is a right of intervention vested in the world collective and actionable against any local or particular collective. The world unit possesses certain interests, protected as a matter of norm and law, which smaller collectives may not transgress. Thus Grotius holds that, in the case of injustice which “no good Man living can approve of, the Right of human Society shall not be therefore excluded”. The rights of human society, within the sphere of competence of that society, are superior to any right vested in smaller social and political collectives. The society of mankind is

57 Hugo Grotius, Mare Liberum, Chapters 1, 5, 12 (Indianapolis: Liberty Fund, 2004).
59 Ibid., paras. 23-24.
60 Ibid., Book II, Chapter XXV, sec. viii, no. 2.
‘subjectivized’, enjoying interests and rights of its own, capable of prosecution against all other individuated societies, and human sociability is the well-spring of that comprehensive and objective society, together with the rights appropriate to it. In this way Grotius, concluding the line of Spanish School scholarship, made the world phenomenon relatively concrete, like in nature to the increasingly sophisticated nation states of the early 17th century, and likewise cognizable as a matter of law.

Following Grotius, subjectivity and individualism associated with nation states were ascendant in the international system. A crossroads of sorts in the conflicting appeals to the world phenomenon, on the one hand, and sovereign states in their individual capacities, on the other, is manifest in the work of Immanuel Kant. Kant is perhaps only truly canonical to the liberal cosmopolitan tradition, and even beyond the liberal cosmopolitan tradition has enjoyed more purchase with constitutional cosmopolitanism than with innate cosmopolitanism. But Kant’s political theory also supports the idea of a comprehensive political phenomenon that brings it within the ambit of innate cosmopolitanism. Recently, Jens Bartelson has also revisited Kant’s work for its historical significance and contemporary relevance, as both a turning point away from a historically prior commitment to one world community in political theory, but also as a source for its potential reconstruction.61

Kant’s cosmopolitan theory begins with natural law premises that differ meaningfully from the natural law premises that inform the work of the Spanish School. The natural law associated with the Spanish School derives substantially from Roman imperial law, and represents a set of norms supposed to be discoverable by right reason and conducive to harmonious world relations. Kant’s natural law, by contrast, represents a conflation of natural law with the state of nature thought experiment, part of the liberal enlightenment origins myth, describing the imagined situations of individuals in pre-political conditions of disorder. Thus Kant writes that “States, viewed as Nations, in their external relations to one another — like lawless savages — are naturally in a non-juridical condition”.62 As such, there is an “original Right of free States to go to War with

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each other as being still in a state of Nature”.\textsuperscript{63} Juridical relations must be constructed out of this condition of original right, a condition equally appropriate to individual humans and the individuated collectives that they form.

The individualism manifest in Kant’s political thought, however, is moderated by the full scope of his moral philosophy: the condition of the state of nature “is wrong in itself in the highest degree, and the Nations which form States contiguous to each other are bound mutually to pass out of it”.\textsuperscript{64} In the duty to pass out of the state of nature in international relations, states are like individuals: “The natural state of nations as well as of individual men is a state which it is a duty to pass out of, in order to enter into a legal state.”\textsuperscript{65} Thus states are obliged “to establish some condition of society approaching the juridical.”\textsuperscript{66} The state is an individual entity, but also a moral one, bound mutually with all other states and individuals, but with agency and a will of its own. Here the emphasis shifts from individualism to complex participation in a collective enterprise.

States, endowed with both original right and moral agency, share common purpose with individuals. Kant draws between individuals and nation-states the following distinction only:

\begin{quote}
The difference between the right of individual men or families as related to each other in the state of nature, and the right of the nations among themselves, consists in this, that in the right of nations we have to consider not merely a relation of one state to another as a whole, but also the relation of the individual persons in one state to the individuals of another state, as well as to that state as a whole.\textsuperscript{67}
\end{quote}

Kant’s cosmopolitan law, drawn from the rights and moral agency of states and persons alongside one another in juridical global relations, posits an inclusive “constitution based on cosmopolitan right, in so far as individuals and states, coexisting in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (\textit{ius cosmopoliticum})”.\textsuperscript{68} Perpetual peace in international relations must be comprehensive, and “founded upon the right of individual men

\textsuperscript{63} Ibid., Part 2, II, p.55.
\textsuperscript{64} Ibid., Part 2, II, p.54.
\textsuperscript{65} Ibid., Part 2, II, p.61.
\textsuperscript{66} Ibid., Part 2, II, p.55.
\textsuperscript{67} Ibid., Part 2, II, p.53.
\textsuperscript{68} Immanuel Kant, Perpetual Peace: A Philosophical Sketch, in Reiss, ed., Political Writings, 2nd ed. (Cambridge: Cambridge University Press, 1991 [1970]), footnote p. 98 (emphasis in the original).
and states” alike.\textsuperscript{69} Mutual interrelationship among individuals and collectives in the world establishes a political superstructure for humankind as a whole.

Moreover, Kant’s objective \textit{ius cosmopoliticum}, like Vitorian world authority, is not reduced to the subjective expression of any particular will or wills, state or individual, irrespective of others. Rather, the rights and responsibilities of states, like individuals, must be understood in the context of Kant’s theory of autonomy. To destroy the state’s moral existence is to reduce it to a thing.\textsuperscript{70} In keeping, then, with Kant’s theory of autonomy, individual right becomes a function of the legal order as a whole, and autonomy is defined not by the subjective will alone, but by reference to the interconnected whole, or the sum of the relations in the world of every will to every other. It is the framing mechanism of the interconnected whole, and its crucial role in arriving at the categorical imperative, that makes Kant’s work a fruitful source of innate cosmopolitan theory. Here is also the potential break from a constitutional cosmopolitan reading of Kant: insofar as Kant is understood to describe a contractual move among strangers to leave a state of nature, his work remains within the ambit of constitutional cosmopolitanism, as will be seen in Chapter 3; but insofar as Kant is understood to describe a situation of immanent community, whereby future members of any social contract are already obliged to enter that relationship by virtue of interdependence prior to any juridical act – and if the terms of the final relationship are dictated in part by this prior interdependence – his work falls within the ambit of innate cosmopolitanism.

Cosmopolitan right, by this reading of Kant, supports a comprehensive vision of world relations: the cosmopolitan emphasis shifts from the discrete individual, or discrete entity in the world, to the world as a discrete entity. Cosmopolitan society is juridical world society, inclusive of nations and individuals alike, under a normative regime properly derived from the unique nature of world as a whole, rather than from any particular, subjective will. Moreover, even prior to juridical society, the world as a whole represents a comprehensive phenomenon, or framing mechanism by which to comprehend the norms incumbent on any individual – person or collective – within that inclusive whole. Thus, in keeping with Bartelson’s reconstruction of the Kantian political tradition, Kant’s legal theory may also be understood to posit an objective basis for arriving at world norms by means of an innate cosmopolitan model.

\textsuperscript{69} Kant, \textit{supra} note 62, P2, II, p.61.

\textsuperscript{70} Kant, \textit{supra} note 68, p. 94.
James Brown Scott and the renewal of innate cosmopolitan ideas

Despite the innate cosmopolitan potential discernible in Kant’s work, the narrative of international law continued to be one of ascendant individualism. The story began to change immediately prior to the 20th century. The author perhaps most responsible for the 20th century revitalization of innate cosmopolitan ideas would be James Brown Scott, who did so principally by reference to the Spanish School. Scott promoted republication and translation of works of Vitoria, Suárez and Grotius, among others, and wrote a number of works celebrating the Spanish School elevation of the world as a whole as a discrete and foundational grounds for world norms and international law. Scott’s work concerning the Spanish School, however, was more than mere restatement. His return to those works in particular exhibited a clear object and purpose, and his reading was tailored accordingly. Scott helped to usher in a new generation of innate cosmopolitan ideas in the 20th century by selectively emphasizing and interpreting innate cosmopolitan ideas discernible in the classical scholarship. Thus Scott writes that “[Vitoria’s] conception of the community of nations, coextensive with humanity and existing as a result of the mere coexistence of States, without a treaty or convention, is the hope of the future.”71

Scott’s treatment of Vitoria begins from the premise that the world as a whole, represented in the law of nations by an international community of states, but coterminous in fact with the whole of humanity, constitutes the ultimate grounds of normativity for international law.72 In doing so, Scott devotes substantial attention to the idea of individuals as constituents and subjects of international law, as well as states. Vitoria’s doctrine, following Scott, represents:

a law for each and for all – not merely of each individual and of all individuals but of each State, which is but a group of people, and of all the States forming the international community of States, which is synonymous, and indeed identical, with humanity. ‘Jus gentium’ therefore appears to be used in the double sense of law for people and for States: the law of humanity on the one hand and, on the other, the law of each and every fraction of humanity as expressed in the term ‘nation’ or ‘nations’.73

71 Scott, supra note 56, p. 9a.
72 Ibid., pp. 164-65.
73 Ibid., p. 140.
Though the will of states, following Scott, may delimit international law under certain historical conditions, states are not definitive of the underlying normative potential vested in the world as a whole. Rather, that normativity, and the system of law to which it gives rise, is coterminous with the whole of humanity at any given point in time. Thus international law is “binding upon individual, upon State, and upon the international community [and it is] an international law coterminous with the human race”. Likewise, as a matter of international law, “[w]e may conceive of … an international community, which, being the world, would have jurisdiction over the States and their inhabitants.” Moreover, in the absence of any clearer expression, the norms of international law may be both discerned and cultivated by appeal to “the opinions of mankind.”

Scott alternates between premises of natural law and the law of nations to identify the expression of normativity enjoyed by the world as a whole, varying as well between the will of a majority of the world, and the natural conditions of universal human society. Functionally, the law of nations and natural law are merged, such that Scott describes “the law of nations as the law natural and as added to by the consent of the majority of mankind. Here we have the law of nations applying to all persons: those who had consented to it, as well as the minority who had not consented, but who were equally bound.” The language of the will of the majority, however, is deceptive. Scott is not interested to affirm a world state. Rather, the world phenomenon is not a world state in the mold of traditional states – but it is nonetheless capable of grounding normative authority, as is clear from an approving reference to Suárez, worth quoting at length:

Suárez did not favor the idea of a world state. Viewing human society with a clear and dispassionate eye, he says that it was made up of many political communities, each independent of the other. Yet in all this political diversity he also perceived a certain unity. It was not organic or artificial, not imposed by force of arms, but natural in the sense that it was a unity growing out of human nature itself. This perception lies at the core of his philosophy of international law and of the international community, a philosophy summed up in classic terms in the second book of his De legibus.

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74 Ibid., p. 219.
75 Ibid., p. 213.
77 Scott, supra note 56, p. 158.
He conceived of the law of nations as having a ‘rational basis’, which consisted, he declared, ‘in the fact that the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity’. The unity he had in mind was not merely that of ‘a species, but also a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy’. For this precept is applicable, according to Suárez, not merely among members of the family, among friends, or among fellow-citizens; it applies, or should be applied, ‘to all, even to strangers of every nation’. It is clear from these statements that he rests his law of nations upon a foundation which is at once reasonable, natural and moral.78

Thus the world phenomenon is principally a social one in the first instance; Scott adopts Vitoria’s premise that the inclination towards sociability serves as the foundation of human society, whether in its particular manifestations or in its universal form, encompassing the world as a whole.79 While particular societies represent express bonds of communication, however, the universal society must represent potential bonds of communication. It is an argument drawn from capacity that boils down to immanence: the world phenomenon is an immanent society, inherent in the possibility for communication across people and peoples.

Scott insists, however, that the idea of universal human society as a normative force is not a mere abstraction. Rather, it represents a real and verifiable phenomenon in the world:

we are not dealing with the abstract question – if such there be – but with human beings in society; and that the rule of conduct in such a case should be that which is consistent with the nature and dignity not alone of human beings, as such, but of human beings in a state of society, and which changes to meet changed conditions and the needs of a progressive civilization.80

The world as a whole represents a discrete society with normative force capable of giving effect to international law, and, in the absence of a world legislature representative of the world as a whole, proper observation of the norms of humans in society will yield applicable and appropriate rules of international law. In sum, the world as a whole is capable of making international law and authorizing punishment of its violation.81 The world approximates a superstate, though it lacks

79 Scott, supra note 56, p. 138; Vitoria, supra note 39, App. A xxxvi.
80 Scott, supra note 56, p. 138.
81 Ibid., p. 216.
the formal attributes of a state: “there are the States and a larger State, an international community, existing by the mere coexistence of the States, even though there be no formal organization.” Scott elaborates on the relationship in a passage also worth quoting at length:

[I]nternational community is not a superimposed State; it is coextensive with humanity – no longer merely with Christianity. It is composed of the States and is their representative; it is likewise the representative of the common humanity rather than of the common religion binding the States. It is a union of the States, and the sum total of the States is necessarily more powerful than any of its parts. Its will is the will of humanity, speaking in terms of peoples; its will is international law, speaking in terms of States. But this law reaches the individual through the State, and it controls the actions of the States in their relations with one another.

The international community, therefore, in the Victorian system, possesses the inherent right to impose its will – in the form of law applicable to the individual State – and to punish its violation, not because of a treaty, of a pact or a covenant, but because of an international need. For just as the State is not a ‘perfect’ State if it be not self-sufficient, so would the international community be imperfect if it were not self-sufficient in a superior and universal sense and if it could not impose its collective judgement, in the form of the law of nations, upon humanity – considered as such – and upon the States as members of the international community.

In the Victorian system as described by Scott, exemplary of the innate cosmopolitan model, the world as a whole enjoys a will and interests of its own, which establishes norms and normativity foundational to international law.

Scott’s work to reinvigorate the innate cosmopolitan model in international law was complimented by the contemporaneous perception of a world materially changed by the political and industrial revolutions of the prior epoch. Scholars and practitioners proposed new normative foundations for international law, drawn from the innate cosmopolitan model, intended once again to achieve an objective authority capable of controlling subjective will in the international system. Prior to World War II, the focus was on renewed doctrine for objective norms, founded in a world perceived to have arrived at a stage of appreciable interconnectedness. Following World War II, the attention turned to actual research programs necessary

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82 Ibid., p. 282.
83 Ibid., p. 283.
to verify the perception of interconnectedness and to substantiate the renewed aspiration to objective normative grounds for international law, as well as to explore the professional and policy implications flowing from potential empirical conditions. Assumptions of sociological premises permeate both periods. Below, I proceed roughly chronologically through both periods, before concluding with contemporary scholarship thereafter.

Hudson, Álvarez, Lansing & Madariaga

I will first consider the following scholars and practitioners to establish the initial scope of the 20th century return to the innate cosmopolitan model: Manley Hudson, Alejandro Álvarez, Robert Lansing, Salvadore de Madariaga. Following these scholars and practitioners, I will turn to the work of Hersch Lauterpacht for further refinement of the innate cosmopolitan model, and thereafter to certain of his successors who adopted and expanded on the innate cosmopolitan model, before concluding with the continued engagement with innate cosmopolitan ideas and their legacy in current doctrine.

Hudson and Álvarez are both significant for contributing to the contemporary renewal of innate cosmopolitanism as scholars and practitioners, Hudson having served as a judge on the Permanent Court of International Justice, and Álvarez as one of the first judges on the International Court of Justice. Their work exhibits the contemporary theoretical bedrock of innate cosmopolitanism, as well as the seeds of its application in international jurisprudence. Lansing, a former U.S. Secretary of State, and Madariaga, a Spanish diplomat who enjoyed several posts throughout his career, including at the UN, demonstrate an appeal to innate cosmopolitanism as a matter of diplomatic practice. The combination of perspectives prefigures the development of politically- and empirically-oriented theory following the Second World War. The world developments to which they point in defense of their thesis, empirical or intuited, exhibit an emphasis on sociology, psychology and communications underlying the innate cosmopolitan scholarship that went forward, in calls for a variety of research programs, following the interwar period.

Hudson observed technological advances throughout the 19th century to have produced a consolidation of world society in the 20th century. Thus, “the development of communication and industry proceeded at such a fast pace during the nineteenth century that the nature of our world society has been radically
transformed. It has become indeed a single world society”.\(^{84}\) Following the change in world society, he proposed to revisit the normative foundations of international law: “The foundations of our law, its aims and its philosophic roots, must be re-examined.”\(^{85}\) The goal was to organize world society into a viable political or legal community.\(^{86}\)

Hudson’s principle critique of mainstream international law, as he understood it, was the bedrock analogy of sovereign states in their international relations to private parties in personal affairs, rather than public participants in a forum for world governance. Thus he argued for a legislative, rather than strictly contractual character of some treaties.\(^{87}\) But the norms of world society, following Hudson, are not strictly a matter of conventional legislation among states. Rather, “a sound philosophical basis for the international law of the twentieth century can only result from a functional critique of international law in terms of social ends.”\(^{88}\) The social ends of world society dictate the new – or renewed – normativity of international law. In sum, the system of international relations and international law resembles a comprehensive forum, rather than an anarchy, dedicated to the social ends of the world, beyond those of the state.

To ascertain the normative regime drawn from his wide range of world social ends, Hudson proposed a broad research agenda: “the future law of nations must seek contributions from history, from political science, from economics, from sociology and from social psychology if it would keep pace with the society which it serves”.\(^{89}\) Thus the cosmopolitan world unit must be ordered objectively, according to the study of its nature, rather than according to any preconceived or subjective normative agenda.

Like Hudson, Álvarez predicated world norms on a world social phenomenon, expressly cosmopolitan: “Economic life and human activity have become

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\(^{86}\) Ibid., supra note 84, p. 321.

\(^{87}\) Hudson, supra note 84, p. 321.

\(^{88}\) Ibid., supra note 85, pp. 432-33.

\(^{89}\) Ibid., p. 435 (citations omitted).

\(^{90}\) Ibid., pp. 434-35.
A cosmopolitan world meant diminished normative individualism in international affairs, in favor of global solidarity: “This new direction was the complete abandonment of metaphysics, and chiefly of individualism which has dominated the science of law up to the present time, in favor of a more social point of view; that is to say, an attitude more in harmony with the solidarity which these factors themselves required.”

The foundations and ends of modern international law change accordingly: “The new conception of law is that of a realization of solidarity; that is to say, the regulation of jural relations not in the interest of the individual, but in the interest of society.” Again, the new normative regime, founded in the interests of world society rather than individuals or individuated collectives in the world, is not to be the product of any subjective or even merely neutral agenda. Rather, “[t]he same factors or phenomena which led to the elimination of individualism furnish the outline and principal applications of the new idea.” There inheres proper ends to the cosmopolitan order, discernible in the nature of the cosmopolitan social phenomenon.

Similar to Hudson, Álvarez ties the substance of the cosmopolitan order to the product of two proposed fields of study, “two new and closely inter-related sciences, the 'science of international life' and the 'science of national psychologies in international affairs'.” Their combined scope includes attention to “the various conceptions of law which have flourished, and to the various legal systems which have appeared in history or which now exist.” Álvarez adumbrates their scientific mission as follows:

That study must trace out the lines of legal evolution in the course of history; next mark out the diverse conceptions of law which have prevailed in different groups of countries during the nineteenth century, in a comparison of the fundamental institutions of these various groups; and lastly investigate the different social factors which from the second half of

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91 Ibid., p. 175.
92 Ibid., p. 178.
93 Ibid., p. 177.
95 Álvarez, supra note 90, p. 180.
the nineteenth century have operated in all countries in a uniform direction toward the inauguration of a new legal epoch - the socialization of the law.96

Álvarez is equally ambitious in his description of method:

This method should be historical and comparative and should be supplemented by observation of contemporary life. A true philosophy of law is possible only when it is based on a judicious investigation of institutions athwart the ranges of time and space, and the influences bearing on them through surrounding social phenomena.97

Álvarez's emphasis is on the “social factors”: “it behooves us to study from as broad a standpoint as possible the life of the international community in all its present manifestations.”98 In the broad scope of the life of the international community, it is the psychological life of the international community in particular that Álvarez proposes to focus on:

We must study, moreover, international life in all its depth, that is to say, we must consider not only the material but also the immaterial factors which are involved, the 'imponderables' often spoken about without more accurate definition. Of these the most important are psychological in nature; they are sentiments of one kind or another, such as national sentiment, the sentiment of international good neighbourliness, anti-social sentiment, as well as ideals, states of mind, doctrines, etc. The nations are guided in their international relations much more in reality by psychological factors such as these, or by economic considerations, than they are by reason or justice.99

Anticipating considerable reliance by scholars and practitioners on psychological conditions purportedly characteristic of participation in world community – scholars and practitioners including, among those who’s work is considered here, Harold Lasswell and the New Haven School, various judges of the ICJ, Jutta Brunnée and Stephen Toope, as well as Jens Bartelson – Álvarez suggests that the psychological life of the international community forms the normative bedrock of world law: “The psychological character of the law of nations, itself a consequence of the psychological character of international life, is apparent particularly in the

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96 Ibid., pp. 180-81.
97 Ibid., p. 181.
98 Álvarez, supra note 94, p. 470.
99 Ibid., p. 473.
origin and basis” of the new international law.\textsuperscript{100} The emphasis on psychological factors underscores the normative weight given as a matter of innate cosmopolitanism to world public opinion, or world juridical conscience, which, as will be seen in Chapter 4, plays a meaningful role in the juridprudence of the ICJ.\textsuperscript{101} Thus, following Álvarez: “The object of this new philosophy of law should be the illustration of public opinion giving it a clearer estimate than it has hitherto enjoyed.”\textsuperscript{102}

In sum, Álvarez follows Hudson’s call for a broadened science of international law with a call for entirely new sciences concerning international life generally. By identifying the source of cosmopolitan norms with world public opinion, however, Álvarez ties world normative authority to a specific political phenomenon, though not a well-defined one. The broad study of the world affairs is meant to correct that imprecision, discerning in the unique psychological and material life of the historical world community objective rules for its collective conduct, rules not derived from any subjective interest or presumed doctrine of law or relations. Notably, however, the observation of behavioral patterns as a matter of sociology or observational science is not identical with public opinion as it may be discerned or affirmed by one or another theory of political or communicative agency. The ambivalence between reliance on one or the other grounds for normative authority reflects a certain ambivalence in the innate cosmopolitan model. I return to this point in the conclusion.

Moving on, Robert Lansing, US Secretary of State under Woodrow Wilson, published an unusual piece in the American Journal of International Law,\textsuperscript{103} exhibiting a similar appreciation of one world community, rich in historical overtones, proclaiming that “the entire human race ought to be considered, and in fact is, a single community, which awaits the further development of modern civilization to complete its organization and make of all mankind a great, universal political

\textsuperscript{100} Ibid., p. 476.
\textsuperscript{101} Álvarez, supra note 90, p. 180.
\textsuperscript{102} Ibid., p. 181.
\textsuperscript{103} Curiously, the article was to be the third in a series of articles on sovereignty, the first two of which were published together in the same journal in 1907. In 1907, the third installment was withheld “because the logical application of the theory to the world as a whole seemed too speculative and to lack the practical value of the two series published”. Robert Lansing, Notes on World Sovereignty, 15 Am. J. Int'l L. 13 (1921), p. 13. In 1921, however, following his tenure as Secretary of State, Lansing suggests in an explanatory note that “the discussion seems less academic and more pertinent to present day philosophic thought concerning the political relationship between nations than it did fourteen years ago.” Ibid., p. 13. The manuscript apparently went unchanged between 1907 and 1921.
Moreover, Lansing effectively connects canonical authorities and more recent writers by suggesting that historical compliance with international law demonstrates the validity of the innate cosmopolitan model. He writes of the single human community that “the great states of the civilized world have recognized, perhaps unconsciously, its existence in the applied law of nations, just as they have recognized it in the sphere of morals by giving binding effect to the principles of humanity.”

Likewise, Lansing anticipates the political theory of Jens Bartelson, describing the innate cosmopolitan model as an immanent condition in the world. By this theory, the world community exists, if only as a constant potentiality. Lansing, unlike Bartelson, argues from the hypothetical potential of consolidated democratic power in the world:

Since it is possible to conceive of the human race as one body composed of a large number of political groups including millions of individuals, or as one body with these individuals as units, and, in either case, as a community, it follows from the very nature of things that in this unorganized mass of humanity there must be a certain body of individuals possessing a physical might sufficient to compel obedience by every member of the human race throughout the world. Such superior physical might constitutes sovereignty, and, since its only limit is the earth, it may properly be termed World Sovereignty.

Significantly, Lansing suggests that the world community, even an inchoate world community, is the only truly independent political community. In rendering the immanent world community as the only independent political community, he affirms it to be the singular objective grounds for the system of international law:

sovereignty in every modern state lacks the essential of real sovereignty, namely independence. Sovereignty, as it exists in a state, stands in much the same relation to the supreme might of the world that civil liberty stands in relation to the sovereign power in a state. From the broader point of view, therefore, the sovereignty in a state is dependent upon the collective physical force of mankind, or rather upon the collective will of those, whether considered as political groups or as individuals, who possess the preponderance of such force, and who are because of such possession

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actually independent. In the case of this dominant body all the essential qualities and attributes of real sovereignty are present, but it is unorganized, undetermined, and necessarily variable, composed of a multitude of individuals who are members of numerous states and offset against one another by race, national allegiance, and other differences.107

Lansing’s own intuition about the inchoate world community suggests a Kantian framework in accordance with its innate cosmopolitan reconstruction, wherein the autonomy of any international actor is derived by reference to the whole of the international community. Lansing also envisions a future federal world political organization, drawing together the innate and constitutional aspects of Kantian theory:

It may be said then that every state, whether strong or weak, whether great or small, whether rich or poor, whether civilized or barbarous, is in a sense a protectorate, a ward of the other states of the world, holding its political powers of them and responsible to them for its international conduct. In a word, every state is a member of the Community of Nations, wherein resides World Sovereignty, and which in the fullness of time will become, through the positive expression of that sovereignty, an organized political union, a Federal World State.108

Lansing acknowledges a normative problem associated with an inchoate or merely immanent world human community, but the problem is not about the fact or normativity of the community itself. Rather, the problem is a matter of communicating norms in the absence of any clear and consolidated source of independent authority capable of articulating world law. In his terms, the world is “without a government, and therefore without an agent of the sovereign to formulate in terms and formally proclaim rules of human conduct,” such that the will of the world human community “cannot find expression through the usual channel of enacted law, by which the sovereign will is announced in a state.”109

Lansing suggests two possibilities to address the absence of a clear normative source capable of announcing the will of the world: one is reminiscent of the subjective legal doctrine of Emerich de Vattel, and with it the failure of cosmopolitan law; the others resembles the jurisprudence of Hudson and Álvarez. Lansing appeared to favor both equally, at least as near-term possibilities at the time

107 Ibid., p. 17.
108 Ibid., p. 19.
109 Ibid., p. 22.
of his writing. Recalling Vattel, the normative will of the world community is largely reduced to an ethical mandate, and left for its interpretation and enforcement to the auto-execution of each sovereign state.\footnote{Ibid., pp. 23-24.} Alternatively, recalling Hudson and Álvarez, and Vitoria before them, valid world law is a question of properly comprehending the nature of the world community, and its will:

\[\text{it is necessary to determine, first, what that will is in regard to human conduct in the world, and, second, whether the body of rules which governments and publicists recognize as the Law of Nations, coincides with and actually expresses such sovereign will. If it is thus coincident and expressive then it is law in the legal sense; if it is not, then it is law only in name and not in fact.} \footnote{Ibid., p. 22.}\]

Going further, Lansing reduces the will of the world, properly understood, to a discrete phenomenon similar with the primary source of world authority identified by Álvarez, namely, world public opinion, or, in Lansing’s terms, “the collective opinion of nations”.\footnote{Ibid., p. 26.} He cites the international prohibition of piracy and the slave trade as evidence of the existence and power of world public opinion:

\[\text{The international adoption of policies like those relating to piracy and the slave-trade is a manifestation of the existence of a sovereign will in the world, which is super-national and supreme. It is suggestive of the possibilities of the future. The influence of the collective opinion of nations operating throughout the Community of Nations compels state after state to recognize the superiority of World Sovereignty over the sovereignty in a state and consequently the superiority of law emanating from the higher authority over the municipal legal codes of states.} \footnote{Ibid., p. 26.}\]

Salvador de Madariaga, also a diplomat throughout his life, as well as a scholar at Oxford, developed a still more comprehensive theory of innate cosmopolitanism. Madariaga primarily focused not on a world conscience, such as Álvarez explored, but on a world consciousness. In positing world consciousness, he falls into a tradition of a common or shared mind or mentality, begun with Averroës and Danté, and still more recently revisited to reconstructive effect by Bartelson.\footnote{Bartelson, supra note 61, pp. 56-59.} Moreover, the world consciousness that Madariaga observes is a function of self-
awareness: “the world is everywhere aware of itself as a whole”. As will be seen, Quincy Wright later also adopted world self-awareness as a key element in an innate cosmopolitan theory of cosmopolitan norms.

World consciousness or world self-consciousness, as described by Madariaga, is reflective of collectivity in the world, and not reflective of any particular or individual state of mind. The world consciousness is a unique phenomenon that comprises all self-aware individuals in an inescapable relation of unity, and is not identical with the thoughts or feelings of any one or several of them. Thus the phenomenon of the self-aware world is not contingent on any particular plan or state of mind. Rather, the development of a self-aware world “has come about on the plane of things, as a progress of the solidarity of things, not initiated and willed by men, but suffered by them in all passivity and for the most part in all ignorance.” The status of being a thing in the world is what lends the condition of solidarity, and the consciousness associated with it, its objectivity. Madariaga observes that “subjective solidarity lags behind objective solidarity, i.e. while men are already members of one world unit, they do not yet feel themselves to be so.”

Madariaga proposes a two-step normative program to address the gulf between objective and subjective solidarity: “What is wanted is a world approach, i.e. the consideration of the problem in hand from the point of view of an organized and conscious mankind. The second condition is that men should learn to think and feel themselves as members of such an organized and conscious mankind, i.e. as world citizens.” First, the world consciousness must be understood; thereafter, all persons must be brought to appreciate their incorporation in it. Madariaga ties the definition of progress to the satisfaction of these conditions: “ultimately, the inner meaning of progress lies in the realization of the organic character of mankind as the conscious inhabitant of the planet.” Here emerges the link between law and policy implicit in the innate cosmopolitan model: the law must be made to conform with the telos or mandate associated with the world as a whole, and subjects of the law must be induced to appreciate it.

Moreover, in now familiar fashion, the legislative function, or the responsibility for

116 Ibid., pp. xv-xvi.
117 Ibid., p. xvi (emphasis in original).
118 Ibid., p. xix.
119 Ibid., p. 98.
world norms, is not left to the exercise of subjective political will, but to the study of the unique normative phenomenon of the world consciousness itself, from which the norms for the world community flow. The lawmaker “has therefore a double function in legislation and sociology: not only to endeavor to lead empirical law towards ideal or natural law, but also to shape current ideas so that customs and behaviour evolve nearer and nearer to that ideal, natural law, itself dependent on customs and ideas.”

The double function of sociology and legislation that Madariaga proposes falls within the tradition begun with Vitoria. The lawmaker must induce behavior towards an ideal, and presumably away from the current situation at the time of writing; the ideal pertaining to the proper recognition of objective collectivity, the current situation reflecting limitations of unaided, subjective knowledge. Achieving the ideal condition entails better comprehending its reality. Thus the natural law to which Madariaga refers is the natural law of Vitoria, namely, rightly-reasoned rules for the unique world social phenomenon, developed by means of inquiry into the nature of that phenomenon. Madariaga says of Vitoria that his doctrine of world community was fundamentally sound, but failed for coming too soon: “The attempt of the Spanish theologians of the school of Salamanca, from Vitoria to Suárez, to build up international law on the basis of the unity of Christendom, i.e. of a community united in spirit, failed, as it was bound to fail, because it was premature.” Like Kant, Madariaga suggests an historical process driving the cosmopolitan phenomenon: “We are – we always have been – in a process of evolution towards a conscious world community, or, in other words, towards a World Commonwealth.” There is, additionally, a further Kantian aspect to Madariaga’s assumption of a world consciousness. Madariaga, like Kant, attributes moral agency to the collective phenomena of nations, recognizing that “units of collective life, or communities, are forms of nature and therefore possess an inherent law”. Madariaga treats the nation as a intermediate point between individual consciousness and world consciousness; it is “the middle term in our human series – men, nations, mankind”. Consequently, Madariaga, like Kant and Álvarez, too, assigns states a place alongside individuals in the cosmopolitan order: “The World Commonwealth ... must be a commonwealth of men as well as of

120 Ibid., p. 112.
121 Ibid., p. 116.
122 Ibid., p. 130.
123 Ibid., p. 104.
124 Ibid., p. 16.
nations”.125

The conclusion of the historical development of world consciousness is the cosmopolitan realization of “one great city”.126 The city, by Madariaga's definition, is “the political institution which expresses a community”.127 The one great city is the world city, or cosmopolis: the ordered political institution which harmoniously expresses world community. The reality, however, of the cosmopolitan vision remains, in the writing of Madariaga, a matter of intuition: “we find man's progress to consist in raising towards awareness a feeling or instinct which had made him subconsciously assume that the world obeys one law, has a sense, means something.”128 Indeed, Madariaga makes the intuitive nature of the cosmopolitan phenomenon a function of its objective character: “This unity of nature, both in man and in the world outside, is there, apart from whether man knows, guesses or feels it. Secondly, man feels or guesses this unity even though he does not realize it, even though he does not see what a far-reaching assumption he is making.”129 The suggestion makes clear the tacit claim that the persistent appeal to the innate cosmopolitan model over time, even as an intuitive assumption, establishes its own source of authority.

Lauterpacht

I turn now to the work of Hersch Lauterpacht, from whom innate cosmopolitanism received perhaps its most compelling expression. Lauterpacht has lately been thoroughly revisited by Martti Koskenniemi, prompting others to do so as well, and Koskenniemi’s work on Lauterpacht is littered with references to cosmopolitanism. But cosmopolitanism is a broad term in the larger body of Koskenniemi’s work. I need here only briefly review aspects of Lauterpacht’s work to bring out those specifically expressive of innate cosmopolitan tenets and initiatives.

Innate cosmopolitanism, to return to a basic point, includes the use of a political-theoretical idea to influence the form and function of international law. Lauterpacht was more clear than many legal scholars about the role of political theory in law, and

125 Ibid., p. 259.
126 Ibid., p. xix.
127 Ibid., p. 89.
128 Ibid., p. 84.
129 Ibid., p. 84 (emphasis in original).
more assertive in endeavoring to marshal or control political theory in favor of a progressive vision of international law. His international legal theory begins with an appreciation for the juridical consequences of foundational assumptions of political philosophy:

the philosophical bases of international law and its position among cognate social and legal sciences cannot be better illustrated than by disclosing the manner in which representative systems of thought ended in the treatment of the problem of relation of states to humanity, i.e. of their relations to one another.\textsuperscript{130}

In his relatively early article on the influence of Spinoza in international law, Lauterpacht writes that “the relation between political theory and international law is of a more pervading character than is commonly assumed.”\textsuperscript{131} Thus, “political doctrine based on the omnipotence and glorification of the state as an end in itself will naturally result, and has usually resulted, in the negation of the law of nations as a body of rules which, both in its binding force and in its creation, is independent of the will of the state.”\textsuperscript{132} He dedicates his article on Spinoza to neutralizing a tradition of political philosophy largely understood to do precisely what he has described negatively – glorify the state to the detriment of the law of nations.

Later, in his article on the Grotian tradition, Lauterpacht may be observed to take the next step. Not to rebut an opposed political theory, but to put forward political theory in support of international law as he would have it. It is clear, first of all, that Grotius is more than strictly a legal scholar. He is compared with or opposed to Erasmus, Machiavelli, Hobbes and Locke, among others. The legacy of Grotius’s political theory and influence in international law is for Lauterpacht “the tradition of progress and idealism.”\textsuperscript{133} Thus Grotius’s work comes by the end of the article to represent not only “a source of evidence of the law as it is, but also as a well-spring of faith in the law as it ought to be.”\textsuperscript{134} Grotius’s work serves as a model or guide in the way that Lauterpacht makes clear in his treatment of Spinoza, whereby philosophical bases and political theory will determine the end point of the system.

\begin{itemize}
\item \textsuperscript{130} Hersch Lauterpacht, Spinoza and International Law, 8 Brit. Y. B. Int'l L. 89 (1927), p. 91.
\item \textsuperscript{131} Ibid., p. 91.
\item \textsuperscript{132} Ibid., p. 91.
\item \textsuperscript{133} Hersch Lauterpacht, The Grotian Tradition in International Law, 23 Brit. Y. B. Int'l L. 1 (1946), p. 48.
\item \textsuperscript{134} Ibid., p. 51.
\end{itemize}
that applies to the “relation of states to humanity”. The work is, for that reason, “an invaluable asset.... an exposition of international law woven into the structure of a general system of law and jurisprudence – a significant affirmation of the unity of all law”.

The sum of the guiding features of the Grotian tradition as Lauterpacht identifies it remains largely synonymous with much of innate cosmopolitanism. Consider the first principle features that Lauterpacht draws out:

They are: the subjection of the totality of international relations to the rule of law; the acceptance of the law of nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of states and individuals; the rejection of ‘reason of State’; the distinction between just and unjust war...

The whole of international relations is subject to international law, which is not reducible to state will alone. Rather, the state is placed alongside individuals internationally, and the law of nature – which is an affirmation of the human social character, not derived from a Hobbesian state of nature – is elevated to a source of norms alongside the formal sources of law identified with state consent, and indeed, as Lauterpacht makes clear elsewhere, is prior to them.

Lauterpacht’s work is directed against sovereign prerogative, and especially against prerogatives of war and even self-defense. He recognized “an inherent antagonism between international law, which, except when conceived as an empty and contradictory ‘law of co-ordination’, means restraint upon freedom of action, and the idea of reason of state, which means freedom from restraint.” Stronger still: “Modern international law recognized for a long time the existence of gaps which obliterated altogether the border-line between law and lawlessness in international relations. Of these gaps the admissibility of war as an absolute right of states, requiring no other legal justification, is the outstanding example.” He writes with admiration of the “emphasis with which Grotius denies the absoluteness of the right to act in self-preservation”, a conclusion the International Court of Justice was not

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135 Lauterpacht, supra note 130, p. 91.
136 Lauterpacht, supra note 131, p. 18.
137 Ibid., p. 51.
138 Ibid., p. 33.
139 Ibid., p. 19.
able to reach in its *Threat or Use of Nuclear Weapons* Advisory Opinion, despite clear cosmopolitan sympathies discernible there, as well.\(^{140}\)

The social unit that defines international law, and in accordance with which international law is defined, is, alternately, international society and international community, as the title of Lauterpacht’s most famous work indicates.\(^{141}\) International community exhibits “social and political realities” of its own, international society its own needs.\(^{142}\) Together they represent “the legal and moral unity of mankind.”\(^{143}\) The unity of mankind, again, derives from the social nature of humankind; thus the law of nature that is crucial to Lauterpacht’s reading of the Grotian tradition is principally identified with “the social nature of man and the preservation of human society”.\(^{144}\) Moreover, it is from the social character of humankind that international law derives the force of its legal norms: “the binding force of even that part of it that originates in consent is based on the law of nature as expressive of the social nature of man.”\(^{145}\) In sum:

> The place which the law of nature occupies as part of the Grotian tradition is distinguished not only by the fact of its recognition of a source of law different from and, in proper cases, superior to the will of sovereign states. What is equally significant is Grotius’s conception of the quality of the law of nature which dominates his jurisprudential system. It is a law of nature largely based on and deduced from the nature of man as a being intrinsically moved by a desire for social life…\(^{146}\)

What results is a model of a unified legal system that enjoys an objective normative foundation grounded in a world social phenomenon, its norms directed to the proper expression of the universal social character of humankind.

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\(^{141}\) Hersch Lauterpacht, The Function of Law in the International Community (Oxford: OUP 2011 [1933]).


\(^{143}\) Lauterpacht, *infra* note 132, p. 31.


Kelsen’s opposition

Consider briefly, for point of contrast, select aspects of the work of Hans Kelsen. Kelsen may be considered cosmopolitan in some respects, by virtue of his affirmation of the unity of law in the world, but his pure theory of law does not represent or incorporate innate cosmopolitanism. Rather, his pure theory of law eschews the ambition to achieve an objective law by reference to an otherwise inchoate community such as the world collective, as posited by adherents of the innate cosmopolitan model.

There are aspects of Kelsen’s work that superficially resemble the innate cosmopolitan model. Kelsen writes of the Pure Theory of Law, for instance, that it has “the tendency to blur the border line between international and national law, so that as the ultimate goal of the legal development directed toward increasing centralization, appears the organizational unity of a universal legal community, that is, the emergence of a world state.”147 He almost sounds like Álvarez when he writes that “a conflict of norms between international law and national law can never occur.”148 Likewise, he sounds like both Álvarez and Lauterpacht, among others, when he writes that “[a]ny conflict between States as well as between private persons is economic or political in character; but that does not exclude the possibility of treating the dispute as a legal dispute.”149 Nonetheless, these several similarities do not run deep, and Kelsen’s work opposes innate cosmopolitanism in a number of more telling ways, which I review here briefly for the particular limits that they demonstrate with respect to the substance and appeal of the innate cosmopolitan model.

Some primary grounds of distinction are as follows: as a scientific theory, the Pure Theory of Law represents a formal exercise that does not allow for an ideological orientation comparable to the progressive telos typically associated with innate cosmopolitan ideas. Moreover, Kelsen eschews pretensions to a prior community serving as an objective foundation for legal norms independent of the positive law. Likewise, the Pure Theory of Law is a positivist exercise at odds with a natural law tradition which includes the innate cosmopolitan model. As a function of all of the foregoing, Kelsen is critical of the way concepts such as the innate cosmopolitan

148 Ibid., p. 342.
model may lend more authority to law makers than the law properly would allow. Each of these grounds of distinction and opposition, to which I turn immediately below, make clearer some bounds of the innate cosmopolitan idea as it has been treated in the work of the figures already considered, from Scott to Álvarez to Lauterpacht.

As a formal exercise, the Pure Theory of Law purports to demonstrate the unity of law in the world. But the unity of law does not necessarily hold that international law is primary, or superior to municipal law. Rather, both are potentially primary, and the Pure Theory of Law is agnostic as between the two possibilities, indicating only that it must be one or the other. Thus the unity of the law may just as well find its focal point in the sovereign state, as in the world order. Referring to “subjectivistic” and “objectivistic” systems, Kelsen writes: “Both systems are equally correct and equally legitimate. To decide between them on the basis and with the specific means of the science of law is impossible.”150 Likewise, the Pure Theory of Law is equally agnostic as between political projects (such as imperialism and pacifism) to which each theoretical order is typically joined: “the Pure Theory of Law opens the road to either the one or the other political development, without postulating or justifying either, because as a theory, the Pure Theory of Law is indifferent to both.”151

The Pure Theory of Law, however, is not at all indifferent about the innate cosmopolitan model supposition of an otherwise inchoate world community, from which normativity flows. Putting the matter bluntly, and in the process dismissing the innate cosmopolitan appeal to the interest of the posited world community for normative authority, Kelsen writes: “The fact that several individuals have an interest in common does not constitute a community any more than the fact that they have dark hair in common.”152 With more nuance, he holds that “it is impossible to determine the unity in the plurality of individuals we call state by a criterion independent of the social order we call the law of the state”.153 The rejection is tied to his rejection of natural law. He is especially critical of natural law for its ambiguity concerning the articulation of law, insofar as natural law – and innate cosmopolitan law with it – purports to observe law rather than enact it. Natural law “need not be created by the act of man, since it issues directly from the

151 Kelsen, supra note 147, p. 342.
153 Ibid., p. 380.
nature of men or the nature of the relations of men, and as such need only be recognized by man, not created by an act of will.”154 The effect of this failure to acknowledge responsibility or volition in the formulation of law is particularly problematic, following Kelsen, because “the doctrine which denies that the positive law-makers really are what they pretend to be – the creators of the law – has the effect, if not the purpose, of strengthening their authority.”155

For all of the foregoing reasons, Kelsen offers a clear statement of separation distinguishing his Pure Theory of Law from the pretension to objective law such as represented by the innate cosmopolitan model: “the Pure Theory of Law insists upon a clear separation of the concept of law from that of justice, be it called natural, true or objective law,” and “the Pure Theory of law renounces any justification of positive Law by a kind of super-law, leaving that problematical task to religion or social metaphysics.”156 In sum, the positivist Pure Theory of Law limits the field of law to an express forum of human agency. Kelsen’s own sociological investigations led him to reject the possibility of identifying a super-order in the extra-legal behavior of people in the world.157 By contrast, innate cosmopolitanism insists on the possibility of observing behavior in the world in such a way as to discern normative patterns capable of supporting basic tenets of law for an interdependent world, in the absence of a legislator or legislature capable of achieving a more adequate system of law for world relations. I return to Kelsen’s grounds of critique in the Conclusion of this work. For now, it will suffice to have observed that Kelsen’s positivism does not accept the heuristic model of innate cosmopolitanism, and the way in which the volitional nature of positivism under the Pure Theory of Law is opposed to the assertion of a right normative arrangement discernible in the world as a whole. Both the Pure Theory of Law and innate cosmopolitanism allow for a cosmopolitan understanding of law in the world; each model understands the normative grounds of that system differently.

155 Kelsen, supra note 152, p. 386.
156 Ibid., p. 390.
157 Ibid., p. 380.
Observational science and world policy

As against Kelsen’s opposition, and the opposition of less sophisticated positivists, it remained for the innate cosmopolitan project to take farther the method that Vitoria and Kant suggest, namely to arrive at world norms by the proper study of the nature of the world – empirically to demonstrate and determine the reality of social and political potentialities identified by Lauterpacht and others with the international community. 20th century scholars took up the project with gradually accelerating proposals for an increasingly elaborate program of scientific inquiry to ascertain the nature of the world phenomenon, and the norms that may guide it. In short, the world social or political unit remained to be understood, with the law to follow, such that the normative regime of international law might achieve the independence and objectivity aspired to from Vitoria forward, representing neither the product of subjective interest, nor received values, nor a formal exercise in neutral principles.

Post-World War Two scholarship exhibited new initiatives in two related directions. One included research programs engaged in empirical efforts to discover and promote the empirical grounds of the innate cosmopolitan phenomenon. The other included further theoretical efforts to project a progressively more complex research agenda, or conceptual blueprint, necessary to realize the cosmopolitan phenomenon. Both exhibited increasing multi-disciplinarity in scope. Together, they represented what Josef Kunz referred to skeptically as the “changing science of international law”.

Research programs engaged in empirical efforts to discover and promote the empirical grounds of the innate cosmopolitan phenomenon included activities of the World Rule of Law Center at the Duke Law School, the Cornell Project on the Common Core of Legal Systems, and the activities of the Committee for the Study of Mankind. Giovanni Longo wrote of the Common Core project, touched on in the Introduction to this work: “Whatever the judgment on the final results of the research, it is at least notable for its attempt to re-discover or to promote a rebuilding of that kind of positive *ius naturale* or *ius gentium* which the Romans referred to by saying: “... *Quod naturalis ratio inter omnes homines constituit*.” The attempt to re-discover or promote the rebuilding of *ius naturale* or *ius gentium* takes

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forward the innate cosmopolitan reliance on a Vitorian conception of natural law and objective, independent normativity for an ordered world community. The World Rule of Law Center similarly proposed to discover the unity of one possible world normative system under law. Its first major project was an inquiry into the normative treatment globally of incitement in international communications, with the aim of identifying viable grounds for world speech law, i.e., establishing the allowances and limitations for speech in world community. The largest project undertaken by the Center challenged the nature of sovereignty. Results of the project purported to demonstrate that all major civilizations in the world hold the expression of sovereignty to be bounded by law, thus paving the way for “the concept of a jurisprudence that is higher than and independent of the will of any particular local sovereign.” The dean of the World Rule of Law Center, Arthur Larson, produced a book composed entirely of a list of proposed research items for international law.

The primary object of the Committee for the Study of Mankind was “to make mankind aware of itself and to make this awareness influential at all levels of decision-making.” Self-awareness, as noted in the discussion of Madariaga, reflects the embrace of a vocabulary of psychology common to the innate cosmopolitan model, by which the innate cosmopolitan phenomenon is substantially identified with a singular psychic capacity associated with the comprehensive human collective. Following the work of the Committee, two objectives are paramount to making mankind aware of itself, namely, world law and world society, which objectives Quincy Wright addressed in the name of the Committee. Law, by Wright’s formulation, is essential to communal self-awareness: “to be aware of itself, mankind – the largest and most complex human group – must have a law.” Society, by the same formulation, is joined to law, though there is a problem of circularity: “Neither society nor law can exist without the other, but like the hen and the egg, one or the other must come first.” Putting to one side the circularity dilemma, the formula guiding the mission of the Committee held as

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164 Ibid., p. 437.
165 Ibid., p. 439.
follows: “A law of mankind implies that, in some degree, mankind is a society, and this implies that mankind is a public, the members of which, on some matters, have a relatively homogeneous opinion.”

Thus, public order for all-inclusive world society – i.e., cosmopolitan order – resolves into the same phenomenon emphasized by Álvarez, namely, “world public opinion”.

World public opinion thereby becomes a primary normative foundation for cosmopolitan community: “Thus it is through the development of a world public opinion, manifesting general understanding and recognition of emerging principles of universal law, that mankind can become aware of itself, of its value, and of its intuitions of justice, and can become a functioning society.”

The research agenda of the Committee became synonymous with research into the nature of world public opinion: “The analysis of public opinion may suggest the best approach to conscious control of this process [of the consolidation of human society] and to creation of conditions for a more adequate law of mankind.”

Significantly, however, the research agenda can be seen to have shifted from discovery of the nature of the cosmopolitan phenomenon, to the means of directing it. The move to direct the cosmopolitan phenomenon reflects what becomes an increasingly thin division in innate cosmopolitan scholarship between an inquiry into objective world norms and a particular program of world policy, an issue to which I return in touching on the work of the New Haven School.

Where Wright, in the name of the Committee for the Study of Mankind, described a “universal law for mankind”, Wilfred Jenks proposed a “common law of mankind”.

Jenks’s formulation, not part of any greater research project, belongs to the body of scholarship intended to articulate a more complex blueprint for the study of the innate cosmopolitan phenomenon. His work in the field, as he described it, was

but one of the many contributions to this process of exploration and definition which will be required for the purpose of formulating in a generally acceptable manner on the basis of current practice the alternative conception that international law represents the common law of mankind

\[166\] Ibid., p. 442.

\[167\] Ibid., p. 442.

\[168\] Ibid., p. 443.

\[169\] Ibid., p. 443.

in an early stage of its development.\textsuperscript{171}

Jenks's common law of mankind presupposes the innate cosmopolitan phenomenon of the world as a whole, or world community as Jenks used the term in 1954, synonymous with mankind: “By the common law of mankind is meant the law of an organized world community”.\textsuperscript{172} Moreover, the norms of Jenks’s world community represent more than mere formal association: “The common law of mankind towards which the international legal system has already evolved so far is increasingly a law with a developed social content.”\textsuperscript{173} Indeed, Jenks holds “[t]hese rules are in the fullest sense ‘an expression of the life of a true society’ and not merely a ‘means for regulating external contacts’.”\textsuperscript{174}

Jenks’s idea of an ordred mankind supplants the exclusive function of the sovereign political community, exhibiting “a merger of international and national law which is a further illustration of the evolution of the law of nations towards a common law of mankind.”\textsuperscript{175} The effect elevates the position of individuals under international law: “the law has long since evolved from a law between States only and exclusively into a law which creates for the benefit of individuals rights the international and national character of which is merged.”\textsuperscript{176} In a position, however, in keeping with a reading of Kant according to innate cosmopolitanism, echoed by Álvarez, Madariaga and others, Jenks observes states to retain a place under the norms of world society, holding that “[s]tates continue, and will long if not always continue, to be the basic units of organization of the international community, and the law governing the relations between States, while no longer representing the whole of international law, therefore continues, and must continue, to be a leading division of the law.”\textsuperscript{177} States represent an undeniable political authority, but must cede before the objective authority that recalls the theory and intuition of Vitoria, Lansing and the rest, namely, “the will of the world community”.\textsuperscript{178}

Significantly, despite the ongoing powers of states in the international system, Jenks understands the jurisprudence of tribunals such as the ICJ to support the nascent

\textsuperscript{172} Ibid., p. 2.
\textsuperscript{173} Ibid., p. 36.
\textsuperscript{174} Ibid., p. 40.
\textsuperscript{175} Ibid., p. 40.
\textsuperscript{176} Ibid., p. 38.
\textsuperscript{177} Ibid., p. 27.
cosmopolitan normative regime. Thus “a general theory of international law must qualify the historical approach of treating arbitration and judicial settlement as being primarily expedients to avoid recourse to violence by States and must regard them increasingly as the adjective law of an organized community.”

Thus international jurisprudence is called upon to serve an innate cosmopolitan program, which Jenks describes as follows:

> the collective and long-term task of rebuilding the intellectual foundations of a more adequate analysis and exposition of a law of nations which, profoundly transformed by modern developments, is rapidly evolving from a law between sovereign states, concerned primarily with the delimitation of their jurisdiction, towards a common law of mankind.

The innate cosmopolitan premise, for Jenks, is in equal parts empirically and aspirationally grounded. Empirically, he observes in the law that “the growth of strategic and economic interdependence has made the extent of such common responsibility so wide that the interdependence, rather than the independence, of nations has become the foundation of contemporary international relations and contemporary international law.” He breaks down the empirical foundations with lawyerly detail into eight comprehensive areas of clear legal development.

Though otherwise prosaic, Jenks, borrowing from Westlake, defends with more exalted language the “significance of each of these [eight] divisions for the further development of international law as the law of the great community, the universal commonwealth of the world”. Cumulatively, the sum of the divisions reflect “the transformation of international law from a law governing the mutual relations of States into the common law of mankind.”

Despite the accumulation of cataloged detail, however, Jenks describes the cosmopolitan phenomenon as weak: “The imperfect development and precarious nature of the organized world community is reflected in the early state of development of the law, but does not invalidate the basic conception.” Accordingly, he also frames the innate cosmopolitan program as an ideal, or:

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179 Jenks, supra note 171, p. 45.
180 Ibid., p. 46.
181 Jenks, supra note 178, p. 87.
182 Jenks, supra note 171, pp 10-11.
183 Ibid., p. 11 (citations omitted).
184 Ibid., p. 11.
185 Ibid., p. 46.
a great seminal idea, which recognizes that the law is constantly in motion, gives adequate expression to the concept of interdependence, bridges the differences of tradition, culture and interest which divide the world, and furnishes a basis of obligation which is applicable to the wide range of different types of legal relationship falling within the scope of the contemporary law and can contribute to making a reality of the universality of international law.186

Against this backdrop of aspirations, new empirical initiatives and doctrinal agendas, I turn briefly to the New Haven School and especially the work of Myres McDougal. The New Haven School effectively merges the broad social research agenda of Wright's Committee for the Study of Mankind, with Jenks's lawyerly account of interdependence. Interdependence is the grounds for a strong claim: “It is the fact of an interdependent world community that makes some system of international law inescapable.”187 At the same time, the scope of interdependence incorporates the fullness of Wright's research agenda, and perhaps more, potentially subsuming acts and expectations discernible in the interpersonal pursuit of any value, anywhere in the world. It bears noting here that the complexity and scope of the New Haven School – a sophisticated and developed doctrine of its own – takes it in some respects beyond the innate cosmopolitan model. I explore it here only for certain points of overlap.

Concerning the range of all values, McDougal, Lasswell and Reisman write: “The increasing interaction and interdependence which have been noted in a few spheres of human activity could easily be demonstrated in regard to the pursuit of every value which human beings covet.”188 Concerning the involvement of every individual, they write: “sustained global interaction has rendered the life and stable existence of every individual dependent upon numerous factors operating beyond his local community and national boundaries”.189 The enormity of the field of interdependence, however, reduces to its effects on individuals, “[t]he fact which requires emphasis is the highly personal impact of all this interaction and interdependence upon the lives of individual human beings”.190

186 Jenks, supra note 178, p. 88.
189 Ibid., p. 190.
190 Ibid., p. 191. Interestingly, the emphasis on the personal effects of global interdependence appears
By positing such an expansive field of transnational interdependence, the New Haven School purports to make good in definitive manner on the comprehensive objective reality that the innate cosmopolitan model represents. The viability of world community is no longer contingent on certain qualifying acts of interdependence, à la Jenks, nor on a possible psychological state of collective self-awareness, à la Wright, nor on any other common capacity that may lie dormant or go unrealized, but rather on the sheer fact of all acts and expectations expressive of interdependence. The sense of a world community that remains to be substantiated, discernible alike in theories of immanence and the idealistic tone adopted at points in Jenks's work, is rejected. The idea of a possible world community is hardened into the comprehensive reality of a world community that exists undeniably in the everyday acts of individuals everywhere: “The inhabitants of the contemporary globe are, unquestionably, the members of a ‘group,’ not merely an ‘aggregate,’ since they share a sufficiently high frequency of perspectives and interaction.” The global group is synonymous with world community, connoting a relatively thick social order: “The interdetermination of peoples on a global scale and the pervasiveness of its perception justify the characterization of a ‘world community’.”

In sum, adherents of the New Haven School “use the expression 'world community' ... not in a metaphoric or wistfully aspirational sense but as a descriptive term.” Norms of international law flow from the objective world phenomenon: “The specialized process of interaction commonly designated international law is part of larger world social process that comprehends all the interpenetrating and interstimulating communities on the planet.” The world social phenomenon is the ultimate grounds for international law, reflecting the basic character of the innate cosmopolitan model as a political-theoretical concept at work in international law: “It is ... this most comprehensive social process that comprises the events which give rise to claims to authoritative decision”.

192 Ibid., p. 256.
193 McDougal et al., supra note 187, pp. 808-09.
194 Ibid., p. 808.
195 Ibid., p. 811.
The distinction of the New Haven School from the Vitorian tradition of innate cosmopolitanism is the enhanced proposal to move from intuition and theory to empirical fact, without falling back on the idea of merely-possible community. The naturalist Vitorian reliance on intuition and possibility, though accurate according to the New Haven School as a matter of sensibility, is too subjective to substantiate objective world norms: “the early 'natural' law approach, though sometimes cognizant of the larger community of humankind, more often adopted partial and unevaluated conceptions of that community and did not develop the notion of interpenetrating community processes embracing all peoples.”  

As suggested also by Madariaga, subjective failure to perceive or appreciate the world community does not diminish its empirical reality. It is an objective phenomenon, regardless of the subjective phenomena that it comprises:

many members of the world community, as of less inclusive communities, betray little understanding of the impact their behavior has on others and that of others’ has on them. There is, thus, no necessary correlation between the facts of interdetermination and the perception of that interdetermination, including a recognition of the necessity for the clarification of common interest. 

Thus the world community is an objective reality, not contingent on subjective perception, and not merely a possible or theoretical condition to be realized. In consequence, each individual is, objectively and inescapably, a world citizen: “Interdependence has made world power processes and world law as relevant to each individual as the decisions made in the municipality in which he lives. Responsible citizenship, then, extends from the municipality to the limits of the enormous arena in which man interacts.”

Only a policy commensurate with the scope of the world order remains undeveloped: “A globally inclusive system of public order, though operative, is visibly incomplete, proving inadequate to the task of maintaining a minimum level of world public order.” Here McDougal signals another distinction of the New Haven School. Typically, as was noted in the Introduction and to which I will return in Chapter 3, the innate cosmopolitan model is invoked for ad hoc purposes, and

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196 Ibid., p. 812.
197 Ibid., p. 810.
198 McDougal et al., supra note 188, p. 193.
199 McDougal et al., supra note 191, p. 257.
lacks the systemic character of constitutional cosmopolitanism. The innate cosmopolitan model thereby supports an expression of authority in accordance with the interest or will of the world, but does not typically do so by reference to an articulated order in its entirety. Even Jenks suggests that his eight foundational categories are only rudimentary and partial, with further research and development proceeding incrementally. McDougal and the New Haven School, however, propose a vast project capable of rendering a systemic snapshot of the world order under an innate cosmopolitan model at any given point in time. But because the project remains nonetheless to be substantiated, and right policy remains to be determined, subjective perception of the objective world community, and engagement with it, are not irrelevant: “It is the perception of interdependence in community process that leads participants to appreciate the relevance of pursuing common interests and motivates them to clarify it.”

Here, however, some confusion arises: the objective fact of world norms is the sum of subjective acts and expectations in the world interdependent complex, but the subjective actors are largely unconscious of their contribution to the normative scheme. McDougal, Lasswell and Reismann write that “[i]n the optimum public order which we recommend, the expectations of all individuals equally comprise authority.” The normative basis shifts between an objective world phenomenon and the countless subjective acts that it comprises. Right policy, then, must be adopted to ensure that the sum or mean of world subjective acts and expectations conform to desirable outcomes, such that the New Haven School tasks itself with “the invention and evaluation of the alternatives in policy most economically designed to move us through these troubled times of contending systems toward the more complete and perfect world order we seek.” The line between inquiry into grounds for world norms, on the one hand, and an exercise in policy-making on the other, is eroded to the point that the complex assertion of interdependence clearly becomes a statement of policy and normative ends, rather than a defense or exploration of normative grounds.

The New Haven School recognizes the new incorporation of policy interests by terming itself a policy science, and by frank adoption of select policy ends. McDougal expresses the necessity of normative choice anecdotally: “It may be that

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200 McDougal et al., supra note 187, p. 810.
201 McDougal et al., supra note 191, p. 256 (emphasis in original).
... one may without 'disastrous consequences' take coffee from the Arabs and tea from the Chinese, but it does not necessarily follow that one may take cannibalism from the cannibals and remain ... wholly dedicated to the minimal-order principle of no cannibalism.” Moreover, McDougal is clear that the value-goals associated with human dignity, the adopted telos of New Haven School policy, are neither neutral nor transcendent:

The essence of a reasoned decision by the authority of the secular values of a public order of human dignity is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either the timidforeswearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the world of men and values in metaphysical fantasy. The reference of legal principles must be either to their internal-logical-arrangement or to the external consequences of their application. It remains mysterious what criteria for decision a “neutral” system could offer.

The values associated with human dignity, then, determine the substance and application of international law: “an international law so conceived will demand that all specific decisions be related to, or grounded in the authority of, the empirical, social-process, secular values of human dignity.”

Thus the New Haven School conjoins innate cosmopolitanism to the particular values of human dignity. But the embrace of human dignity by Myres McDougal, if not the whole of the New Haven School, became largely synonymous with western liberal values in general and U.S. foreign policy in particular. The New Haven School, it should be clear, is not liberal in the sense of liberal cosmopolitanism: it begins with the world phenomenon, rather than the individual, and likewise does not reduce to the individual alone, though sensitive in theory to the role and importance of individuals in the world. The result being that, as an exercise in world public order proceeding from the world collective, but embracing select liberal values in particular, the method and policy represented by the New Haven School takes on a liberal hegemonic character. In the words of Myres McDougal, “[t]he goal of a law of freedom is not the extreme of anarchy, but an

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203 Ibid., p. 122.
204 Ibid., p. 121.
205 Ibid., p. 123.
ordered, productive, shared liberty and responsibility.”\textsuperscript{207} In the words of critics, however, the New Haven School represents “social engineering”, or cover for US foreign policy.\textsuperscript{208}

Continued theoretical import

The New Haven School of thought persists to this day, and I turn now to other contemporary theories. The various research projects of the latter half of the 20\textsuperscript{th} century proved largely chimerical; the New Haven School has received substantial critique and moreover proved so complex as to limit its persuasiveness;\textsuperscript{209} and the pretension to cosmopolitan international law generally has lately been subject to substantial deconstructive critique, noted in Chapter 1, and to which I return in Chapter 5. Nonetheless, the innate cosmopolitan idea survives in largely the same capacity that it is argued to have enjoyed since Vitoria, namely as a necessary political-theoretical premise for the realization of normativity, and a coherent and effective system of international law in the world.

The ongoing vitality of the innate cosmopolitan model remains especially apparent in juridical theory that joins an appreciation of process or intersubjective experience to an argument about the normativity of international law. Thus, for instance, the transnational legal process school and interactional theory both adopt or exhibit aspects of innate cosmopolitanism. Each goes beyond the formal constraints of international law to identify effective world norms with a global intersubjective process. A comprehensive complex of interaction shapes the identity of actors and norms alike, such that world norms may flow from the world itself as a normative unit. It bears noting, however, that, like the New Haven School – a forerunner to both transnational legal process and interactional theory – neither transnational legal process nor interactional theory is wholly synonymous with innate cosmopolitanism. Transnational legal process entertains a rich idea of process that takes it outside of innate cosmopolitanism in certain respects; likewise the constructivist premises of interactional theory correspond with innate cosmopolitan premises but are not identical with them. I explore transnational legal process and

\begin{footnotesize}
\begin{footnote}{207} McDougal, \textit{supra} note 202, p. 126.\end{footnote}
\begin{footnote}{208} Martti Koskenniemi, \textit{From Apology to Utopia: The Structure of International Legal Argument} (Cambridge: Cambridge University Press, 2005), pp. 205-06.\end{footnote}
\end{footnotesize}
interactional theory, below, for the points of overlap with innate cosmopolitanism, but not to offer a comprehensive treatment of either theoretical school on its own terms.

Consider first Harold Koh’s work concerning transnational legal process. His seminal article, *Why Do Nations Obey International Law?*, opens with a history of international legal doctrine – common, as noted, to scholarship invoking innate cosmopolitan ideas – that selectively highlights commitments in the name of international community. The historical canvass begins with Roman law and proceeds through the Spanish School and Grotius; among other 20th century figures included, Alfred Verdross is cited for his invocation of an international “Grotian commonality of interests and values”, and Brierly is cited for his embrace of world solidarity.210 The doctrinal history, however, is prefatory to the fuller realization of international society facilitated by contemporary interconnectedness. The legal and political doctrine observed by Koh finds its ultimate purchase today, as part of a new era exhibiting “increasing interpenetration of domestic and international systems” within “a much broader fabric of ongoing communal relations.”211

The world as a whole, according to Koh, is still more thoroughly interdependent than ever, such that he observes a world-wide, transnational phenomenon, characterized by pervasive interaction and consequent intermixing values and interests. Moreover, in keeping with the heuristic application of innate cosmopolitanism, transnational legal process represents a political model by which to comprehend bedrock normative grounds of international law: transnational world arises out of and reflects nothing other than the world “body politic”, for which international lawyers, among others, are responsible.212

The world body politic, then, features a “global legal process”, which, in itself, is “normative, and constitutive”.213 Koh describes the normative operation of the global legal process, or transnational legal process, as follows:

One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party

seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to "bind" that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.\textsuperscript{214}

The product is a self-perpetuating world phenomenon, contingent on the continued interaction of actors in the world. Legal process is essential to the phenomenon, insofar as values that Koh holds fundamental to legal practice will constrain the range of normative outcomes to be expected as a matter of interaction and process.\textsuperscript{215} But while the process is normative, it is not determined. The sum total of acts and expectations will dictate appropriate norms at any point in time, subject to the constraints established as a matter of legal process. Actors in the transnational legal process become “carriers of history” in an international society that is always and necessarily emerging, not unlike the immanent world community envisioned by others canvassed here. Thus, repeat participation in the transnational legal process “helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society.”\textsuperscript{216}

In Koh’s account, international society is the merged product of identities and norms that run in two directions, from the international level to the individual actor and back. The sum total of these multi-directional engagements is a unitary phenomenon with normative consequences. The substance of that phenomenon is not fixed, but can be observed in the totality of the acts and expectations in all of the transnational engagements at any given time. As such, it embodies the innate cosmopolitan model.

The interactional theory of international law, developed principally by Jutta Brunnée and Stephen Toope, bears a family resemblance with transnational legal process. Both, as noted, find antecedents or “analogies” in aspects of the New Haven School, and share some of that school’s points of overlap with innate cosmopolitan

\textsuperscript{214} Ibid., pp. 2646.
\textsuperscript{215} Koh, supra note 212, pp. 184, 206-07.
\textsuperscript{216} Koh, supra note 210, pp. 2654-55.
Both transnational legal process and the interactional theory of law contemplate the totality of acts and expectations – or understandings, another term used by Brunnée and Toope – falling loosely within the overarching structure of international relations and law at any given point in time, with the new wrinkle that something particular about the practice of law serves as a constraint on the normative phenomenon associated with the world as a whole, though that normative phenomenon is otherwise open with respect to the historical norms which it may give rise. Thus both understand the normativity associated with the world as a whole to give rise to an open list of norms, constrained principally by something particular to legal discourse or doctrine. Interactional theory observes a constantly changing, intersubjective complex that represents the primary or bedrock normative grounds of international law.

Interactional theory relies largely on the international relations school of constructivism, merged with the legal philosophy of Lon Fuller. Brunnée and Toope rely on constructivism particularly to show “how international law can be an important force in socializing actors and shaping their interests and choices.” Actors are socialized into the overarching complex from which international law and relations derive their normative force, and in which actors and structure “are mutually constituting, and both are inherently social.” Bartelson, notably, refers similarly to mutually implicating relationships in his articulation of the innate cosmopolitan model. Moreover, interactional theory captures a central feature of innate cosmopolitanism from Vitoria forward: interactional theory is rooted in “an assumption about human nature, which is that the main goal of human life is not mere survival, but ‘maintaining communication with our fellows.’” As such, the interactional complex approximates the innate cosmopolitan intuition generally and recalls in particular the appeals to capacity and communication common throughout the innate cosmopolitan narrative. In sum, the world is an intersubjective complex in which actors will be socialized, and which is a consequence of the natural capacity for and inclination towards communication. As a comprehensive intersubjective

219 Ibid., p. 9.
220 Bartelson, supra note 61, p. 9.
221 Brunnée & Toope, supra note 218, p. 19.
complex into which all actors are socialized and which is grounded in assumptions of natural fact, the world as a social whole enjoys an objective claim to normative authority.

The normative potential that flows from the complex of world social unity, as observed by Brunnée and Toope, represents the primary foundation of the international legal system. Moreover, like other innate cosmopolitan proposals, interactional theory ties the objective norms of international law to the proper recognition of the diversity that makes up the world complex, alternately referred to as international and global society by Brunnée and Toope. Thus “the rule of law upholds and supports diversity in moral and political ends while at the same time helping to build a stronger global society”. Likewise, the appreciation of diversity signals the innate cosmopolitan aspiration to accommodate the particular and the individual as well as the universal and the collective. Following interactional theory, the international legal system will enjoy legitimacy and effectiveness “only to the extent that law supports autonomy while facilitating social interaction”. In short, “[t]he fundamental commitment is to enabling participants to pursue their own ends while being guided by law.”

Global society, in the terms of interactional theory, is a social phenomenon properly guided by universal norms that facilitate diverse expressions of the human inclination to communication and interaction. The global society of interactional theory represents a telos in keeping with the heuristic use of the innate cosmopolitan model, such that international law will be recognized as legitimate only insofar as the social capacity of humankind may achieve adequate expression. Accordingly, “the first step in building interactional law is the creation of social legitimacy through the emergence of widely shared understandings.” Notably, however, there appears some ambiguity typical of the innate cosmopolitan model. It is not clear whether the basic criteria of legitimacy arise naturally or must be manufactured: law is either created or it emerges. The potential arises, as per Kelsen’s critique of the natural law and the innate cosmopolitan model, treated supra, for interactional theory to divest the law-maker or magistrate of responsibility for announcing the law.

222 Ibid., p. 22.
223 Ibid., p. 18.
224 Ibid., p. 3.
Moreover, there appears a contradictory potential in the terms of the interactional
program, one that is not unfamiliar from other innate cosmopolitan proposals. The
world as a whole enjoys normative authority, which authority will be discerned in a
diversity of behavior in the world, but the legal manifestation of which will be
contingent on the relative homogeneity of shared understandings. The innate
cosmopolitan model recognizes and incorporates diversity, but operates in terms of
the collective unit. Coupled with the potential divorce of responsibility for the
articulation of norms, interactional theory appears to harbor a common policy
potential that has marked innate cosmopolitanism throughout its modern history.

Additionally, it bears emphasizing that interactional theory is not a theory about
what international law might be; rather, it is about what international law must be:
“The primary test for the existence of law is not in hierarchy or in sources, but in
fidelity to internal values and rhetorical practices and thick acceptances of reasons
that make law – and respect for law – possible.” In keeping with the innate
cosmopolitan model, interactional theory addresses perceived shortcomings in the
traditionally-recognized sources of international law, to allow for the expression of
norms arising from the global whole, rather than the volition of sovereign states
alone:

[I]nternational lawyers can finally eschew the preoccupation with legal
pedigree (sources) that has constrained creative thinking within the discipline
for generations. Sources of law can be understood as shorthand for shared
understandings, the processes of their invocation made legitimate both by
strong adherence to an internal morality and by highly circumscribed tests of
substantive content.

The appeal to a source of law outside of those captured in Art. 38 of the statutes of
the World Court, represents a primary use of the innate cosmopolitan model
identifiable in the jurisprudence of the ICJ, as will be seen in Chapter 4.

Finally, Brunnée and Toope, following Fuller, anchor the social complex of global
community to a common morality. They take pains to eschew substantive political
ends for the global community, but interactional international law is conditioned on
an internal morality, and subject to external morality, such that “the internal
morality of the law will tend to favor stasis, as upholding settled expectations and
predictability, the external morality, rooted in human ends, will appropriately

226 Brunnée & Toope, supra note 217, p. 69.
227 Ibid., p. 65.
demand change.”228 They borrow their moral criteria from Fuller, part of a Fullerian “vision of the moral community that is a direct challenge to international lawyers and IR theorists.”229 The internal morality of interactional law represents a discrete morality appropriate to law, universal in nature, including attributes that law must always and everywhere exhibit to qualify as legitimate and effective where transnational legal process observed normative constraints on the world phenomenon arising out of characteristics typical of lawyers and legal practice or legal discourse, interactional theory finds constraints arising out of moral terms identified with law as a theoretical construct.

For interactional theory, external morality – as opposed to internal – reflects historical values associated with a given community. As such, external morality corresponds with the observational premises of innate cosmopolitanism, by which international legal norms must reflect normative acts and expectations discernible in the world community. Brunnée and Toope indicate that “modest substantive commitments to an external morality evidence an underlying congruence with commonly shared understandings in society”.230 Internal morality, on the other hand, recalls the turn to policy already evident in the work of Wright and McDougal, among others. As was seen above, for those innate cosmopolitans who turned expressly to matters of policy, the move was intended to constrain the apparently endless normative ends at which a genuinely observation-oriented innate cosmopolitan model might arrive; recall McDougal’s words that one may not “take cannibalism from the cannibals and remain ... wholly dedicated to the minimal-order principle of no cannibalism.”231 For interactional theory, a fixed and universal internal morality is adopted at least to constrain the range of normative possibilities available to international law, since the allowance for and sensitivity to external morality otherwise admits no clear normative distinction or priority as between competing moralities and corresponding normative ends. In that sense it is typical of a move in the latter half of the twentieth century to join an appreciation of diversity in world relations to a responsibility to guide those relations by means of normative constraints, in the name of the phenomenon represented by the world as a whole.

228 Ibid., p. 59.
229 Ibid., p. 62.
230 Ibid., p. 53.
231 McDougal, supra note 202, p. 122.
In sum, interactional theory, in its development of constructivist insights, reflects the innate cosmopolitan model of a unified world social phenomenon with normative consequences capable of conferring an objective grounds for international law, irrespective of traditionally-recognized sources, grounds presupposed to underlie and facilitate interaction across the diverse expressions of community in the world. Moreover, Brunnée and Toope expressly distinguish interactional theory from the other schools of cosmopolitanism considered here: “Our theory of legal obligation is not aligned with cosmopolitan liberalism … or with visions of global constitutionalism. Rather, we envisage interactional law as a particular kind of ‘community of practice’”. Theirs is a vision with roots in a normative potential purportedly established by and for the world as a whole.

Conclusion

Proceeding largely by example from historical doctrine and modern scholarship, a consistent picture emerges from the varied manifestations of the innate cosmopolitan idea observed in international legal discourse. I will continue the theoretical investigation of innate cosmopolitanism by comparison with liberal and constitutional cosmopolitanism in the next chapter, and I will turn to critique in the Conclusion. It will suffice here briefly to summarize the form innate cosmopolitanism has taken in scholarly discourse. From the inception of modern international law, there has been a perceived need for an independent source of normativity to substantiate legal rules of world conduct. The innate cosmopolitan idea locates that independent source of authority in the world collective, or world as a whole. The world as a whole has been endowed with a voice, in the form of world public opinion, and some capacity for agency, whether by reference to some communicative potential, some psychological condition, or the sheer possibility of a world democratic majority. What began with the natural law of Vitoria, vested in right reason applied to human nature, remains natural in the sense of a normative complex arising necessarily out of the social dimension of the world community, which complex precedes and is not reliant of its normativity on any expression of community as a matter of positive law.

Though 20th century research programs into the details of that normative complex and social dimension proved largely chimerical, and though the New Haven School

232 Brunnée & Toope, supra note 218, p. 29.
suffered under the weight of its own complexity, the innate cosmopolitan model, in various contemporary manifestations, continues to found an assumption of normativity in the intersubjective acts and expectations that are argued to make up normative interconnectedness in the world. Thus the innate cosmopolitan model shows the most continuing vitality in international legal scholarship grounded in process theory or the constructivism associated with international relations theory. In each articulation, the innate cosmopolitan model observes the world as a whole, for the purpose of determining and authorizing norms proper to it. But in its contemporary articulation, the innate cosmopolitan model is increasingly recognized to exhibit an open normative potential, such that certain constraints are necessary to prevent arriving at undesirable ends. Consequently, throughout the various instantiations of the innate cosmopolitan model, the line between world norms and world policy becomes increasingly indistinct, and in some cases is expressly collapsed. I will return to this point in the Conclusion.
In this Chapter, I will compare the innate cosmopolitan idea, as it has been observed in Chapter 2, against the alternative schools of liberal and constitutional cosmopolitanism. Thereby, I hope further to map the different domains occupied by the different schools of cosmopolitan thought in the discourse of international law, and further to distinguish and shed light on the domain particular to innate cosmopolitanism. To restate the underlying commonality among the three schools: cosmopolitanism in international law generally calls for achieving some unified, objective grounds for international law beyond the subjective prerogatives traditionally associated with states in the international system. Innate cosmopolitanism would achieve objectivity according to a special normative potential bound up with a vision of the world as a collective whole. Liberal and constitutional cosmopolitanism would do so differently, liberal cosmopolitanism according to an ethical framework developed out of certain moral premises, and
constitutional cosmopolitanism according to certain developments within the body of positive international law. I will take each of the two in turn, looking first at liberal cosmopolitanism, then constitutional.

The intent here is not to reproduce the fullness of liberal and constitutional cosmopolitan doctrine. The intent being to trace the domains of each of the three cosmopolitan schools of thought, I will attempt to treat core aspects of liberal and constitutional cosmopolitanism, in addition to special attributes of each school that serve to distinguish the three from one another. Relative to the vast body of literature that exists for both liberal and constitutional cosmopolitanism, I will rely on a narrow selection of authors and literature, chosen as representative of main streams of thought within each school, and for raising matters especially pertinent to the distinctions among the three cosmopolitan schools. Additionally, in the case of liberal cosmopolitanism, I have tried to emphasize select works particularly interested in the application of liberal cosmopolitan political theory to international law. The liberal cosmopolitan literature drawn on here includes select work by political theorists Thomas Pogge and Allen Buchanan and Charles Beitz, among others, as well as work by international legal theorist Fernando Tesón. For constitutional cosmopolitanism, this includes work by Bardo Fassbender, among others, as representative of a school of thought tending to elevate the UN Charter as a constitutional document, and work by Erica de Wet and Anne Peters, among others, as representative of international legal scholars who observe formal constitutional development in a hierarchy of norms arguably recognized under international law.

Liberal cosmopolitanism and innate cosmopolitanism

*Historical and abistorical foundations*

Liberal cosmopolitanism is an ethical doctrine that, applied to law, takes the form of a doctrine of cosmopolitan justice, against which historical acts and contingencies may be measured. The terms of liberal cosmopolitan justice claim objectivity by virtue of being developed out of moral premises, according to a constructivist process. Thus liberal cosmopolitanism relies on a constructivist technique that
typically begins with a-historical, moral premises, such as the equal dignity of the individual.233

Thus liberal cosmopolitanism attains to normative objectivity, in application to international law and otherwise, by virtue of properly applying a constructivist method commencing with select moral premises that are argued to be universally-acceptable. Those premises are drawn from observations about human nature, or the condition of being human, and are not predicated on changing historical constraints that impact the condition of being human. Rather, ethical standards are constructively developed out of universally-acceptable moral premises concerning the condition of being human, such that changing historical conditions, together with the politically-empowered institutions those conditions comprise, may be subject to a critique that is not conditioned on historical factors.

Applied to international law, the ethical system of liberal cosmopolitanism is autonomous of the acts and institutions to which liberal cosmopolitan theory will be applied in passing judgment. Incorporated into international law, autonomous premises are constructively developed into norms suitable to global application. The norms liberal cosmopolitanism arrives at may exhibit sensitivity to the constraints of historical conditions, but remain ahistorical and non-contextual in their origin and core substance. Innate cosmopolitan norms, by contrast, are neither ahistorical nor non-contextual. Rather, innate cosmopolitan norms must be discovered by observation because they inhere in the historical expression of the world social phenomenon.

Developed autonomously of the historical contingencies of international law, liberal cosmopolitan norms typically are not identical with actually-existing rules and rights, such as human rights actually existing as a matter of law. Rather, liberal cosmopolitan rules and rights refer to “preexisting” (also referred to as pre-political) rules and rights, or “moral human rights”.234 The distinction is important insofar as it allows liberal cosmopolitan doctrine to retain independence from the actually existing regime of international law: “recognition of moral human rights is important because it makes room for an independent critical assessment of existing

233 See the discussion of constructivism, infra, pp. 94-98.

international law.” Likewise, autonomy and independence from historical conditions also implies independence from the status quo. Innate cosmopolitanism, by contrast, claims objectivity by reference to a discrete phenomenon, namely a historical world community, and as a result looks by comparison considerably more invested in the status quo.

While liberal cosmopolitanism may serve to correct conditions of historical circumstance, it does not accept them as a normative point of departure or allow them to overthrow the constructivist validity of the normative model. The liberal cosmopolitan method typically begins, following the social contract thought experiment as updated in the work of John Rawls, with an imagined original position, and proceeds constructively to right principles for social organization. It is from disagreement over the ability to apply to the world at large, for purposes of international law or for critiquing international law, the method Rawls pioneered, that liberal cosmopolitanism takes its impetus. Charles Beitz, critiquing Rawls’s failure to adopt liberal cosmopolitanism, criticizes Rawls for straying too far from ideal principles developed according to constructivist method, and for instead entertaining “considerations of political realism” that “have to do with constraints imposed by the status quo on prospects for change, and thus they pertain to questions about institutional design and reform rather than to those about standards of moral appraisal.”

By contrast, law generally, and international law in particular, will typically proceed as discourse and practice according to a given set of political conditions and ordered historical authorities. International law represents rules of international conduct that take their legitimacy and purpose from a set of assumptions about institutions as they have developed. As Lea Brilmayer puts it: “International law takes the status quo for granted as the appropriate point of departure.” The typical rule of public international law is designed to reinforce conformance with a social and political order in the world as it is understood to exist, by actors empowered to establish international norms. Even rules designed to achieve a measure of change typically aim at change that begins from and affirms the general ambit of the established order: the status quo remains the point of departure. By comparison, the liberal

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235 Ibid., p. 718.
cosmopolitan adoption of an independent position in opposition to the status quo, typified above by Pogge and Beitz, proceeds from a different point: norms are predicated on an ideal condition that is not contingent on historical conditions or the status quo – indeed, the liberal cosmopolitan norm demands justification from outside of the historical order of international law. Thus liberal cosmopolitan norms are indicative of moral human rights, “whose validity is independent of … governmental bodies [and international law]”, thereby providing “a more solid basis for critical assessment” of international law than any “internal assessment” might otherwise achieve. Where liberal cosmopolitan norms basically hold that international actors ought to act in compliance with ideal standards developed constructively out of select moral premises, public international legal rules typically hold that international actors ought to act in a way that conforms to order in the international world as it is understood by relevant actors to exist.

The connection between the typical aim or orientations of legal rules, on the one hand, and the perceived reality of the order by and for which it is developed, on the other, underscores why the assumption that the world social phenomenon actually and already exists is so important to the innate cosmopolitan model: the innate cosmopolitan model purports thereby to remain with a traditional, legal discourse appropriate to international law, however transgressive it may seem other respects. The world phenomenon must be perceived to be a reality to substantiate a valid and viable system of rules of public order and international law, even if the world phenomenon has not otherwise been recognized as such according to traditional terms of volutary positivism in international law. At the same time, this position ties the innate cosmopolitan model to the status quo in a way that liberal cosmopolitanism rejects. I return to that relationship between innate cosmopolitanism and the status quo in the Conclusion of this book.

Liberal cosmopolitanism, by virtue of its character as an ethical system of norms, takes the world as it ought to be as grounds for identifying norms and generating new law. As such, liberal cosmopolitanism demands justifications of real world institutions according to a critique based in the first instance on, following Sidgwick’s statement of method, “an ideal system of rules” which “ought to exist, but perhaps have never yet existed”. To quote Arnold Brecht: “Only that is of

239 Pogge, supra note 234, p. 718.
ethical value which *ought* to exist”\(^\text{241}\). Derived from ideal rules, liberal cosmopolitan norms exhibit less attachment to historical conditions than is typical of legal norms, and especially international legal norms. The ethical orientation of liberal cosmopolitanism means that liberal cosmopolitan norms are designed in the first place to achieve or encourage compliance with an ideal world that ought to exist, as opposed to the status quo conditions in the world as it is understood to exist. Where norms of international law typically are oriented to rules of behavior that conform with the world as it is understood to exist, norms of liberal cosmopolitanism typically are oriented to rules of behavior that conform with an understanding of how the world ought to be.

It bears noting that this treatment of the world as it is understood to exist and an understanding of the world as it ought to exist is not identical with the use of the terms *is* and *ought* to describe the definition of a norm under Kelsen’s pure theory of law, whereby *is* either represents the objective act of the legislature, such as the sanctioned raising of hands, or any other completed act or natural condition, while *ought* represents the prescriptive content of a norm, or what the norm purports to command. By contrast with the pure theory of law, here the world as it is understood to exist and an understanding of the world as it ideally ought to exist represent competing perspectives concerning the mission of the legislator: the legislator, as a matter of law, is typically interested to produce norms that ensure conformance with an existing system of public order. There may be incremental change, including incremental change encouraged by law, but the law, in the first instance, remains dedicated to sustaining the over-all order within which it functions. For this reason, the observational method associated with innate cosmopolitanism is dedicated to demonstrating that innate cosmopolitan norms flow from an order that already exists, namely the world social phenomenon, and would produce norms that comply with the acts and expectations actually manifest in the world social phenomenon.

Innate cosmopolitanism is more or less radical for proposing to affirm legal norms on the basis of a source of norms – the interests or will of the world as a whole, autonomously expressed – not included among the traditionally-recognized sources of law in international law; but innate cosmopolitanism remains nonetheless within the broader confines of legal discourse generally, insofar as it purports to identify a

viable source of legal norms within the general structure of a historical social and political order in the world as it may be perceived to exist. The innate cosmopolitan phenomenon does not overthrow international law; rather it supplements international law with a source of law that purports to be in some respects superior to the traditional sources of international law, but is not per se exclusive of them. In terms of ascertaining law, innate cosmopolitanism would adhere to the framework discernible in international law generally, but would add to the precise terms comprehended under that framework today. The recognition of sources would extend to acknowledged means of recognizing norms associated with the world as a whole.

In sum, the innate cosmopolitan model does not describe a different world, nor an ideal world, but the historical world of the present, as it may be observed to exist. Liberal cosmopolitanism, on the other hand, by operating from an ideal perspective established according to constructivist or deductive method, and beginning with select moral premises, proceeds in a manner opposite to that of innate cosmopolitanism. In this way, while innate cosmopolitanism remains within the bounds of traditional legal discourse, liberal cosmopolitanism operates from outside of it; it is situated in a discourse founded in the ideal strictures that characterize ethics and justice, and demands justifications of institutions for variance from the way things ought to be. Innate cosmopolitanism, by contrast, is a model founded on the reality of historical constraints, and fits within a discourse by which law and the ascertainment of law represent means for sustaining an existing order.

**Normative individualism and public authority**

The norms of liberal cosmopolitan justice are derived constructively out of autonomous, moral premises that flow from what are argued to be universally-acceptable assumptions about human nature, expressed in terms of normative individualism. Normative individualism holds that individuals are the “primary normative unit”, and the “ultimate unit of concern”, and follows in the liberal cosmopolitan tradition from Rawls’s statement that individuals are “self-originating

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sources of valid claims”.244 Rawls’s statement, in larger context, follows from Kant’s proposition that “any rational being exists as an end in himself”, and is basically synonymous with the dignity of the individual.245 Liberal cosmopolitans understand the individualism of normative individualism according to two primary features: universality or all-inclusiveness; and generality. Universality or all-inclusiveness means “the status of ultimate unit of concern attaches to every living human being equally”.246 Generality means that individuals are “the ultimate units of concern for everyone”, generating “obligations binding on all.”247 Thus liberal cosmopolitan justice attains to objectivity by comprehending the value of the individual in terms of first moral principles. The process is constructive or deductive: moral norms are reasoned from universally-acceptable attributes of individuals generally.

Though not reliant on the history of its own discourse in the way that innate cosmopolitan arguments in international law are, liberal cosmopolitanism in international law nonetheless draws on a tradition of natural law concepts particular to classic liberal political theory. The human rights that are characteristic of liberal cosmopolitanism applied to international law are the legacy of original, or pre-political rights in Enlightenment political theory. Thinkers such as Locke and Kant employed a distinct natural law vocabulary in connection with the thought experiments of the social contract and state of nature. For both Locke and Kant, fundamental or original rights attach to individual persons as a function of human nature. Those original rights inhere in the pre-political condition of individuals, and serve as a guide for the social contract and a constraint upon it.248 For Locke, “The state of nature has a law of nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions”.249 For Kant, “before a public and legal state is established, individual

247 Pogge, supra note 246, p. 49; Pierik & Werner, supra note 243, p. 3.
249 Locke, supra note 248, §V, ¶6;
men, peoples and states can never be secure against acts of violence from one another, since each will have his own right to do what seems right and good to him, independently of all the others.”

Following the social contract thought experiment, select pre-political rights are imagined to survive the hypothetical act of contract; they are never ceded to the public trust. Those pre-political rights are moral rights that remain vested in the individual, identifiable with human rights. As the rights that are not or cannot be given away in the hypothetical act of contract, human rights define the possible scope of that contract, and thereby delimit and take precedence over the resulting public authority, at least in a moral sense. Thereby they are understood to persist as basic rights retained by individuals under historical conditions of political context, and as universal human rights when that context is global in scope. Thus Pogge writes today that “persons cannot waive their human rights to personal freedom, political participation, freedom of expression, or freedom from torture.”

Historically contingent norms adopted by empowered bodies of public authority must always cede to the pre-political and nonhistorical values that human rights represent. In sum, the liberal cosmopolitan regime is founded in individual rights that take precedence above, or cannot be infringed upon by the authority vested in the historical manifestation of the political collective. As such, liberal cosmopolitanism is strikingly different from the innate cosmopolitan model, where the norms and rules follow on the nature and will of the collective itself.

In current application to the world as it exists, liberal cosmopolitanism is concerned with moral justifications: it “is a doctrine about the basis on which institutions and practices should be justified or criticized.” Liberal norms are ideals representing “basic moral principles that a just society has to satisfy”; and liberal cosmopolitan norms applied to international law likewise demand justification of international norms and institutions according to certain moral principles. Those principles, in keeping with normative individualism, are generally concerned with individual well-being. Their expression in international law typically takes the form of human rights and redistributive norms. In sum, international legal institutions and practices in theory must justify their existence and operation according to their effects on individual well-being, as measured with standards of human rights.

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250 Kant, supra note 248, p. 137 (emphasis in original)
251 Pogge, supra note 234, p. 731.
253 Pierik & Werner, supra note 243, p. 281.
Following normative individualism, liberal cosmopolitan principles apply irrespective of distinctions of nationality; thus the justifications for international legal norms and institutions cannot be made by appeal to sovereignty. In consequence, under ideal conditions of liberal cosmopolitanism, the state is no longer sovereign as the term is classically understood as a matter of international law. The state is neither inviolate nor supreme, nor does it serve as a meaningful justification for differing historical conditions of well-being among individuals in the world. The collective, qua collective, holds no discrete authority of its own vis-à-vis the individual, again reflecting the gulf between liberal and innate cosmopolitanism, the latter being founded on the discrete authority of the world collective as a ‘subjectivized’ entity.

Thus while innate cosmopolitanism diminishes the subjective authority of the sovereign state before the objective normativity of the world phenomenon, liberal cosmopolitanism is still less congenial to the state. Innate cosmopolitanism, even as it identifies in the world a collective subsuming all other collectives, recognizes a discrete and ineradicable value of collectives – indeed innate cosmopolitanism suggests that universal and particular collectives arise out of identical processes, and as such exist in a mutually constitutive relationship with one another. Liberal cosmopolitanism, however, allows no discrete value to collectives. Whatever value collectives enjoy is wholly derivative of some demonstrated value for individuals.

Interdependence and natural rights

As noted, liberal cosmopolitans express the basic moral principles that world society ought to satisfy in terms of human rights. Human rights are understood in one of two main ways: as rights triggered by a “global structure of interaction and interdependence”, or as natural rights. Interaction and interdependence, however, play a different role in liberal cosmopolitan discourse than they do for innate cosmopolitan discourse, for which the same terms are also important. Commonalities among the liberal cosmopolitan strands of interdependence and natural rights make clear the different uses of interaction and interdependence in

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255 Pierik & Werner, supra note 243, p. 280, fn. 7.
liberal and innate cosmopolitanism; I turn briefly to the two strands of liberal cosmopolitanism to do so now.

The interdependence approach, as the name suggests, is predicated on global interrelationship among individuals, whether direct or mediated; its natural rights counterpart is drawn from the individual considered in isolation. As a result, the interdependence approach appears to be contextual in a way that the natural rights approach is not. Each, however, derives from the same set of noncontextual premises, and the normative content of each approach is substantively the same. Differences between the two pertain chiefly to systemic capacities to generate positive obligations, as opposed to negative duties.

The interdependence approach, which Pogge calls an institutional approach, posits that all individuals hold human rights, but those rights only arise in the context of social institutions: “human rights are activated only through the emergence of social institutions. Where such institutions are lacking, human rights are merely latent and human rights violations cannot exist at all.”256 The cosmopolitan order becomes material when global institutions begin to encroach on human rights: “the global moral force of human rights is activated only through the emergence of a global scheme of social institutions”.257 The factual predicate for a cosmopolitan normative order under law – i.e., the emergence of “a single, global institutional scheme” – recalls Rawls’s description of a basic structure underlying society, globally applied.258

The connection between institutions or interdependence and norms suggests a familial relationship with the innate cosmopolitan reliance on interdependence. Both models share a like sense that interdependence among people in the world has given rise to norms that would not inhere absent such interconnectedness, with consequences for international law. For innate cosmopolitanism, world norms are drawn precisely from the historical expression of interdependence in the world, measured as a matter of observation and reducible to legal norms by something like inductive process. For the liberal cosmopolitan, however, interdependence merely triggers norms that already exist prior to any interaction. Human rights inhere in and are developed out of the nature of the individual: the substance of human rights is not a product of the nature of the interdependent community; the need to enforce

256 Pogge, supra note 246, p. 51.
257 Ibid., p. 51.
258 Ibid., p. 51.
the human right, however, is. The substance of human rights and the “moral force”, or presumptive normative authority that they call on, preexist the interdependent relationship that activates them. The historical element, namely the historical emergence of world interdependence and global institutions, merely signals that pre-existing rights and obligations need reinforcement under international law.

In short, liberal cosmopolitan norms associated with interdependence are not historically conditioned, but historically activated. To restate, though human rights and norms of justice are activated by the context of social institutions, their substance is independent of the context of social institutions, and not conditioned by it. To use Pogge’s language, they are “latent” absent qualifying conditions of interdependence, and “activated” by the same; only their violation does not exist absent interdependence, hence only their enforcement is contingent.

Consider the second strand of liberal cosmopolitanism. Buchanan, who favors the natural rights approach, disfavors the interdependence approach largely because “it is hard to see how the mere fact of cooperation with others, whether within a basic structure or not, is sufficient to ground any obligation to treat them justly.” Buchanan’s language is imprecise, and it is worth noting the potential misunderstanding about the interrelational approach: rights and obligations under the interrelational approach are not properly grounded in interrelation, but triggered by it. Buchanan puts it more accurately when he holds that, “[a]ccording to the interactionist view, relations of justice only obtain among those who are engaged in cooperation with one another.” Relations of justice only obtain among persons who are interrelated, even indirectly through institutions; but the principles or premises of liberal cosmopolitan justice are constant and unchanging across all cases in which they arise. Once triggered, the interrelational rights and obligations reduce, in terms of law, to the same liberal set of basic human rights affirmed by Buchanan.

Buchanan, unlike liberal cosmopolitans focused on interdependence, “does not assume that obligations of justice obtain only among those who interact cooperatively”. Following his natural rights approach, the basic set of moral rights and obligations that liberal cosmopolitans draw on are always manifest, and


260 Ibid., p. 85.

261 Ibid., p. 86.
never merely latent. There is no need for a trigger, the constraints of justice apply always. In part, Buchanan’s preference for the automatic application of the constraints of justice is due to skepticism as to whether the worldwide institutional scheme “is already sufficiently robust to ground comprehensive principles of justice for the international legal order.” The principle distinction of the automatic approach, however, is that it gives rise to positive obligations without having to prove engagement with a global basic structure.

The natural rights approach is roughly shared by Kok-Chor Tan, among others who propose a relatively thick scheme of positive cosmopolitan obligations. Though Tan does not share Buchanan’s skepticism with respect to a robust global basic structure, nor does he “share the justificatory claim in Pogge’s approach that we have duties of justice only in so far as we are causally via our institutions responsible for injustices”.263

Following the interdependence approach, only negative duties adhere absent institutional or cooperative relations, or outside the global basic structure. Absent its violation, the right is not triggered; if an individual is not harmed, there is no obligation to further that individual’s rights; and if an individual is harmed, the obligation to make right may not fall on those outside of the interdependent and institutional context in which the harm occurs. By contrast, the natural rights approach holds that one must affirm and actively support the rights of another even absent any act, direct or indirect, by the one affecting the other. As Buchanan puts it, “even if there were no global basic structure of cooperation or any form of interaction whatsoever among individuals across borders, we would still have a limited obligation to help create structures that provide all persons with access to just institutions.” Moreover, “this obligation attaches to us as persons, independently of any promises which we make, undertakings we happen to engage in, or institutions in which we are implicated”.265

The product is a mandate at law to give effect to predetermined individual rights. Though the mandate as a matter of international law may or may not be triggered by historical context, depending on the school of thought, the underlying rights themselves exist independent of any historical context. The liberal cosmopolitan

262 Ibid., p. 94.
263 Tan, supra note 254, p. 21, fn. 6 (emphasis in original).
264 Buchanan, supra note 259, p. 86.
265 Ibid., p. 86.
rights regime, then, appears substantially different from the innate cosmopolitan model, which are drawn in substance from the nature of interdependence, not irrespective of interdependence and not merely triggered by it. Under the innate cosmopolitan model, bedrock world norms are not necessarily concerned with individual rights (nor are they necessarily opposed to them) but rather with interests and will exhibited by the interdependent phenomenon as it is historically expressed across and among the diversity of individuals and collectives in the world at any given point in time.

Departing from Rawls

Both strands of liberal cosmopolitan theory, emphasizing interdependence and natural rights, respectively, converge around their departure from the work of John Rawls. Each takes Rawls’s Theory of Justice as foundational to the contemporary liberal cosmopolitan project, and each rejects Rawls’s work declining to extend the theory of justice directly to the international realm. In the defining break between Rawls and the liberal cosmopolitans, distinctions of methodology and substance between liberal and innate cosmopolitanism, as well as occasional sites of convergence between them, become still clearer.

Two sets of distinctions between Rawls and the liberal cosmopolitans are instructive. First, distinctions between Rawls’s constructivist method underlying his theory of justice, and the constructivist method as applied in theories of liberal cosmopolitan justice. Second, broadly, between the objectives of Rawls’s law of peoples, and the objectives of liberal cosmopolitan normative regimes that draw on his theory of justice. I turn to the two sets of distinctions in order.

In *A Theory of Justice*, Rawls employed a constructivist method featuring deductive reasoning based on assumptions about persons as individuals. He did not, however, use the term constructivism anywhere in *A Theory of Justice*. Instead, he described

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267 Rawls’s constructivism is a methodological tool developed out of political theory, and not the constructivism that is a theory of identity and norm formation in the world shared by international relations and international law scholars. Where I refer to constructivism in the context of Rawls and post-Rawlsian political theory, I mean the former; in all other places, I mean the latter.
what he referred to as “one Kantian variant” of constructivism in a subsequent article, *Kantian Constructivism in Moral Theory*, which Kantian variant of constructivism he identified with his method in *A Theory of Justice*. A brief version of the definition he offers in *Kantian Constructivism* is as follows:

> What distinguishes the Kantian form of constructivism is essentially this: it specifies a particular conception of the person as an element in a reasonable procedure of construction, the outcome of which determines the content of the first principles of justice. Expressed another way: this kind of view sets up a certain procedure of construction which answers to certain reasonable requirements, and within this procedure persons characterized as rational agents of construction specify, through their agreements, the first principles of justice. The leading idea is to establish a suitable connection between a particular conception of the person and first principles of justice, by means of a procedure of construction.

Significantly, in *Kantian Constructivism*, Rawls also held that his method applied to a closed society, his own, and he grounded his assumptions in observations of historical commonality. Moreover, as Rawls evolved his method in conjunction with his turn to a theory of political liberalism, he acknowledged Kantian constructivism to incorporate “basic conceptions of person and society” grounded in Kantian theory of transcendental idealism. In sum, the conception of the individual that Rawls’s method provides for, in *A Theory of Justice* and *Kantian Constructivism*, is broad, but not limitless in its allowance for distinctions.

Liberal cosmopolitans apply their method to encompass the whole world, and, in so doing, diminish recourse to historical commonality, relying instead on universal assumptions about persons as individuals that Rawls avoided. In its operation, Rawls’s constructivist methodology purports to arrive at first principles of justice by deducing necessary principles from accepted premises. By means of the veil of ignorance applied in the original position – Rawls’s modified social contract thought experiment – Rawls abstracts out essential and noncontextual values of the individual from the adopted conception of a person. Norms of justice derive from

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268 Rawls, supra note 244, p. 515.
269 Ibid., p. 516.
270 Ibid., pp. 516-19.
271 John Rawls, *Political Liberalism* (New York: Columbia University Press 2005 [1993]), p. 100. Notably, Rawls’s move towards a constructivist method more in keeping with political liberalism underlies the general shift from *A Theory of Justice* to *Political Liberalism*, and it is in that shift that the seeds of the break between liberal cosmopolitans and Rawls are planted.
these values. Rawls’s method boils down to this: “it specifies a particular conception of the person as an element in a reasonable procedure of construction, the outcome of which determines the content of the first principles of justice.”

Thus Rawls abstracts from the individual for non-contextual values – but the starting point, the particular conception of the person, is an historically conditioned conception drawn from Rawls’s experience. Understood to apply to a closed society to which Rawls belonged, short of world society, Rawls’s Theory of Justice is liberated to rely for premises not on universal or universally-acceptable assumptions of about human nature, but rather on insights that Rawls observed to be reasonably accurate concerning himself and fellow members of his historical community: “The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations.”

The end of the constructivist method for Rawls is objective authority, but not in terms of absolute objectivity. Rather, he aims at “objectivity in terms of a suitably constructed social point of view” that will be authoritative for all historically-joined parties to the same body public. Thus, “rather than think of the principles of justice as true, it is better to say that they are the principles most reasonable for us, given our conception of persons as free and equal, and fully cooperating members of a democratic society.” Objective authority does not flow from universality, but from some reasonably abstracted baseline of historical commonality. Following Rawls, there is no more objective or autonomous basis for norms of justice: “Apart from the procedure of constructing the principles of justice, there are no moral facts. Whether certain facts are to be recognized as reasons of right and justice, or how much they are to count, can be ascertained only from within the constructivist procedure.”

Liberal cosmopolitans, in contrast with Rawls, do not refer to discrete societies or historical communities. Thus, the liberal cosmopolitan does not enjoy the same liberty of relying on premises that may be historically contingent, or familiar and acceptable to members of one historical community only (or some limited number...

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272 Rawls, supra note 244, p. 516.
273 Ibid., p. 519.
274 Ibid., p. 554.
275 Ibid., p. 519.
276 Ibid., p. 519.
of historical communities). Rather, the liberal cosmopolitan aims at principles of justice applicable to all regardless of cultural and political distinctions. Recall the legacy of Locke and Kant. Rawls and the liberal cosmopolitans all accept postulates about pre-political conditions of freedom and equality inherited from them. Rawls, however, does not need to argue that these postulates are universally true, and instead assumes they represent contextual characteristics which all other reasonable members of Rawls’s own, closed society – inheritors of the Lockean and Kantian intellectual traditions – will recognize and affirm. The liberal cosmopolitans, interested to apply a theory of justice to world society, take their assumptions of pre-political rights to hold universally, or to be universally acceptable. Buchanan holds the principle that “all persons are entitled to equal respect and concern – or, as Kant would say, that each is to be treated as an end” is “fundamental to any conception of morality worth seriously thinking about.”

Fernando Tesón, perhaps the foremost liberal cosmopolitan focused strictly on international law, argues to similar effect: “Because Kantianism relies on rationality as a universal trait of persons, it is incompatible with relativism. It is not possible to defend simultaneously Kant’s theory of human nature and morality, and the view that liberal democracy and respect for persons is good only for certain societies.”

The distance between Rawls and liberal cosmopolitans concerning the viability of identifying and applying universal principles underscores the still wider gap between liberal and innate cosmopolitans. Rawls was willing to abstract out certain supposedly uncontroversial assumptions about the nature of members of a large historical collective to arrive by constructivist method at norms for that community; liberal cosmopolitans abstract out from supposedly uncontroversial universal assumptions about the nature of being human to arrive deductively at world norms that would appear to adhere outside of historical context; innate cosmopolitans reject abstraction in theory, and would draw norms in the interest of the world from intuition or information about the world as a whole at any given point in time. Rawls’s position here is the middle course, insofar as he relies on a more modest set of assumptions and is relatively more attuned to historical conditions that the liberal cosmopolitans. But innate cosmopolitanism stands opposed, in effect, to both Rawls and the liberal cosmopolitans, insofar as it relies on a largely observational method, and works by reference to the whole, rather than by a constructive method building up from an abstraction of the individual.

277 Buchanan, supra note 259, pp. 87, 88.
278 Tesón, supra note 243, p. 82.
Thus Rawls did not adopt universal assumptions productive of world norms. The particular application of constructivist method to his revised social contract experiment was conceived to forestall them. In keeping with the principle behind his choice of constructivist method, Rawls never applied his theory of justice directly to global public order. Instead, he developed his Law of Peoples, which is still more historically contingent than his Theory of Justice. Rawls’s Law of Peoples incorporates historically conditioned premises typical of international law, and likewise operates under constraints imposed by historical circumstance.

Notably, Rawls’s Law of Peoples is neither a strict theory of justice, nor a theory of law per se. Rawls described it as foreign policy principles for peoples committed to a liberal theory of justice, rather than a theory of first principles.\(^{279}\) He relies on social contract methodology for both his Theory of Justice and his Law of Peoples, but the central thought experiment is differently tailored for the different projects, with meaningful normative consequences. In *A Theory of Justice*, the original position of contracting parties presents a “choice problem”.\(^{280}\) The first principles of justice constitute the “object” or “solution” of the choice problem.\(^{281}\) For want of a better hypothetical deliberative technique, parties in the original position are presented with a list of plausible alternatives for the foundational principles of social justice. There exist an indefinite number of candidates for election, and, beyond rough plausibility, the list admits only the qualifying criterion that they are not contingent on circumstance: “None of the principles is contingent upon certain social or other conditions.”\(^{282}\) From the list of alternatives, the selected principles represent “the unique solution to the problem set by the original position.”\(^{283}\)

The original position in *The Law of Peoples*, by contrast, does not present a choice problem by which hypothetical parties choose a unique solution from an indefinite list of qualifying principles. Rather, the parties are presented with established international norms, and are expected to affirm them:

> These familiar and largely traditional principles I take from the history and usages of international law and practice. The parties are not given a menu of


\(^{280}\) Rawls, *supra* note 236, pp. 16, 102.


alternative principles and ideals from which to select, as they are in *Political Liberalism*, or in *A Theory of Justice*. Rather, the representatives of well-ordered peoples simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives.284

Moreover, the second original position is not concerned with the basic principles of world relations, but with their interpretation: “It is these interpretations, of which there are many, that are to be debated in the second-level original position.”285 The change, then, in the use of the original position in Rawls’s Theory of Justice and his Law of Peoples is this: the first original position founds an normative baseline against which the status quo will be compared; the second original position adopts the status quo baseline against which normative arguments will be compared. The end of the second inquiry is an affirmation, for right or just reasons, of progressive interpretations for established international norms.

Liberal cosmopolitans, seeking to extend Rawls’s theory of justice, reject his turn towards historical terms more typical of contingent law and politics than of justice. Charles Beitz, as noted, objects that Rawls entertains “considerations of political realism” that “have to do with constraints imposed by the status quo on prospects for change, and thus they pertain to questions about institutional design and reform rather than to those about standards of moral appraisal.”286 Similarly, Thomas Pogge objects to undue weight for an appraisal of historical circumstances: “Yes, we must be realistic, but not to the point of presenting to the parties in the original position the essentials of the status quo as unalterable facts.”287 Kok-Chor Tan likewise criticizes the elevation of practical constraints above moral judgments in Rawls’s consideration of world norms.288 Allen Buchanan equates Rawls’s Law of Peoples with rules for a Westphalian world, which is to say that he equates Rawls’s law of peoples with traditional international law. Buchanan demands instead, if there should be a second original position to determine a law of peoples, to consider “a full range of alternative conceptions of justice” at the second as well as the first original position.289

285 Ibid., p. 42 (emphasis in original).
287 Pogge, *supra* note 266, p. 224.
Here, the liberal cosmopolitan critique reflects a point of convergence between liberal and innate cosmopolitanism. Rawls’s sensitivity to historical conditions, despite his adherence to liberal moral and political theory, causes his law of peoples to track closely the status quo of international law. In large measure, Rawls’s timidity flows from a general reluctance to elevate any one universal or objective authority at the level of world relations. Both liberal and innate cosmopolitanism, however, aim to do precisely that in response to what is perceived as the dysfunctional legacy of a subjective international legal system. By comparison with Rawls’s Law of Peoples, both liberal and innate cosmopolitanism – though by different means and with different conclusions – tend to be less sanguine in theory with respect to the status quo of the working terms of the international legal system, as they are constrained by a tradition of voluntary positivism.

Different structures, different orientations

I return now to a direct comparison of liberal and innate cosmopolitanism. The two are similar in their efforts to extend a comprehensive objective authority for world norms, but proceed from opposite directions. Because the liberal cosmopolitan order recognizes all the world’s individuals as individuals, without regard to any intermediary bodies of incorporation, it takes the form of a bottom-up model. The bottom-up structure of the liberal cosmopolitan model is in contrast with the top-down structure of innate cosmopolitanism, which derives in the first place from the world collective. The normative mandate that would control international law according to liberal cosmopolitanism flows from individuals, and never from collectives except according to justifications derivative of their value for individuals. As Tesón writes simply: “international law must be made congruent with justice, and thus be conceived in terms of individuals, not states or governments.”

The bottom-up structure, however, is deceptive: the individuals that make up the global basis of the liberal cosmopolitan order are treated only according to properties that are held to be universal, or universally-acceptable, across all individuals. The liberal cosmopolitan order is wholly consolidated around one normative source, an individual abstracted, such that all of the world’s individuals are consolidated by abstraction into one universal individual. The effect is a narrow normative mandate. That individual serves as the one normative source for world

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290 Tesón, supra note 243, pp. 96-97.
justice, by which, as a matter of international law, all public regimes in the world are joined, and to which they all must defer. The top-down model of innate cosmopolitanism, by contrast, purports to recognize normative diversity in the world. The bedrock normative phenomenon is not, or is not supposed to be, an abstraction, and the innate cosmopolitan methodology is neither deductive nor constructivist. Rather, the innate cosmopolitan model purports to draw its normative underpinnings from the observation of the sum total of acts, experiences and expectations expressive of the world phenomenon at any given point in time. Where the normative individualism of liberal cosmopolitanism is narrow in its reliance on an abstraction, innate cosmopolitanism is broad in its reliance on or assumption of sweeping observational data.

The method on which liberal cosmopolitanism relies effects a bottom-up structure of authority, in which all individuals are paramount qua individuals, a clear point of contrast with the observational method of innate cosmopolitanism, which establishes a top-down model. But while liberal cosmopolitanism flows from individuals everywhere, its content is consolidated around an abstraction that treats all individuals equivalently. Innate cosmopolitanism proceeds from the world phenomenon, but would comprehend that phenomenon by reference to the diversity of normative acts and expectations in the world. The normative program that flows out of the former takes especially the form of human rights: uniform rights vested uniformly in all individuals everywhere, representing the highest priority under law. The normative program that flows out of the latter is more ad hoc in character, especially as invoked for the resolution of particular issues as they arise before international tribunals, as will be seen in Chapter 4. Generalizing, innate cosmopolitan norms typically are associated with public order, or sustaining right conduct among members of the collective whole of the world under conditions of diversity and varying levels of interdependence.

The distinctions between liberal cosmopolitanism and innate cosmopolitanism may also be cast in terms of the relationship of each to the existing body of international law. Liberal cosmopolitanism represents a model of political and ethical theory against which the justifications for rules and institutions may be tested. As such, and as noted, it operates in principle from outside the institutional constraints of international law. That liberal cosmopolitan scholars have made efforts, under the banner of non-ideal theory, to acknowledge and adapt to real-world limitations constraining the prospects of a liberal cosmopolitan normative program, does not change the basic posture: liberal cosmopolitan norms are drawn according to a
constructivist methodology beginning with universally-acceptable abstractions about human nature; liberal cosmopolitan institutions, even non-ideal institutions, are guided by those norms. Innate cosmopolitanism, by contrast, is a model designed to support doctrinal change from within international law. While it posits a source of norms that is external to the traditionally-recognized sources of authority in international law, such as those enshrined in Art. 38 of the World Court’s Statute, that novel source of authority in innate cosmopolitanism nonetheless falls within a broader, classically-legal discourse and framework for ascertaining law.291

In some cases, however, the innate cosmopolitan model has been hedged in ways that bring it closer to the liberal cosmopolitan normative program, especially in the turn to policy exhibited in conjunction with innate cosmopolitan theory in the latter half of the 20th century, as observed in Chapter 2. A brief reconsideration of select uses of the innate cosmopolitan model will illustrate the point, though it will ultimately also underscore an enduring gulf between liberal and innate cosmopolitanism. The approach towards ideas of liberal cosmopolitanism, or, more appropriately, the incorporation of liberal theory towards ostensibly cosmopolitan ends, is especially true of those examples of an innate cosmopolitan model that rely on process-oriented theory, in which the model appears to suffer for a certain arbitrariness. If process alone is construed to be definitive of the normative program, but without any clear value to guide the process, then the normative program, paradoxically, may arrive at practically any ends. Process alone can result in a so-called race to the bottom, or, to use another formula, a positive feedback loop tending to produce undesirable results.

Myres McDougal may be the most representative, and also the most controversial, example of the incorporation of liberal ethical principles alongside innate cosmopolitan theory. The New Haven School’s vast appreciation of complexity in the world, as noted in Chapter 2, reaches, as noted, a certain ethical stopping point, because one may not “take cannibalism from the cannibals and remain ... wholly dedicated to the minimal-order principle of no cannibalism.”292 Thus McDougal meets a concern for the open-ended possibilities identifiable with his articulation of the innate cosmopolitan model, by joining the model to an external source of value founded in liberal morality and the value of human dignity, taken by the New Haven

291 Cf., d’Aspremont, supra note 242.
School to be the core policy value applicable to the world. Thus McDougal incorporates moral limits from sources external to the social processes that constitute the world collective, such that the innate cosmopolitan model reflects a policy of liberal ethical standards. Superficially at least, the innate cosmopolitan program comes to resemble a liberal cosmopolitan program.

Even in the case of McDougal, however, the likeness between innate cosmopolitanism and liberal cosmopolitanism remains limited. The innate cosmopolitan model arrives at and adopts liberal values in terms of a mandate founded in the public order of the world as a whole, giving the reliance on liberal values a hegemonic character. McDougal, consequently, has been perceived as engaged in social engineering, or a partisan defense of United States foreign policy. The root source of normative authority remains the collective, such that concern for the individual is imposed as a normative constraint justified on the basis of collective order, according to the demands of collective order. Liberal cosmopolitanism is more straightforward in its reliance on liberal values for traditional liberal ends, following traditional liberal methodology: liberal premises are the internal doctrinal foundation, and not imposed from without, such that normative authority is justified on the basis of the individual, according to the demands of the individual.


Constitutional cosmopolitanism and innate cosmopolitanism

I turn now to a comparison of innate cosmopolitanism with constitutional cosmopolitanism. Where liberal cosmopolitanism operates outside of traditional legal discourse, by virtue of a primary appeal to liberal ethical and political theory, constitutional cosmopolitanism, like innate cosmopolitanism, operates largely within traditionally-recognizable legal discourse. Innate cosmopolitanism does so by primary appeal to a historically-conditioned source of norms. Constitutional cosmopolitanism does so by primary appeal to arguable developments within the recognized body of international law.\(^{295}\)

**Differently constituted normative authorities**

Constitutional cosmopolitanism and innate cosmopolitanism share a basic likeness in a common argument that the international community or society is or may be constituted.\(^{296}\) Innate cosmopolitanism considers this phenomenon in largely sociological terms, as the expression of the reality of a condition in the world; constitutional cosmopolitanism in still more formal terms, as an expression of the validity of a legal development under international law. In this context, innate cosmopolitanism resembles proto-constitutional theory: the international society or community is socially constituted and exhibits its own norms and normative authority, but that authority remains to be articulated in a comprehensive way adequate to effect a constitution formally controlling a system of law.

The relationship in terms of proto-constitutional and constitutional theory includes the basic grounds of divergence between the two forms of cosmopolitanism. Innate cosmopolitanism posits a constituted and objective world authority to exist independent of formal recognition under international law. Constitutional cosmopolitanism proceeds in the first instance according to formal doctrine, on the premise that a constitutional settlement will effect a formal and objective world authority where none necessarily exists. Two points of distinction arise. First, innate cosmopolitanism is more definitive about identifying a community independent of and prior to positive juridical expression, whereas constitutional cosmopolitanism identifies the community precisely with its positive juridical


\(^{296}\) Ibid., p. 279.
expression. Concerning this distinction, innate cosmopolitanism is subject to Kelsen’s critique, touched on in Chapter 2 and to which I return in the Conclusion, of identifying a political community prior to and for the purposes of identifying the law appropriate to it.\(^{297}\) Constitutional cosmopolitanism for the most part avoids this critique. The second point of distinction is that innate cosmopolitanism, though operating within the bounds of recognizable legal discourse, looks outside of the orthodox limitations of international law for the bedrock source of cosmopolitan legal authority, whereas constitutional cosmopolitanism would in the first instance develop that authority from within the constraints of the international legal system, though the argument might be a creative one.

There have been a variety of arguments put forward positing a formal international constitution. Some of those arguments have been forward-looking, suggesting a possible international constitution. In these cases, the distinction between constitutional cosmopolitanism and innate cosmopolitanism is especially thin. But so long as the emphasis remains on the constitutional moment as a formal achievement under international law, constitutional cosmopolitanism retains its central distinction from innate cosmopolitanism: one in which the formal legal argument and the norms that support the formal argument take precedence over any sociological or ontological argument and the norms that flow from it. In making an argument for the formal sufficiency of a cosmopolitan achievement under international law, constitutional cosmopolitanism effectively assumes or accepts the sufficiency of the system of international law as it has traditionally been conceived. Innate cosmopolitanism, by contrast, appeals to a source of legal norms that has not been recognized under orthodox international law – namely the world phenomenon, variously expressed in terms of world public opinion, the world juridical conscience, etc. – and thereby rejects limitations of the system of international law as it has traditionally been conceived.

To assume or accept the sufficiency of international law as it has traditionally been conceived is to accept the subjective voluntarism that underlies modern international law. The international system, by this characterization, resembled an anarchy, in which each state was formally its own master. The system thus described approximates a state of nature, absent any superior or objective authority capable of defining it otherwise, despite the accretion of innumerable rules agreed to as a matter of consent among states. Constitutional cosmopolitanism largely

\(^{297}\) See, supra, Chapter 2, pp. 59-62, and Conclusion, pp. 185-93.
accepts the historical reality of that condition as a matter of law, but claims to see evidence that international actors are progressing or have progressed away from the state of nature, in the way that individuals are presumed hypothetically to have left a state of nature in forming political union. International law manifests the formal achievement of that progression away from subjective relations, towards an objective normative authority not contingent on subjective will. Following constitutional cosmopolitanism, the objective, cosmopolitan achievement is juridically accomplished. By contrast, following innate cosmopolitanism, the objective, cosmopolitan phenomenon exists prior to any juridical act, and the system of international law conceived as a subjective one reflects the critical failure to acknowledge and incorporate the objective normativity of the world unit.

Because, under constitutional cosmopolitanism, the voluntarist system of international law is capable of producing objective authority by means of a formal cosmopolitan settlement among subjective actors, the constitutional cosmopolitan has no need for the reconstruction of historical doctrine that is a hallmark of international legal theory adopting the innate cosmopolitan model. Whereas innate cosmopolitanism has been joined to an argument that the international legal system was misconceived as a strictly subjective one, without any unifying cosmopolitan normative foundation in the will or interests of the world unit, constitutional cosmopolitanism allows for the sufficiency of the orthodox understanding of a voluntarist system; it is developments within that system that establish or may establish the objective, cosmopolitan achievement of world constitution. Innate cosmopolitanism assumes the doctrinal necessity of recognizing a naturally-occurring cosmopolitan normativity; constitutional cosmopolitanism posits the formal possibility of cosmopolitan normative authority. In the latter case, states and other capable actors under international law represent the primary negotiators for the global political settlement, or constitution, and define the global constitutional community according to terms and procedures following the practice of modern (but progressively evolving) international law.

As noted, however, there have been a variety of arguments affirming or envisioning an international constitution. For present purposes, I divide them into two streams, and refer to the two streams as Charter constitutionalism and value constitutionalism. I turn to them now.
Charter constitutionalism and value constitutionalism

The clearest strand of constitutional theory in international law may be the strand associated with Hermann Mossler, Mossler’s student, Christian Tomuschat, and, most recently, Bardo Fassbender. Fassbender offers the following minimal definition of a constitution: “A constitution establishes rules regarding the formation and exercise of political power.”298 International constitutionalism in this usage roughly means a movement initiated by states towards a positive framework for a unified international normative authority. It takes as a centerpiece the UN Charter, which is argued to reflect a radical shift in the international system towards a constitutional community. This is what I refer to as Charter constitutionalism.

Another strand purports to observe a global coalescence around certain basic, substantive values. The work of Erica de Wet is representative of this category. She observes a world society coming together or constituted according to select values represented by a variety of international legal norms principally developed under the Charter regime – but not identical with the UN Charter – including norms of human rights law, international criminal law and other peremptory norms. By comparison with Charter constitutionalism, de Wet’s idea of a constitution is relatively complex; she adopts Neil Walker’s recondite definition of constitutionalism: “Constitutionalism is a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of a post-Westphalian world.”299 This is what I refer to as value constitutionalism.

Scholars such as Anne Peters, who may be included within the field of value constitutionalism, aim to reconstruct modern international law. In purporting to reconstruct international law, Peters observes what might be called formal proto-constitutional developments in international treaties and international organizations, among other things. For Peters, constitutionalism is a forward-looking theory about the evolution of international law towards the value-oriented constitutional community that de Wet describes. The forward-looking perspective of the reconstructive theory brings it especially close in certain respects to the innate

cosmopolitan idea. For one thing, the constitution itself remains more potentiality than fact. For another, like innate cosmopolitanism, reconstructive value constitutionalism addresses doctrinal deficiencies in international law: “the constitutionalist reconstruction of international law draws attention to existing legitimacy deficiencies” in international law. The source of Peters’s reconstructive theory, however, remains founded in certain positive developments within the formal body of international law, though neither the constituted world phenomenon nor the achievement of a constitution is yet a reality. For that reason, constitutional theory for Peters is also a statement of advocacy: “Global constitutionalism is an academic and political agenda”.

The basic distinction between innate cosmopolitanism and both rough categories of constitutional cosmopolitanism, Charter and value constitutionalism, remains the same. Constitutional cosmopolitanism differs from innate cosmopolitanism insofar as the constitutional argument is vested in the formal sufficiency of acts recognized as a matter of law and tending to establish a world constitution. Innate cosmopolitanism represents a model by which to encourage the development of international law reflecting the world constituted as a single social and political unit, but does so independent of any constitutional achievement. In practice, constitutional cosmopolitanism is typically articulated in systemic fashion, in keeping with the nature of a constitution, whereas innate cosmopolitanism is typically articulated for purposes of ad hoc solutions to select issues as they arise.

The sufficiency of conventional law

Charter constitutionalism is the more substantially developed constitutional theory as a matter of law and legal discourse. It aims to hew closely to the traditional, consensual understanding of international positive law, with particular attention to conventional law, though it purports to observe a progressive move by states themselves away from the subjective, voluntarist system. That move is embodied in the UN Charter, which represents, following Fassbender, the constitutional document underlying world order. By proceeding from consensual positive law and the acts of states, Charter constitutionalism in its method stands in clear contrast to both liberal cosmopolitanism and the top-down cosmopolitan movement of innate

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cosmopolitanism. The constitution with which it is concerned (the UN Charter) represents a definitive choice of means for effecting legitimate normative authority in political community. The conventional achievement of the constitutional Charter is the cosmopolitan phenomenon, as opposed to any prior social phenomenon, à la innate cosmopolitanism, or any convergence around universal ethical standards, à la liberal cosmopolitanism.

Thus, though it is radical in its own way, Charter constitutionalism “stays within the limits of ‘mainstream’ legal thought.” As described by publicists such as Mossler, Tomuschat and Fassbender, Charter constitutionalism is “rooted in positivism and determined not to lose touch with actual state practice, but at the same time [is] cautiously idealistic”. It preserves the individuation that is characteristic of modern international law and similarly entertains a traditional analogy to individual persons, whether in a state of nature or a relation defined by constitutional contract:

it is a profound misunderstanding to equate the advancement of the constitutional idea in international law with a weakening of the institution of the independent state. To assume the existence of a constitution of the international community does not mean to put the state in new, and necessarily more restraining, legal chains. On the contrary, it is that constitution which protects the legal authority and autonomy of every state against unlawful interventions by other states and international organizations, similar to the protection of the fundamental rights and freedoms afforded to individual citizens by a state constitution.

Tomuschat puts it squarely: “The international community and its constitution were created by States.” But while Charter constitutionalism reflects the positivist idea of consensual international law defined by sovereign states, it also suggests progressive change in the law. Tomuschat goes on to describe the process as follows: “Over centuries up to the present time, buttressed in particular by the U.N. Charter, the idea of a legal framework determining certain common values as the guiding principles States are bound to observe and respect has gained ground and has been progressively strengthened.” The consequence is “a legal integration of

303 Ibid., p. 320.
304 Christian Tomuschat, Obligations Arising for States Without or Against Their Will, 241 Rec. des Cours 195 (1993-IV), p. 211.
305 Ibid., p. 211.
states which is more intense than the traditional one.”306

Altogether, Charter constitutionalism accepts the subjective orientation of modern international law as a positive law formed between sovereigns as a matter of consent, but observes in that body of law a comprehensive political settlement that gives definition to a global normative authority beyond the will of states. Fassbender makes clear that the global political settlement has occurred in the development of the UN Charter: “the Charter, although it was formally created as a treaty, is characterized by a constitutional quality which in the course of the last 50 years has been confirmed and strengthened in such a way that today the instrument must be referred to as the (substantive and formal) constitution of the international community.”307 The legal constitution reduces to the positive law of the Charter: “the Charter is the supporting frame of all international law and, at the same time, the highest layer in a hierarchy of norms of international law.”308 Thus a conventional product of the subjective international legal system has achieved the status of a legal constitution, effecting objective law capable of defining the international community and its interests as constituted.

The consequence of the move from a subjective to objective regime as the Charter constitutionalist sees it is not the overthrow of sovereignty, but the limited juridical subjugation of sovereign will to the constitutional order. On the one hand, “[i]t is the constitution of the international community which safeguards the entitlement of a state”;309 on the other hand, the international legal community “can no longer be simply described as a Genossenschaft, or association of equals not subordinated to any higher authority and exclusively associated by agreement. The community is meant to be more than the sum of its constituent parts; it does not express a mere volonté de tous but a volonté générale.”310 But with the acknowledgment of both orders, subjective and objective, charter constitutionalism is not wholly free of the persistent tension between cooperation and consolidation in modern world relations. Observe the conflicted vocabulary in Fassbender’s synopsis: “International constitutionalism is a progressive movement which aims at fostering international cooperation by consolidating the substantive legal ties between states

306 Fassbender, supra note 298, p. 552.
307 Fassbender, supra note 302, p. 322.
308 Fassbender, supra note 298, p. 585.
309 Fassbender, supra note 302, p. 326.
310 Fassbender, supra note 298, p. 564.
as well as the organizational structures built in the past.”311 In Fassbender’s own
terms, the constitutional program is still marked by the incongruous terms of
cooperation and consolidation, and the law continues to exist between states in the
first instance, though a meaningful constitutional authority must exist above them.

The appeal to values

Value constitutionalism, as represented by de Wet, seems also to proceed from
conventional law, and the Charter in particular, though her language is hedged and
equivocal: “it would be fair to conclude that the UN Charter’s normative framework
has been instrumental in bringing about a verticalization in the relations of Member
States inter se.”312 The consequence appears as well to be a move from a subjective
system of law to an objective one, insofar as the Charter’s normative framework
“has been the catalyst for the development of a legal order based on hierarchically
superior values, as opposed to one exclusively based on the ‘equilibrium or value of
sovereigns’.”313 De Wet is clear, however, that “it would not be accurate to describe
the UN Charter as ‘the constitution’ of the international community.”314 The
Charter has been instrumental to achieving a constitutional condition, but does not
represent the constitution itself. Instead, the substance of the international
constitution is principally vested in an “international value system”, made up of
peremptory human rights norms and obligations \textit{erga omnes}.315

Thus value constitutionalism, like Charter constitutionalism, purports to operate
according to acts of states, in keeping with the traditionally-conceived international
legal system, but in a different manner. De Wet “extends the use of the term
constitution” beyond the idea of a consolidated charter defining and delimiting the
pathways of public authority. Value constitutionalism describes a hierarchical order of
substantive norms, predicated on fundamental values and drawn at least as much
from \textit{jus cogens} and obligations \textit{erga omnes} as from conventional law. International
constitutionalism, as de Wet describes it, is distributed in terms of its formal
components, but consolidated in terms of its substance; it is:

311 \textit{Ibid.}, p. 552.
312 de Wet, \textit{supra} note 299, p. 59.
313 \textit{Ibid.}, p. 59.
314 \textit{Ibid.}, p. 54.
315 \textit{Ibid.}, pp. 51 and 57-63.
a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community (‘international polity’) that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement.\textsuperscript{316}

The constitutional product is thus made up of a variety of legal structures representing a “fragile international community glued together and guided by a core of fundamental values”.\textsuperscript{317} Moreover, in a number of respects, the strength or effectiveness of the constitutional framework to which value constitutionalism points, or aspects of it, appears to rely to a meaningful degree on the normative force of the underlying value itself, rather than its strict formal sufficiency as a matter of law. As such, value constitutionalism approaches both innate and liberal cosmopolitan arguments, insofar as the constitutional argument borrows from the strength of extra-juridical conditions to defend an effective hierarchical framework of world norms. Because Charter constitutionalism, by contrast, reduces the international constitution to a discrete document, it is the more distinct from innate cosmopolitanism.

The fundamental values of value constitutionalism, however, are not precisely the moral postulates of liberal cosmopolitanism, nor are they identical with the interests of the world as that term is employed for purposes of innate cosmopolitanism. The difference derives from the peculiar legal nature of jus cogens as it is formally relied upon by the value cosmopolitan. Jus cogens in this context represents a formal means by which to observe the development of positive cosmopolitan law in a system otherwise defined by subjective interests; it is not a direct appeal to moral premises, nor to a vision of the world as a whole. As a result, the doctrinal effect is not so radical. As Fassbender puts it, the comparative attractiveness of jus cogens “is explained by the lingering effects of “a legal training based on the cornerstone of the ‘sovereign state’”.”\textsuperscript{318} This is because jus cogens, “[i]n its quality as customary international law, can easily be fitted into the traditional system of sources of international law and, what is more important, the traditional idea of international law as a system of rules based on the consent of states.”\textsuperscript{319} In sum, value constitutionalism purports to observe a constitutional by-product of enlightened

\textsuperscript{316} Ibid., p. 54.
\textsuperscript{317} Ibid., p. 76.
\textsuperscript{318} Fassbender, supra note 302, p. 326.
\textsuperscript{319} Ibid., pp. 326-27.
international custom, facilitated perhaps by the conventional achievement of the Charter.

It bears noting, in addition, an argument that assertions of jus cogens are founded less on any quality of customary law, and more on the preferred or assumed normative priorities of the asserting party. Likewise, less polemically, Prosper Weil links, critically, certain arguments in favor of jus cogens with “a vague personification of the international community.”320 If these critical takes on jus cogens hold, the constitutional order founded on jus cogens comes closer to the innate cosmopolitan model: the assertion of jus cogens looks like the intuition of a superior normative authority that informs much innate cosmopolitan thought, but with the imprimatur of formal sufficiency under current international law grafted onto it.

Peters, by comparison with de Wet, places special emphasis on global constitutionalism’s “embryonic” nature, a term she shares with de Wet – but Peters’s use of the term stops short of de Wet’s “fragile” but realized community. Owing, perhaps, to the premature constitutional condition she observes, Peters’s constitutionalism exhibits some ambiguity: “Global constitutionalization refers to the continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist elements in the international legal order”321. Nonlinear constitutionalization produces “constitutionalist elements”, but not necessarily a constitution. The ambiguity also flows from the fact that reconstructive constitutionalism, following Peters, is an act of advocacy, for which a constitution is not necessarily the goal, but may also be the medium: Peters’s reconstructive constitutionalism “advocates for the application of constitutional principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order.”322

Peters, like de Wet, looks principally to a variety of developments within the body of positive international law to discern the framework of a cosmopolitan constitution, capable of effecting objective authority for a duly-constituted world unit. In Peters’s analysis, the constitutional framework is largely prospective, and the occasion for advocacy to achieve a more effective international law. As noted,

321 Peters, supra note 301, pp. 397-98.
322 Ibid., p. 397.
constitutional cosmopolitanism as Peters describes it resembles innate cosmopolitanism insofar as it is invoked to correct some defect in the doctrine of international law. But while innate cosmopolitanism makes that argument by appeal to a source of authority outside of the traditionally-recognized sources of international law, Peters refers in the first instance to a variety of positive developments recognized within the body of international law. And where the innate cosmopolitan model is in tension with deep aspects of the body of positive international law, Peters’s constitutional model is designed in part to support it. By her own terms, Peters’s “constitutional approach to international law helps to prevent uncontrolled ‘deformalization’ of international law.”\textsuperscript{323}

At the same time, the reconstructive character of Peters’s constitutionalism has the character of a liberal cosmopolitan proposal. In the reconstructed constitutional order, “states are not ends in themselves”.\textsuperscript{324} Rather, “human needs are taken as the starting point”, and the end point as well: “the focus shifts from states’ rights to states’ obligations vis-à-vis natural persons, and a state that does not discharge these duties has its sovereignty suspended.”\textsuperscript{325} The goal is “transformation of international law into a system centered on individuals.”\textsuperscript{326} To achieve this goal, reconstructive constitutionalism turns to human rights and “provokes the pressing question of the legitimacy of global governance”\textsuperscript{327}

Peters, however, is not arguing from first principles any more than she relies on the world collective of innate cosmopolitanism. Rather, it is developments in the positive law itself that drive her inquiry into legitimacy. Peters’s reconstruction is founded in what she observes to be at least four real constitutional developments in international law, or “embryonic hierarchical elements”.\textsuperscript{328} The four developments are: “the erosion of the consent requirement”;\textsuperscript{329} “the creation of World Order Treaties”;\textsuperscript{330} “changes in the concept of statehood and a legal evolution regarding the recognition of states and governments”;\textsuperscript{331} and “the growing participation of

\textsuperscript{323} Ibid., p. 409.
\textsuperscript{324} Ibid., p. 398.
\textsuperscript{325} Ibid., p. 398.
\textsuperscript{326} Ibid., p. 399.
\textsuperscript{327} Ibid., p. 409.
\textsuperscript{328} Ibid., p. 51.
\textsuperscript{329} Ibid., p. 52.
\textsuperscript{330} Ibid., p. 53.
non-state actors, such as Non-Governmental Organizations (NGOs), transnational corporations and individuals in international law-making and law-enforcement”.

The first development, diminished voluntarism, is identified with a weakening of the persistent objector rule, and succeeded in its operation by increasing centralization:

the erosion of consent requirements manifesting itself in the weakening of the persistent-objector rule, third party effects of treaties, and majority voting within treaty bodies and international organizations. A most conspicuous event in this context is legislation by the Security Council (binding via Article 25 UN Charter and circumventing eventual ratification requirements of parallel treaties). In this perspective, constitutionalism supplants voluntarism.

For the third development, taking them out of order, Peters cites Security Council Resolution 1483 for implicitly formulating conditions for the recognition of a new Iraqi government. For the fourth development, by way of example, Peters attributes a formative influence to NGO lobbying for the Landmines Convention of 1997 and the Rome Statute. Concerning the second development, “the creation of World Order Treaties, formerly called traités-lois or ‘objective’ legal orders”, Peters indicates the range of fields to have observed qualifying development in the positive law: “Such treaties have been adopted in the subject areas of human rights, law of the sea, environmental law, world trade law and international criminal law.” Once again, the constitutional analysis reflects progressive development of international law by means of traditional, subjective law making. The means that Peters observes are not cosmopolitan, though the ends are.

Peters’s objective order achieves “collective obligations serving global community interests which transcend the individual interests of the states parties.” Peters’s language flags a closeness with both the innate and liberal cosmopolitan model. Obligations serving global community interests reflect, for Peters, public interest norms embodying universal values.

332 Ibid., p. 53-4.
333 Ibid., p. 51.
335 Peters, supra note 300, p. 54.
336 Ibid., p. 52.
337 Ibid., p. 52.
338 Ibid., p. 52.
interest norms include “the centrality of the human being, the acceptance of a common heritage of mankind, and the ideas of sustainable development or free trade.” Furthermore, reviewing the sum of her evidence of positive constitutional development, Peters holds that “the idea of constitutionalism implies that state sovereignty is gradually being complemented (if not substituted) by other guiding principles, notably the ‘global common interest’ and/or ‘rule of law’ and/or ‘human security’.” In this manner, “the structure of international law has generally evolved from co-existence via cooperation to constitutionalization.”

Peters’s emphasis on unfinished progress suggests an inchoate constitutional order – which is to say, not a constitutional order at all, but the possibility of one (an unwritten constitution being one thing, an unformed constitution being a contradiction in terms). Herein lies further potential for interplay between constitutional and innate cosmopolitanism. Insofar as Peters purports to observe or advocate a constitution developing according to terms in the interest of the world – again, the proto-constitutional condition – she might be observing an innate cosmopolitan phenomenon. But insofar as that observation is wholly contingent on the formal achievement of a constitution, achieved as a sort of Kantian progression out of a duly constituted – if anarchic – system of international law, the phenomenon she describes no longer exhibits innate cosmopolitan premises. Innate cosmopolitanism posits that the world collective preexists the formal achievement, whereas this second understanding of Peters’s proto-constitutionalism suggests the reverse, that the world collective is established by the formal achievement.

In any event, world relations, following Peters, have left or are leaving a phase of subjective international relations at law by means of formal mechanisms, but have not arrived squarely at a phase of objective juridical relations. In consequence, the international system is left in theory with conflicting attributes of subjective and objective authority. Perhaps for this reason, Peters and other value constitutionalists tend to eschew the aspiration to value-neutral theory typically associated with constitutionalism, instead discerning or advocating a constitution of world society according to a perceived consensus in the positive law around substantive values and norms. The cosmopolitan constitution comes to resemble liberal cosmopolitanism, by appeal to widely-held moral principle to bolster the case for overcoming

339 Ibid., p. 52.
340 Ibid., p. 49.
341 Ibid., p. 39.
countervailing subjective authorities. As noted, value constitutionalism, like liberal cosmopolitanism, orients towards human rights and peremptory norms. But the mix of formal arguments and substantive norms suggests a controversial theoretical maneuver not unlike the efforts of innate cosmopolitans, such as Myres McDougal, to marry arguments about process to select values.342 Fassbender, in this context, refers to a constitutional regime developed out of human rights peremptory norms as founded on “a sort of Decalogue of a secularized world”.343 The formal argument to achieve objective authority among subjective actors is strengthened by appeal to select values, though the selection process for qualifying values is unclear; values become the ordering principle for the cosmopolitan world, but only select values that find expression in the positive law of a non-cosmopolitan, or not yet cosmopolitan system.

Different treatments of problems of subjectivity

Charter constitutionalism also struggles with conflicting attributes of subjective and objective authority in the international system, even under the Charter as constitution. And in examining that struggle in terms of Charter constitutionalism, it may be further observed how constitutional cosmopolitanism arrives at or emphasizes different norms from those towards which innate cosmopolitanism is oriented. The basic methodological argument put forward by the Charter constitutionalist holds that the Charter transformed from treaty to constitution: that transformation, in turn, represents the change of the entire system from a subjective order to an objective one. As a treaty, the Charter is like any other treaty, subject to the law of treaties and the subjective authority of states; as a constitution, however, the Charter is uniquely vested with superior normative authority, beyond the law of treaties and, within its proper domain, the authority of states.

Thomas Giegerich objects to the idea of the UN Charter as world constitution, based on a distinction between a constitution in a descriptive and a normative sense. A constitution in a descriptive sense is a matter of formal definition: “a constitution is a body of legal rules regulating the exercise of political authority”; “[t]he rules of a constitution in a descriptive sense circumscribe in more or less detail the

342 See, supra, Chapter 2, pp. 68-72.
343 Fassbender, supra note 302, p. 318.
authority’s powers and oblige its subjects to obey its orders.”

The normative criteria, by contrast, are essential characteristics derived from the historical purpose of political constitutions. A constitution in the normative sense must effectively provide for the legitimacy and accountability of the political authority that it establishes, which categories include ensuring respect for human rights and some separation of powers, and for effective supervision enabled by the constitutional program over its constituent parts.

Giegerich accepts the Charter as a constitution in a descriptive sense, but rejects its normative sufficiency. The Charter fulfills the following descriptive criteria:

The Charter certainly sets up a public authority with worldwide reach, namely the Security Council with the power to make binding political decisions to accomplish specified goals, most importantly the maintenance of international peace and security. In the preamble, the Charter derives its authority from us, the people of the United Nations. Amending the Charter is at least as difficult as amending a national constitution.

Normatively, however, despite all of its constitutional terms, Giegerich suggests that the Charter remains only a treaty, an act of international law, not an act capable of changing international law: “A constitution in the descriptive sense embodied in an international treaty remains subject to the interpretative rules of international law and the virtually absolute mastery of the parties.”

The objective cosmopolitan order remains unfulfilled, because the founding of that order remains subject to the subjective powers of states in the decentralized order within which the new founding was conceived.

Giegerich’s argument underscores basic difference between innate cosmopolitanism and constitutional cosmopolitanism. The formal achievement, Giegerich suggests, is not enough. The constitutional cosmopolitan is still lacking the real or independent source of authority that the innate cosmopolitan purports to identify outside of the formal constraints of international law. In other words, the formal argument lacks the objective, validating force that the innate cosmopolitan model

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345 Ibid., pp. 44-48.
346 Ibid., p. 48.
347 Ibid., p. 44.
348 Ibid., p. 59.
identifies with the world collective.

Fassbender captures the challenge to achieve objective authority over subjective powers as follows:

In the case of such a treaty-constitution, it is an open question which of its two constituents will be consolidated. If the first, i.e. the form of the instrument, prevails, the new corporation will have a separate legal personality but “no measure of independence or power to eradicate its subordination to its States’ parents and its subjection to the classical laws governing the States’ treaty relations …. The basic principles of the law of treaties would apply to privilege the makers of the treaty at all critical junctures in the life of a treaty – treaty-making, amendment, interpretation and organization.” It is only if the second constituent succeeds, and substance triumphs over form, that the instrument will subordinate the constituent units to the new creation and will apply to each of them irrespective of their continuous individual consent. In spite of its origins, it becomes non-consensual or “autonomous.”

Once transformed, the constitutional order becomes autonomous, or objective, no longer subject to the will of states. The international system is changed from a decentralized one, to a system recognizing an independent and unified source of political and juridical authority.

Fassbender sees the core of the transformation, where Giegerich does not, in a subtle but critical shift in sovereign relations under the Charter. What was a system of relations predicated on equal sovereignty becomes, under the Charter, a system of sovereign equality. In an order founded on relations of equal sovereignty, following Fassbender, the law is concerned to maintain the juridical sovereignty of each constituent equally. In an order founded on sovereign equality, the law is concerned to maintain the juridical equality of each sovereign constituent. In the former, sovereignty is the paramount term, and each state is equally sovereign, or equally its own master at law: the law exists between states, according to their consent, thereby coordinating among them. In the latter, under conditions of sovereign equality, equality is the paramount term, such that each state is equally its own master under the law, preserving individuation but subordinating subjects to the demands of equality under law.


350 Fassbender, supra note 298, p. 582.
Fassbender refers to the move to sovereign equality as the “important innovation” of Article 2(1) of the Charter, the foundation of the Charter organization: “The Organization is based on the principle of the sovereign equality of all its Members.”351 Following Fassbender:

[Article 2(1)] emphasizes the interdependence of sovereignty and equality and, what is more, gives the idea of equality precedence over that of sovereignty by relegating the latter to the position of an attributive adjective which merely modifies the non “equality.” It is “sovereign equality,” not “equal sovereignty” the Charter speaks of. … Sovereignty, as a concept excluding legal superiority of any one state over another, is not at odds with a greater role of the international community vis-à-vis all its members. All that states can ask is to be treated equally in and before the law.352

Fassbender cites also the General Assembly’s Declaration of Friendly Relations for its affirmation that “States are juridically equal”.353 Still, however radical, the simple reversal in terms does not seem to go far enough. Giegerich is joined by others, such as de Wet and Peters, in finding that the reality of the Charter regime does not sustain the document’s formal, cosmopolitan normative and constitutional potential.

Irrespective of its reflection in reality, however, Fassbender’s proposed solution underscores the different applications of constitutional and innate cosmopolitan ideas. The distinction begins with something in common: the Charter is a central document in innate cosmopolitanism as well as constitutional cosmopolitanism. The Charter is central to innate cosmopolitanism for its elevation of the first rule of public order for an interdependent world, namely the prohibition on the use of force. Art. 2(4) is especially important as a matter of innate cosmopolitan jurisprudence, as will be seen in Chapter 4. The critical Charter provision for Fassbender, however, is not Art. 2(4), but Art. 2(1), because it is the formal attributes of the latter that establishes the constitutional community. The Charter is not remarkable to Fassbender for norms that presuppose or convey the interest of the world collective; the Charter is remarkable for the norm that creates the world collective. The latter, Art. 2(1), is the formal innovation demonstrating a constitutional settlement; only once the formal settlement is achieved does the

351 Ibid., p. 582; UN Charter, Art. 2(1).
352 Ibid., p. 582 (emphasis in original).
world collective exist as a subjectivized political body with a juridical will.

Innate cosmopolitanism, by contrast, endorses the Charter precisely for the substance of Art. 2(4), for establishing in the positive law the first rule of public order in the interest of the world. Not any rule would have sufficed; it is the affirmation of the bedrock norm of public order that distinguishes the Charter, rather than any other formal innovation. While the formal achievement of a constitution may be corollary to the establishment of objective, public order norms in international law, the constituted body already exists and carries its own normative authority. Innate cosmopolitanism is a model employed to achieve objective authority for public order norms in the world; a constitution may be one such means, but it is not the exclusive means, and indeed little of the innate cosmopolitan work reviewed in Chapter 2 exhibited any interest in a world constitution. In any event, innate cosmopolitanism rejects the need to make the recognition of objective authority in international law contingent on a formal validation of a constitutional settlement among subjective actors.

Within and without formal constraints of international law

In sum, constitutional cosmopolitanism may be observed to share at least the following two characteristics with innate cosmopolitan thought: both are roughly focused on remedying what are perceived to be doctrinal defects in the subjective system of law qua a system of law, rather than as an ethical system, system of justice or anything else; consequently, both constitutional and innate cosmopolitanism would arrive at a normative regime in which a cosmopolitan order is established with objective juridical authority. But the constitutional cosmopolitan argument operates substantially more from within the positive constraints of orthodox international law, whereas the innate cosmopolitan model is situated largely outside of those constraints, by virtue of its appeal to a source of authority not properly recognized by orthodox international law. The world already enjoys normative authority under the innate cosmopolitan model, whereas that authority is to be conferred on the world by constitutional settlement under constitutional cosmopolitanism.

By definition, constitutional cosmopolitanism is concerned with the systemic achievement of the cosmopolitan settlement. The formal terms must be capable of supporting a comprehensive system of law. The Charter constitutionalist sees this
in framework effectuated by Art. 2(1). The value constitutionalist, by contrast, sees this in select sets of values capable of attracting sufficient consensus to achieve a unified and hierarchical system of norms in the world. While both operate within the formal constraints of international law, the former looks towards more formal innovation to establish the constitutional regime, whereas the latter looks to the persuasion of specific, substantive values as expressed by and in support of formal developments. Innate cosmopolitanism, by contrast, posits the prior existence of world collective, and recognizes normative authority already inhering in that collective. It does not need to be established as a matter of positive or constitutional law, only credited with authoritative power where necessary or appropriate. Consequently, though innate cosmopolitanism may support or endorse constitutional development, it also supports – and far more regularly – ad hoc solutions to select issues as they arise, particularly in matters of international controversies before tribunals such as the ICJ, to which I turn in the next Chapter.

Conclusion

I will return to a map of the three cosmopolitan schools in the Conclusion of this work. It bears noting here a summary sketch of conceptual areas of distinction and convergence among the three schools of thought, as well as the different form that each takes as a matter of expression under international law.

The three schools of cosmopolitanism, then, all aim to achieve some autonomous authority over subjective powers in the world, but each does so differently. Liberal cosmopolitanism, grounded in normative individualism, does so according to an ethical system that operates in the first instance outside of the system of international law and without regard to historical constraints typically applicable to legal systems generally. Operating outside of the system of international law and without regards to historical constraints founds the liberal cosmopolitan pretension to autonomy. The autonomous cosmopolitan authority inheres in the product of a constructive method applied to derive valid norms from universally-acceptable moral principles.

Constitutional cosmopolitanism aims to achieve autonomous authority over subjective powers by means of a more or less formal doctrine that operates largely from within the confines of positive international law – indeed, as a constitutional theory, constitutional cosmopolitanism is synonymous with the legal system it
affirms. The constitutional achievement represents the achievement of autonomy, by means of a superior act of positive law, including unwritten positive law such as customary law and jus cogens. An autonomous cosmopolitan authority exists as of the moment it is validly constituted and duly recognized as a matter of law. Notably, where constitutional arguments begin to reflect an assumption of normative authority more than any clear formal validity, such as perhaps with speculative arguments in favor of jus cogens, the constitutional argument begins to collapse into an innate cosmopolitan argument.

Innate cosmopolitanism operates, in its key supposition of a source of normative authority vested in the pre-juridical phenomenon of the world collective, outside of the formal constraints of international law, but nonetheless within the historical constraints typically applicable to law. Innate cosmopolitan aims to sustain the historical reality of a world order, though in derogation of a subjective system of international law that does not properly recognize normative authority vested in the objective order of an independent world collective. Innate cosmopolitanism pretends to autonomy by virtue of the subjectivization of the all-inclusive world community, representing its autonomy from its constituent parts. Innate cosmopolitanism reflects legal discourse in a way that liberal cosmopolitanism does not, but whereas the constitutional cosmopolitan argument remains grounded in positive law, the innate cosmopolitan argument identifies valid bedrock normativity outside of the positive law, in the subjectivized world community identified by intuition or roughly sociological observation.

Liberal cosmopolitanism, in application under international law, typically gives rise to norms that flow from an interest in human rights which, as formal survivals under law of pre-political rights, are capable of trumping any conflicting law or political authority. This body of norms includes legal norms necessary to sustain human rights against violation, including distributive norms and norms providing for forcible intervention internationally where necessary. Constitutional cosmopolitanism, by contrast, recognizes whatever dynamic or substantive norms the duly enacted constitution prescribes, with the proviso that in the case of constitutional cosmopolitanism, the constitution as a whole must on balance be cosmopolitan, rather than fascist or imperialist or anything else. That is, there must be some meaningful pretension to a harmonious ordering of world relations that is all-inclusive. For Charter constitutionalists, the critical constitutional achievement is represented by the terms of Art. 2(1), affirming sovereign equality, and the substantive terms of cosmopolitanism are represented by the language of the
Preamble. For value constitutionalists, the critical constitutional achievement is distributed across a variety of positive developments recognized as a matter of international law and tending to effect a hierarchy of norms capable of ordering a world community. Most value constitutionalism adopts values similar to those espoused as a matter of liberal cosmopolitanism, especially human rights.

In some cases, constitutional cosmopolitanism is more about the possibility of a future constitution than the reality of an existing constitution. Where constitutional cosmopolitanism concerns a possible constitution, it resembles innate cosmopolitanism, which shares proto-constitutional characteristics. Even, however, where constitutional cosmopolitanism concerns a possible constitution, meaningful differences remain. The constitutional cosmopolitan still identifies the reality of the constitutional community with the constitution itself, such that an act of advocacy for a potential world constitution is an act of advocacy to bring a world community into existence, or to substantiate or make concrete the possibility of a world community. For innate cosmopolitanism, the world collective capable of supporting law in the world already and objectively exists, with or without a constitutional settlement under law – a possible world constitution may well represent the world collective, but does not create it.

Thus innate cosmopolitan norms are those norms that flow from the pre-juridical phenomenon. This does not take innate cosmopolitanism, as a discourse, outside of a framework for ascertaining law that is typical of law generally, but it does take innate cosmopolitanism outside of constraints traditionally associated with an international legal system long connected with terms of voluntary positivism among states. As seen in Chapter 2, however, efforts at a comprehensive scientific rendering of the norms represented by the world collective have been neither conclusive nor persuasive. Consequently, innate cosmopolitanism does not demonstrate the same systemic character as liberal and constitutional cosmopolitanism in application. Rather, innate cosmopolitanism tends to find expression as an ad hoc solution to various issues as they arise in the course of controversies before international tribunals, such as the ICJ, as will be seen in the next chapter, Chapter 4. In these cases, innate cosmopolitanism represents a special appeal to authority for the purposes of extending a norm in the interest or according to the will of the world as a whole, in the absence of such authority under positive international law.
Reliance on the innate cosmopolitan model is discernible in the jurisprudence of the International Court of Justice, though that reliance follows an irregular juridical path through the history of the Court under the Charter. That path may be described as a fruition of alternative precedent: a considerable amount of the reliance on the innate cosmopolitan model occurs outside of the judgments of the Court, in separate opinions and dissents by various judges over time; at a certain point, however, the posture of the Court can be seen to reflect significant aspects of this alternative jurisprudence. What begins in the iconoclastic opinions of Judge Álvarez becomes the most plausible way to understand the judgment of the Court in the Oil Platforms case.

To be clear, when I refer to the Court’s jurisprudence, I mean to include minority along with majority opinions. I do so for three reasons. First, minority opinions can serve to explain or shed light on aspects or reasoning that may otherwise remain
opaque in majority opinions. Secondly, they are key to allowing the Court to satisfy as a forum its mandate to be representative of the main forms of civilization and the principal legal systems of the world. Thirdly, and in sum, minority opinions have a systemic function: they serve a dialectical purpose that enhances the Court’s contribution to and development of international law. Ijaz Hussain, whose study into minority opinions at the World Court remains the most comprehensive treatment of their content and function over time, describes the dialectic in classically Hegelian terms: constant progression towards a ‘new synthesis’, whereby ‘the majority opinions of the Court, drawing inspiration from the new synthesis, would become the thesis, while individual opinions, especially dissenting opinions representing a more progressive and responsive vision of international law, would represent the antithesis’ leading again to ‘a still more perfect synthesis’ and the continuation of the process. In language more typical of classical international law, Shabtai Rosenne describes similar functions for minority opinions, including a clear appreciation of their potential explanatory power in any given case:

[The individual] opinion may indicate other general underlying principles which its author believed could or should have been more appropriately applied in the concrete case. Such an opinion may have a value of its own as a counter-balance to the majority opinion…. When some ideas only appear in a separate opinion, that does not mean that the Court as a whole rejected them. It means nothing more than that the Court did not find it necessary to adopt them for its decision – something quite different. In another direction, there are concurring opinions which flatly contradict both the underlying principles and their application by the majority. Here, dependent on the author’s general reputation and the cogency of his reasoning, the individual opinion may in the course of time come to be seen by enlightened and informed opinion as expressive of better law.

In sum, I will look at minority opinions alongside opinions of the Court for the explanatory power a combined reading demonstrates with respect to discernible – if

354 Ijaz Hussain, Dissenting and Separate Opinions at the World Court (Dordrecht: Nijhoff, 1984), p. 3.
356 Hussain, supra note 354, at 7, 9, 264-65.
357 Ibid., at 264-66.
incremental – cosmopolitan movement in the position of the Court in its treatment of questions of international security and the use of force.

The innate cosmopolitan jurisprudence that runs through the Court’s work is occasionally joined to elements of constitutional cosmopolitanism. Liberal cosmopolitanism is less present in the jurisprudence of the Court and its judges, though arguments in favor of value-oriented norms, especially with a liberal character, arise. Altogether, what emerges is a distinct discourse that adumbrates a theory of juridical good for the world unit, in the form of a roughly constitutional or pre-constitutional arrangement capable giving effect to innate cosmopolitan premises.

Moreover, the ICJ, as an institution, is itself a model for the conflicted historical narrative of cosmopolitan norms generally in modern international law. Cosmopolitan norms reflect the progressive ambition to ground an otherwise subjective order – the anarchic system of relations among equal and independent sovereign states – with an autonomous and objective normative foundation. As noted, cosmopolitan norms reflect an appeal to a comprehensive and unified arrangement under law, whether it is one founded on certain unassailable values, a constitutional settlement, or an innate and ineluctable situation of global unity. The Court similarly represents an institutional pretension to exercise an objective normative function, but it is formally empowered only according to the strictures of consent among among states in a system of subjective relations. Thus the Court manifests an aspiration to the normative unity of international law, but also manifests the constraints that have caused modern international law to resemble so many contracts among states. To name a few familiar contradictions: it is the single institution that comes nearest to the role of a high court in national context, approximating the authority to give definitive expression to any legal rule in international society, but the Court cannot formally refer to its own rulings as valid international law; the Court was established to address pressing international controversies, but it enjoys jurisdiction only as a matter of consent; and though designed to reflect the juridical will of the whole of the international community in every case, the Court’s pronouncements are not binding outside of the arbitrations in which they are pronounced.

The conflicted attributes of the Court are most clear in cases concerning the law on the use of force. Cases concerning the use of force tend to implicate questions of security and self-interest among states that resist, as a fundamental matter, cosmopolitan pressures to abandon the prerogative of subjective judgment. Nonetheless, as the Nicaragua case demonstrates, the Court includes among its tasks the resolution of questions of law in cases of armed conflict, as against the subjective will of states, and independent of the political will of the Security Council. The Court, in cases concerning the resort to force between states, is bound to contradict a subjective assertion of right put forward by one or another party to the conflict, but is constrained in its ability to do so by the limited powers at its disposal.

Moreover, while the Court is a creature of relatively clear positive law, its own jurisprudence represents a nebulous extension of that law in the area of the use of force, as follows: The UN Charter, including the Statute of the Court, represents the culmination of a progressive movement in conventional international law to suppress the recourse to force, but neither the use of force as a policy option among states, nor the normative movement to restrict it, ended with the conventional achievement of the Charter; rather, the continued development of norms restricting the recourse to force has been transferred to, among other places, the jurisprudence of the Court, including the separate and dissenting opinions of judges to the Court. Progressive pressure to give more comprehensive and cosmopolitan substance to the prohibition on the use of force is carried forward in a line of opinions by the Court and judges to the Court. Ultimately, the Court and judges of the Court can be seen to have engaged and developed, in modest but meaningful ways, a sustained discourse of innate cosmopolitanism applied to issues of international security and controversies arising out of the use of force. What emerges out of the dialectical analysis is a discernible movement in the position of the Court, with respect to its jurisdiction over matters of international security and the use of force, that can be observed over time and understood by reference to the streams of cosmopolitan and innate cosmopolitan thought explored for the most part in minority opinions.

Judge Álvarez introduces the first sustained application of cosmopolitan norms from the bench of the Court. Before joining the Court, as seen in Chapter 2, Judge Álvarez was one of the foremost exponents of innate cosmopolitan ideas. He continued to develop on his legal theory in a series of separate opinions and dissents, proposing sweeping normative changes in international law, and an
enlarged role for the World Court, flowing from a new cosmopolitan reality. Thus I will turn first to the nature and scope of his cosmopolitan jurisprudence, with particular attention to elements that return in later opinions from the bench of the Court.

Judge Álvarez's alternative jurisprudence, however, made little headway in his time. Rather, the Court was constrained by the cooperative (and uncooperative) nature of international relations, and Judge Álvarez's tenure was followed by a period in which the Court's authority was demonstrably limited vis-à-vis the subjective actors appearing before it. From this period, I will touch briefly on two cases, the *Fisheries Jurisdiction* and *Tebran Hostages* cases, for the limitations on the powers of the Court that they demonstrate, and for contrast with subsequent cases in which the Court was less restrained. On the whole, in reviewing the entire body of work of the ICJ in the area of the recourse to force for cosmopolitan elements, there is a clear distinction in method between the work of Judge Álvarez, and the work of the rest of the Court. Judge Álvarez used his every opinion to achieve a doctrinal affirmation of a new international law conforming to the innate cosmopolitan model. Subsequent judges adopted aspects of the innate cosmopolitan model on a piece-meal basis, in a manner tailored to the context of the case before the Court, without ever recognizing or acknowledging any doctrinal development. I will examine Judge Álvarez’s work as a foundation for the subsequent, piece-meal treatment of the innate cosmopolitan idea by the Court. In so doing, I will treat the work of Judge Álvarez as an integrated doctrinal argument, much as he intended it. By contrast, in the succeeding section of this chapter, I will treat the rest of the work of the Court on a case-by-case basis, examining each for its discrete contribution to the discourse.

Thus normative ambitions for a more comprehensive and objective juridical scheme persisted after Judge Álvarez’s tenure on the bench of the Court, and after a relatively fallow period for jurisdiction over the use of force, the Court can be seen to have assumed a progressively, if incrementally, expanding authority over the actors and disputes before it. I turn to a line of cases, from *Nicaragua to Oil Platforms*, in which the Court and judges of the Court exhibit increasingly expansive views of the Court's jurisdiction, together with a widening presumption of the objective character of the law by which the Court is empowered, with reliance on the innate cosmopolitan model.
Altogether, three levels of innate cosmopolitan jurisprudence can be discerned.
Judge Álvarez’s work represents the broadest and most radical level, ineffectual in
its time, but a precedent for later jurisprudence. In keeping with his scholarship,
treated in a prior chapter, Judge Álvarez’s opinions broadly sketch an ambitious
development of the innate cosmopolitan model, affirming a world phenomenon
capable of sustaining objective normativity in international law. The second level of
innate cosmopolitan jurisprudence at the Court includes more limited efforts
selectively to expand on the list of sources recognized in international law. As
opposed to the new and sweeping framework for international law as envisioned by
Judge Álvarez, this second body of jurisprudence would effectively incorporate the
innate cosmopolitan model as a possible and perhaps exceptional channel for
resolving controversies under international law. The third level is the most modest,
but has seen the most development in the opinions of the Court. It involves a
piecemeal expansion of the Court’s jurisdiction, drawing on the normativity
associated with the innate cosmopolitan model for the limited purposes of sustaining
the Court’s power and responsibility to preside over discrete cases or discrete
questions within cases.

The increasingly narrow appeal to innate cosmopolitanism – from a new normative
framework, to a limited allowance for otherwise unrecognized sources of
international law, to piecemeal expansion of jurisdiction – underscores the reality
that an aspiration to objective world norms administered by an autonomous world
court remains controversial, at best. The cases marshaled here should make clear
that the appeal at the ICJ to innate cosmopolitan norms is part of a larger narrative
of progressive world politics with a cosmopolitan telos, but which is in tension with
other narratives and aspects of the Court’s jurisprudence. The focus on cases
concerning the use of force, where the conflict between aspirations to juridical
objectivity and systemic subjectivity is most clear, helps to bring out and explore that
tension.

The alternative jurisprudence of Judge Álvarez

In all of his separate and dissenting opinions, Judge Álvarez vests the ICJ with
responsibility for a new international law. His treatment of the new international
law, and the Court’s responsibility under it, is an elaboration of his scholarly work
articulating a theory of innate cosmopolitanism, treated in Chapter 2. The body of
Judge Álvarez’s work from the bench of the Court at once elevates his innate
cosmopolitan scholarship, and serves as a foundation for subsequent cosmopolitan
discourse from the bench of the Court. I turn here to the aspects of his opinions
that are most salient with regard to both functions; and I will emphasize certain
areas in which Judge Álvarez’s jurisprudence offers the fullest or most compelling
explication of innate cosmopolitan principles that can be found in subsequent
opinions of other judges. Thus in Judge Álvarez’s opinions begins a sort of
shadow-precedent, an interconnected series of separate opinions and dissents over
time, which take the innate cosmopolitan model to guide the Court in novel exercises of its jurisdiction.

Interdependence and a new normative scheme

Developing on his theory of innate cosmopolitanism, Judge Álvarez describes a
world condition of social interdependence, which gives rise to a new international
law, inaugurated with the Charter. He writes: “De la sorte a commencé à se former
rapidement un droit international nouveau. Il a ses racines dans le régime
d'interdévance qui s'est frayé une voie depuis le milieu du XIXeme siècle.”360 Social
interdependence, for Judge Álvarez, represents a comprehensive world political
complex that supersedes the system of equal and independent states:

La base dont il part est qu'aujourd'hui les États sont de plus en plus
interdépendants et que, par suite, ils ne forment pas une simple communauté
comme autrefois, mais une véritable societé internationale, laquelle est
organisée. Cette societé ne détruit nullement l'indépendance et la souveraineté
des États, ni leur égalité juridique (art. 2, al. 1, de la Charte), mais elle limite
cette souveraineté, et les droits qui en dérivent, au profit des intérêts généraux
de ladite societé.361

International society, as Judge Álvarez uses the term, enjoys its own interests, and
gives rise to world norms above and beyond the rules of conduct agreed to among

360 “In this way a new international law has rapidly begun to come into existence. It has its roots in the
régime of interdependence which has been emerging since the middle of the XIXth century.” Competence of
4, at 13 (Judge Álvarez, Dissenting Opinion).

361 “Its point of departure is that, to-day, States are increasingly interdependent: and that consequently
they do not form a simple community, as formerly, but rather a veritable international and organized
society. This society in nowise abolishes the independence and the sovereignty of the States, nor their
legal equality (Article 2 paragraph 1, of the Charter); but it limits this sovereignty, and the rights which
flow therefrom, in view of the general interests of this society.” Ibid., pp. 13-14.
states. But because there remains no world legislature to give adequate expression to the normative mandate arising out of the world political complex, Judge Álvarez establishes a role for the ICJ as chief custodian of world norms, with a responsibility for their development. Thus, “la Cour a pleine liberté pour donner passage à l'esprit nouveau qui progresse au contact des conditions nouvelles de la vie internationale : au renouvellement de cette vie doit correspondre un renouvellement du droit des gens.”362 Following Álvarez, the norms of the international system are dependent on the new conditions of international relations; as the primary institution responsible for the expression of the norms of the international system at law, the Court is entitled and even bound to give voice to the new norms arising out of the new conditions. Thus Álvarez elaborates in parallel both the cosmopolitan substance of the new international law, and the cosmopolitan role of the Court as its primary exponent.

In sum, Álvarez employs the innate cosmopolitan model to announce a new international normative regime, with the Court as its first body. Conditions of interdependence in the world have established what Álvarez refers to as international society, a subjectivized society that enjoys discrete interests of its own, founding a primary – though not exclusive – normative grounds to see those interests recognized under international law. But because the new international law arises out of the reality of a political complex that does not enjoy any comprehensive organization (the UN represents an institution within that political complex, but not the complex itself), Álvarez's new international law defies constraints of positive international law:

Etant donné que le droit international nouveau se fonde sur l'interdépendance sociale …. il n'est pas nécessaire que toutes les obligations soient établies expressément dans un texte; par suite de la variabilité et de la complexité des rapports internationaux, on ne peut pas tout prévoir ; nombre d'obligations ressortent de la nature même des institutions ou des exigences de la vie sociale.363

362 “the Court has a free hand to allow scope to the new spirit which is evolving in contact with the new conditions of international life : there must be a renewal of international law corresponding to the renewal of this life.” Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, 28 May 1948, [1948] I.C.J. Reports 57, at 67 [Judge Álvarez].

363 “Because the new international law is based on social interdependence …. it is not necessary that all obligations be expressly laid down by a text. Because of the diversity and the complexity of international relations it is not possible to provide for every contingency. Many obligations result from
The validity of new norms turns on their correspondence with the reality of the world political complex, but not necessarily any formal expression of or by the same. The rules of decision available to and binding on the Court, following Álvarez, cannot be limited to the positive rules arising out of the traditionally-recognized sources of international law, because those sources do not sufficiently allow for the expression of norms that are manifest in the new interdependent world political complex (a rationale drawn from the French sociological school of law, and related to that of the American legal realists, who founded the law’s legitimacy not strictly on its formal validity, but also on a roughly equitable correspondence with real conditions in society). Thus: “La Cour doit appliquer non pas le droit international classique, mais le droit tel qu'elle estime qu'il existe au moment de rendre sa sentence, en tenant compte des modifications qu'il a pu subir par suite des changements survenus dans la vie des peuples ; c'est-à-dire elle doit appliquer le droit international nouveau.”364 Here, though Álvarez does not propose how the Court is to ascertain the reality of new conditions and the norms that flow from them, he incorporates into the nature of the Court’s exercise the sociological and observational logic that is central to the innate cosmopolitan idea in legal scholarship, as seen in Chapter 2.

**The role of the Court**

Judge Álvarez uses his series of separate opinions to demonstrate how the Court ought to have decided the cases before it not by reference to the narrow constraints of available positive law, but by reference to a broad spectrum of political and other norms that characterize conditions of interdependence in the world, or international society: “la Cour doit donner une solution non pas conforme au droit international traditionnel, ce qui serait une anomalie, mais conforme au droit international qui se forme actuellement et qu'elle peut créer.”365 In this reasoning, however, a central

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364 “The Court must not apply classical international law, but rather the law which it considers exists at the time the judgment is delivered, having due regard to the modifications it may have undergone following the changes in the life of peoples; in other words, the Court must apply the new international law.” *Anglo-Iranian Oil Co. Case*, Jurisdiction, Judgment of 22 July 1952, [1952] I.C.J. Reports 93, at 125 (Judge Álvarez, Dissenting Opinion).

365 “the Court has to give decisions, not in accordance with traditional international law – that would be an anomaly – but in accordance with the international law which is now emerging and which the
ambivalence is prominent: it is not clear whether legal norms arise naturally out of the sum total of acts and expectations expressing interdependence in the world, or whether the Court in fact creates the legal norms applicable to those acts and expectations. The ambivalence resembles the ambivalence exhibited by the interactional theory of law, as observed in Chapter 2, between emerging and enacted law. In consequence, the Court, custodian for world interests, is alternately a pass-through or a policy chamber. This ambivalence in the custodial role of the Court, however, reflects instability in the actual grounds of authority for the new normative regime that is to be announced in accordance with the Court’s custodial responsibility. I return to this matter in a critical light in the Conclusion of this book. In any event, as custodian of the new international law, and one of the few international institutions capable of giving positive legal expression to the new norms of international society (together with the UN General Assembly), the Court’s responsibility comprehends the political, cultural and even psychic conditions of international life. Thus: “A l’avenir, ce sont surtout l’Assemblée générale des Nations Unies, la Cour internationale de Justice et les juristes qui vont créer le droit international nouveau”; and “le nouveau droit des gens n’a pas un caractère exclusivement juridique ; il a aussi un caractère politique, économique, social, psychologique, etc.”

Accordingly, the norms at the Court’s disposal, and those binding on the Court, are not strictly legal, but also sociological and even ontological in nature. Three important touchstones for the ascertainment of new norms include the exigencies of life in the interconnected whole of international society, world public opinion, and the conscience of peoples. This is the innate cosmopolitan project, as prefigured in Álvarez’s prior scholarship: The Court’s decisions are valid not by virtue of reliance on the mandates of voluntary positive law, but by virtue of reference to the progressive reality of a unitary and autonomous international society, and the

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366 Chapter 2, supra, pp. 72-79.
367 “In future, it is to the General Assembly of the United Nations, to the International Court of Justice and to the jurists that we shall look, more than to anyone, for the creation of the new international law.” Competence of Assembly Regarding Admission to the United Nations (Judge Álvarez, Dissenting Opinion), supra note 400, at 13.
368 “the new international law is not of an exclusively juridical character. It has also political, economic, social, and psychological characteristics.” International Status of South-West Africa (Judge Álvarez, Dissenting Opinion), supra note 363, p. 176.
mandates of its political, economic, social and psychological conditions, among other things.

Within the scheme of Judge Álvarez’s jurisprudence, the sovereign state is reduced to an institution that satisfies a social function, and no longer enjoys primary responsibility for and authority over the development and application of international legal norms:

Aujourd’hui, en raison de l’interdépendance sociale, ainsi que de la prédominance de l’intérêt général, les États sont liés par bien des préceptes sans que leur volonté intervienne. La souveraineté des États est devenue actuellement une institution, une fonction sociale internationale de caractère psychologique et devant s’exercer conformément au droit international nouveau.370

Rather, the development of international law is disassociated from individual and subjective actors, and falls instead to those bodies, such as the General Assembly and the ICJ, objectively able to comprehend and articulate the independent norms appropriate to the interconnected world collective.

Objectivity and autonomy displace individuality

The paramount value under this new scheme is the value of solidarity, entirely displacing the value of individuality, which, following Álvarez, had theretofore dominated modern international law according to the doctrine of equal and independent sovereign states: “Le point de départ est qu’au régime traditionnel individualiste qui a été jusqu’ici à la base de la vie sociale, se substitue de plus en plus le Corfu Channel Case, Judgment of 9 April 1949, [1949] I.C.J. Reports 4, at 43 [Judge Álvarez].

370 “Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law.” Corfu Channel Case, Judgment of 9 April 1949, [1949] I.C.J. Reports 4, at 43 [Judge Álvarez].

371 “The starting point is the fact that, for the traditional individualistic regime on which social life has hitherto been founded, there is being substituted more and more a new régime, a régime of interdépendance, and that, consequently, the law of social interdependence is taking the place of the old
The rejection under Álvarez's scheme of the normative individuality of states, along with the rejection of positive law constraints, establishes the crucial pretension to objectivity. The Court is tasked with articulating norms applicable to the global reality of an independent international society, representing the world as a whole, rather than norms flowing from the subjective expression of so many equal and independent agents:

La communauté des États qui était demeurée jusqu'alors anarchique, est devenue une véritable société internationale organisée. Cette transformation est un fait ; il n'est pas nécessaire qu'un accord international le consacre. Cette société est composée non seulement d'États, parfois groupés, voire même associés, mais aussi d'autres entités internationales ; elle a une existence, une personnalité distinctes de celles des membres qui la composent ; elle a des fins qui lui sont propres.372

In sum, the Court represents a unitary world order, autonomous of the will of states. Moreover, the world unit is a self-conscious one: “tous les peuples comprennent actuellement qu'ils ne sont plus isolés ni liés seulement par les actes qu'ils ont librement acceptés mais qu'ils font partie d'une véritable société plus ample que la société civile à laquelle ils appartiennent”.373 Despite its discrete interests and objective normative authority, however, the self-conscious world unit lacks classic manifestations of government: “l'ancienne communauté des nations s'est transformée en une véritable société internationale, bien que ne possédant ni pouvoir exécutif, ni pouvoir législatif, ni pouvoir judiciaire, lesquels sont des caractéristiques de la société civile mais pas de la société internationale.”374 This represents perhaps


372 “The community of States, which had hitherto remained anarchical, has become in fact an organized international society. This transformation is a fact which does not require the consecration of an international agreement. This society consists not only of States, groups and even associations of States, but also of other international entities. It has an existence and a personality distinct from those of its members. It has its own purposes.” *International Status of South-West Africa* (Judge Álvarez, Dissenting Opinion), supra note 363, at 175.

373 “all the peoples now understand that they are no longer isolated or bound only by the instruments which they have freely accepted, but that they are a part of a real society which is broader than the civil community to which they belong”, Dissenting Opinion by Judge Álvarez, *Effect of awards of compensation made by the U.N. Administrative Tribunal*, Advisory Opinion of 13 July 1954, [1954] I.C.J. Reports 47, at 69 (Judge Álvarez, Dissenting Opinion).

374 “the old community of nations has been transformed into a veritable international society, though it has neither an executive power, nor a legislative power, nor yet a judicial power, which are the characteristics of a national society, but not of international society.” *Admission of a State to the United Nations (Charter, Art. 4)* [Judge Álvarez], supra note 362, at 68.
the most radical expression of the innate cosmopolitan model: a world collective that is self-aware and enjoys subjective interests, and is accordingly capable of actuating a primary normative potential under international law, but which does not exhibit or, for the time being, require any sophisticated political organization to enjoy that authority. As of the time of Álvarez’s tenure on the bench of the ICJ, the Court would suffice to give expression to the new norms flowing from the innate cosmopolitan model.

In representing an autonomous order absent other forms of government, the Court's unique competence with respect to international law is identical with a unique responsibility for international policy. International law, following Álvarez, is no longer divisible from politics, as it once appeared to be: “La distinction traditionnelle entre le juridique et le politique, ainsi que celle entre le domaine du droit et celui de la politique, se trouvent aujourd'hui profondément modifiées”.375 Law and politics are merged for the purposes of an independent world society:

Loin donc de s'opposer, comme autrefois, le droit et la politique sont aujourd'hui en relations étroites. Celle-ci n'est pas toujours la politique égoïste et abusive des Etats ; il y a aussi une politique collective ou individuelle inspirée de l'intérêt général. Cette politique exerce actuellement une influence profonde sur le droit des gens, soit en le confirmant, soit en le vivifiant, soit même en le contrariant quand il apparaît désuet.376

In this changed normative environment, the Court bears a primary responsibility over law and politics together: “Pour que les principes de droit qui naissent de la conscience juridique des peuples aient de la valeur, il est nécessaire qu’ils aient une manifestation tangible, c’est-à-dire soient exprimés par des organes autorisés”377 and “La Cour est l'organe le plus autorisé pour exprimer cette conscience

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375 “The traditional distinction between what is legal and what is political, and between law and politics, has to-day been profoundly modified”, Ibid., p.69.
376 “Far therefore from being in opposition to each other, law and policy are to-day closely linked together. The latter is not always the selfish and arbitrary policy of States ; there is also a collective or individual policy inspired by the general interest. This policy now exercises a profound influence on international law ; it either confirms it or endows it with new life, or even opposes it if it appears out of date.” Ibid., p.70.
377 “For the principles of law resulting from the juridical conscience of peoples to have any value, they must have a tangible manifestation, that is to say, they must be expressed by authorized bodies”, Individual Opinion of Judge Álvarez, Fisheries Case (United Kingdom v. Norway) [Judge Álvarez], supra note 371, p. 148.
The distinction between politics and law is collapsed, empowering the Court to enact the policy of a unitary international society absent traditional legislative authorities: “Le droit d'interdépendance sociale n'oppose pas, comme on l'a fait jusqu'ici, le droit à la -politique ; au contraire, il admet qu'il existe des rapports étroits entre eux.” Herein, Álvarez from the bench of the ICJ anticipates the turn to policy that was observed in Chapter 2. As custodian of the interdependent normative complex, the Court becomes its primary political agent, prefiguring the tendency under the innate cosmopolitan model to merge political and juridical authority under international law.

There are, additionally, hints of a partial and particular constitutional doctrine in Judge Álvarez’s jurisprudence. Certain new norms “ont un caractère universel ; elles sont, en quelque sorte, la Constitution de la société internationale, le Droit public international nouveau.” For the most part, however, what emerges is a vision of the ICJ as a broadly-powered, cosmopolitan magistrate. It is the political representative of international society, its legislator and administrator as well as its adjudicator. In the end, the pretension to an objective, autonomous normative order renders the Court responsible for the articulation of world politics and the administration of world policy.

Cases involving the recourse to force

Against the broadly visionary jurisprudence of Judge Álvarez, subsequent cases involving the use of force first demonstrate political constraints restricting the exercise of the Court’s jurisdiction. Thereafter, a line of cases exhibits a return to and embrace of elements of the innate cosmopolitan scheme articulated by Judge Álvarez. I turn to those cases now, looking at underlying facts as well as ultimate disposition, doing so one at a time and in chronological order, to capture an historical arc in the narrative of the Court’s exercise of its authority.

378 “The Court is the most authoritative organ for the expression of this juridical conscience”, Admission of a State to the United Nations (Charter, Art. 4) [Judge Álvarez], supra note 362, at 69.
379 “The law of social interdependence does not place law in opposition to politics, as has been done hitherto; on the contrary, it admits that there are close relations between them”. Corfu Channel Case [Judge Álvarez], supra note 370, p. 41.
380 Certain new norms “have a universal character; they are, in a sense, the Constitution of international society, the new international constitutional law”, Reservations to the Convention on Genocide, Advisory Opinion, 28 May 1951, [1951] I.C.J. Reports 15, at 51 (Judge Álvarez, Dissenting Opinion).
The tenor of the analysis of the following cases is substantially different from the
tenor of the analysis of Judge Álvarez’s jurisprudence. Judge Álvarez used each opinio
that he penned towards an integrated treatment of his vision for a new
international law, and the new role of the Court within it. His jurisprudence as a
whole was a radical and wide-ranging argument for a new system of international
law conforming to the innate cosmopolitan model. Outside of his opinions, howe
the Court has not exhibited the same dedicated interest in elevating the
innate cosmopolitan model. Rather, the innate cosmopolitan model has been taken
up by judges of the Court on an occasional basis, and applied to discrete ends in
conjunction with the given case. The Court and judges of the Court can be seen
incrementally over time to reflect aspects of the innate cosmopolitan model in favor
of ends that are less radical but which still establish some reliance on the innate
cosmopolitan model as a grounds for normativity in international law.

I look below at each case in which judges of the Court have had recourse to the
innate cosmopolitan model, and will offer some description of the particulars of
each case, to establish the context against which the judges offered their opinions.
For reasons already noted, I will limit myself to those cases involving the recourse
to force.

The Corfu Channel case

The ICJ got off to a good start, in one sense, with its first case, The Corfu Channel Case, involving the recourse to force. The Corfu Strait had been mined prior to the incidents of the case. On May 15, 1946, at a time of tension between Greece and Albania, British warships passing through a channel swept of mines were fired on by Albania without warning. The UK thereafter pressed a right of innocent passage, denied by Albania. Subsequently, the UK in October of 1946 sent four battle-ready navy ships through the same channel, but with their guns at bay on orders to return fire only. The UK ships were mined on Oct. 22, suffering casualties and damages. The UK navy subsequently returned in numbers in November, 1946, to sweep the channel and collect evidence linking the fresh mines to Albania, following which it referred the matter to the Security Council, which in turn recommended the dispute be submitted to the ICJ. In the proceedings before the
ICJ, both parties alleged violation of international law in the acts of the other.  

In its ruling, the Court held that Albania had violated international law in the minings of Oct, 1946; the Court further held that the UK had not violated international law in its passage in Oct, but had violated Albania’s sovereignty under international law by its minesweeping operation in Nov. In defense of its minesweeping operation, the UK had asserted a right to intervene in the Strait to protect an established right of passage through Albania’s territory. The Court rejected the argument for menace to the international order.

The Court rejected the UK’s argument that it was entitled to mine-sweep in Albanian waters to protect an established right of passage on the grounds that it constituted an intervention counter to the new international order:

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

The Court’s disapproval affirms the collective security apparatus of the Charter, but does so without any real resort to cosmopolitan terms beyond a rough statement of international organization. By contrast with its treatment of the UK’s responsibility and arguments for defensive intervention, however, the Court’s language concerning the grounds of Albania’s responsibility at law is less restrained. The passage is worth quoting at length:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles.

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383 The Court’s treatment of Albania’s responsibility appears to draw from both the jus ad bellum and the jus in bello, though only the former is relevant here.
namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.384

The Court’s first source of law concerning Albania’s responsibility was neither treaty nor custom, but general principle. Though general principles of law are ostensibly available to the Court as a source of law under Art. 38(1)(c) of the Court’s Statute, which allows for application of “the general principles of law recognized by civilized nations”, the Court did not identify its use of term “general principles” with that article, nor did the Court conform to the full language of the clause. Though there is overlap, as noted in the Introduction to this book, between innate cosmopolitanism and some theories of general principles as a source of international law, it is not clear that the Court is actually establishing any overlap here as a matter of law. In the context of this judgment, however, there appears cosmopolitan potential to the reliance on general principles representative of some presumptive moral or political unity. Moreover, the appeal to principle anticipates similar – and similarly ambiguous – appeals to principle for innate cosmopolitan purposes in later opinions of the Court. Despite the pointed reference to elementary considerations of humanity, however, the Corfu Channel Court’s judgment on the whole is largely forensic in its analysis, for the most part treating the use of force under the Charter rules basically in step with a defense of sovereignty. Judge Álvarez’s opinion, already treated in the discussion of his jurisprudence, shows a substantially greater appeal to innate cosmopolitanism.

Fisheries Jurisdiction

Between the Corfu Channel case and the Fisheries Jurisdiction case the ICJ was not again confronted with the actual use of force (with the exception of a series of cases brought over aerial incidents in the 1950’s and ultimately abandoned for want of jurisdiction). In the Fisheries Jurisdiction case, Iceland attempted unilaterally to extend its exclusive fisheries jurisdiction to 50 nautical miles; the UK claimed the extension to be unlawful and pressed its own fishing rights in the disputed waters. Both sides

384 Corfu Channel Case, supra note 382, p. 22 (emphasis added). The italicized language was later cited with approval by Judge Jennings to explain his concurrence with one aspect of the ICJ’s judgment in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, [1986] I.C.J. Reports 14, at 536 (Judge Jennings, Dissenting Opinion).
made a show of force to support their claims, and the situation was cleverly referred to as the Cod Wars.

Iceland argued through public and diplomatic channels to have acted according to the Scientific Conservation of the Continental Shelf Fisheries Law of 1948, but denied the jurisdiction of the ICJ and made no appearance before the tribunal. The ICJ found that it enjoyed jurisdiction on the basis of a 1961 compromissory agreement between the parties, and heard the case in Iceland’s absence.\(^{385}\) In the course of the dispute, Iceland’s coast guard several times fired on UK fishing trawlers, generally with blank cartridges, to which the UK responded by sending naval warships and tugboats into or around the disputed waters. Iceland’s coast guard additionally cut the nets of UK fishing vessels, and there were multiple collisions between Icelandic and UK ships. By the time of final pleadings, however, England had dropped all claims arising out of the use of force and violation of Art. 2(4), and, of course, Iceland had not made any claims at all before the Court. Accordingly, the Court never took up the use of force in its judgment. Additionally, none of the separate and dissenting opinions took up the use of force. Judge Waldock made reference to Iceland’s enforcement measures, but only to demonstrate Iceland’s disregard for international obligations unrelated to 2(4).\(^{386}\)

Though the ICJ did not address the use of force as a question of law, the Court twice ordered the parties to respect one another’s claims peacefully pending the results of negotiation: once with an interim protective order in 1972, and once again with its final judgment in 1974.\(^{387}\) In both instances the Court was ignored; the dispute continued, with intermittent and even escalating violence, until Iceland threatened in 1976 to close a NATO base on the island, following which the UK dropped its claims to fishing rights in the contested waters.

The absence of any cosmopolitan appeal should be noted here, at least in light of what will follow. Despite directing the parties to resolve the dispute by peaceful negotiations, the Court made no pretence to any higher obligation bearing on the parties to do so, nor to any interests beyond the express commitments each party


had joined in the nature of conventional international agreements. Moreover, in ordering the parties to resolve the underlying dispute via negotiation, the Court appears to have ceded its role as a chamber for dispute resolution. That concession reinforces the absence of any cosmopolitan normative responsibility bearing on the Court – especially as in keeping with the comparatively vast powers and responsibilities for the Court according to Judge Álvarez – and reflects as well the absence of any cosmopolitan responsibility applicable to the parties. The Court effectively failed to demonstrate any authority controlling the contentious situation underlying the case. As such, the case is instructive with respect to the controversies that arise in adjudicating under international law situations involving the use of force, and difficulties that the Court has faced accordingly. Iceland had publicly defended itself according to necessity and sovereign right, and never accepted the jurisdiction of the Court, instead disregarding the process and the Court entirely. The UK then followed suit by disregarding Court orders as well, such as orders to refrain from aggravating the matter by unilateral enforcement of its claims. Both parties resorted to measures of forcible self-help, contrary to orders of the Court. Ultimately, the matter was resolved by political machinations, namely, Iceland’s threat to close the NATO base on its island.

United States Diplomatic and Consular Staff in Tehran

The use of force again came before the Court in the Tehran Hostages case, arising out of the taking of the US embassy in Tehran in 1979. In its application to the Court, the US alleged, in addition to breaches of the Vienna Convention on Diplomatic Relations and related treaties, a breach of Art. 2(4) of the UN Charter. In its subsequent Memorial, however, the US removed reference to 2(4), claiming only breaches of the applicable rules governing diplomatic relations. Iran did not appear before the Court, claiming by letter, similar to Iceland in the Fisheries Jurisdiction case, that the matter was “essentially and directly a matter within the national sovereignty of Iran”, and that the case was not justiciable without examining “the whole political dossier of the relations between Iran and the United States over the last 25 years.”388 The Court dismissed Iran’s assertion of exclusive sovereign prerogative in a

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preliminary ruling, finding the case manifestly a matter of international
jurisdiction.389 The ICJ then disposed of the political argument, holding:

never has the view been put forward before that, because a legal dispute
submitted to the Court is only one aspect of a political dispute, the Court
should decline to resolve for the parties the legal questions at issue between
them. Nor can any basis for such a view of the Court's functions or
jurisdiction be found in the Charter or the Statute of the Court; if the Court
were, contrary to its settled jurisprudence, to adopt such a view, it would
impose a far-reaching and unwarranted restriction upon the role of the Court
in the peaceful solution of international disputes.390

Without taking up Arts. 2(4) or 51, the Court characterized the taking of the
embassy as an “armed attack” ultimately attributable to the state.391 Though steeped
in the language of use of force, the judgment nowhere takes up any substantial issue
of use of force law. Rather, the judgment remains largely within the questions
before the Court concerning diplomatic and consular law, except for an excursion
into human rights law, holding:

Wrongfully to deprive human beings of their freedom and to subject them to
physical constraint in conditions of hardship is in itself manifestly
incompatible with the principles of the Charter of the United Nations, as well
as with the fundamental principles enunciated in the Universal Declaration of
Human Rights.392

Questions of human rights law under the Charter and Universal Declaration of
Human Rights were not before the Court any more than were questions of the
resort to force. In fact, the human rights law that the Court addresses was not
raised in either the Application or Memorial by the US, whereas use of force law
under the Charter had been raised in the Application of the US, though dropped
from the Memorial. Nonetheless, the Court offered no similar digression into the
law on the resort to force, reinforcing the Court’s reluctance in that area.

The Court did, however, indicate its disapproval of a rescue operation begun and
aborted by the US during the same time period in which the Court was deliberating
on its judgment in the case. Though the Court recognized that “neither the

389 United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Order of 15 Dec. 1979,
390 United States Diplomatic and Consular Staff in Tehran (United States v. Iran), supra note 388, p. 20.
391 Ibid., p. 35, paras. 74-75.
392 Ibid., p. 42, para. 91.
question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court”, the Court nonetheless found that the rescue operation was “of a kind calculated to undermine respect for the judicial process in international relations”. Moreover, in a preliminary order, the Court had directed both parties to refrain from aggravating conduct; neither party held to the order. The final order of the Court, directing Iran “immediately” to “take all steps to redress the situation”, including the release of the hostages and reparations for injuries caused, was also ignored.

In its judgment, the Court did make appeal to higher interests of international law, but only with respect to the deep-rooted nature of diplomatic and consular law internationally, rather than to any broader normative mandate. The case, then, bears meaningful similarities with the *Fisheries Jurisdiction* case. The Court again faced an incident involving the use of force, which did not arise as a question of law in the Court’s judgment; again the Court failed to see both parties appear before it; and again the Court failed to see what orders it issued in the case observed. Under these constraints, the allowance for any viable normative cosmopolitanism seems strained at best.

*Military and Paramilitary Activities in and against Nicaragua*

The next case involving the use of force was *Military and Paramilitary Activities in and against Nicaragua*. In that case, Nicaragua put questions of the law of use of force squarely before the Court, founding its Application on the illegal use of force by the US, and maintaining its complaint over the use of force throughout the case. Judge Schwebel, in his dissent to the preliminary judgment in favour of jurisdiction, captured the significance of Nicaragua’s Application:

> The Application in this case is without precedent in the history of the International Court of Justice and the Permanent Court of International

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396 “[W]hat has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm.” *Ibid.*, p. 42, para. 91.
Justice. It is unprecedented in its substance, because never before has a State come to the Court requesting it to adjudge and declare that another State has the duty to cease and desist immediately from the use of force against it.397

Nicaragua claimed that the US had, among other things, illegally intervened against Nicaragua’s territorial and political independence by instigating and directing the armed resistance by the Contra rebels to the then-governing Sandinista government, including Contra manoeuvres and preparations in El Salvador and Honduras, and in addition claimed more direct acts such as mining and overflights. The US claimed that its support for the Contras, including related activities in El Salvador or Honduras, constituted acts of collective self-defense, and counter-claimed that Nicaragua had illegally intervened against El Salvador and Honduras by supporting armed resistance movements and destabilizing their respective governments.

The US participated in the proceedings to contest the Court’s jurisdiction. After the Court’s preliminary judgment in favour of jurisdiction, however, the US withdrew from the process, refusing to appear before the Court to argue the merits, and recalling the failure of Iceland and Iran to appear before the Court in matters concerning the international use of force. Also as with the Fisheries Jurisdiction and Tehran Hostages cases, the Court’s final order was largely ignored. Among other things, the Court awarded a money judgment against the US, in favor of Nicaragua, that was never paid. The US blocked Nicaragua’s attempts at enforcement of the judgment in the Security Council for years, until, in 1991, following regime change, Nicaragua withdrew the case and ceased claims for the outstanding award.

Among other things, the US had put forward arguments that the Court was the inappropriate organ under the Charter to treat ongoing issues of the use of force, and argued that the matter before the Court basically was not justiciable under international law. Regarding both contentions, the Nicaragua Court referred to the Tehran Hostages judgment for its bearing on jurisdiction over the use of force. Where the US had argued that only the Security Council was empowered to rule with respect to the use of force and matters of international peace and security generally, particularly in cases where the Security Council had pronounced on the issue or was deliberating over it, the Nicaragua Court pointed out that the Tehran Hostages Court was not impeded by simultaneous deliberation of the underlying situation in that

case by the Security Council. And where the US argued that a matter of ongoing use of force was generally non-justiciable under international law, the Court referred to the Tehran Hostages Case alongside the Corfu Channel case to establish its own competence to hear the controversy and rule according to applicable law.

Unlike the Tehran Hostages and Fisheries Jurisdiction cases, the questions of law before the Court in Nicaragua went directly to the resort to force, and were not withdrawn in favour of other claims. The Court confronted the resort to force squarely, and even aggressively in sustaining jurisdiction over the matter despite weakness in the positive law grounding. Briefly, the Charter was ultimately found inapplicable by virtue of a US reservation to the Court’s jurisdiction insisting, in case of a claim founded on a multi-lateral treaty, that all parties potentially affected by judgment on the claim be present before the Court: both El Salvador and Honduras, parties to the Charter but not the proceedings, would have been affected by resolution of the Charter questions concerning Arts. 2(4) and 51; thus the Court found that it had no jurisdiction over the US with respect to those articles.

The ICJ instead found the prohibition on the use of force to constitute customary law. In brief, the prohibition flows from and expresses a “fundamental principle”, reflecting recognition of the prohibition of the use of force in the conduct of international relations. Recognition of the fundamental principle is effectively certified by the Charter, and carries with it, a fortiori, the acknowledgment of a customary norm as well. The Court describes fundamental principle as a special category of customary law: Art. 2(4) is “not only a principle of customary international law but also a fundamental or cardinal principle of such law.” The Court’s resort to a premise of fundamental principle, insofar as it is not identical with an appeal to general principle in accordance with Art. 38(1)(c) under the Court’s statute – and the Court gives no indication that it is – suggests an effort to


401 Ibid., p. 100.
elevate principle where positive law might otherwise be unavailing or unavailable as a grounds of decision, as in the present case. As noted in the discussion of the Corfu Channel Case, the interplay of general principles under Art. 38(1)(c) with innate cosmopolitanism was considered in Chapter 1 of this work. In Nicaragua, the Court’s affirmation of principle suggests a generally-applicable international norm derived from abstractions, rather than more traditional, positive manifestations of customary or conventional rules. Though couched by the Court within the doctrine of customary law, fundamental principle looks more like a distinct source of international law, neither conventional nor conforming to the rules for identifying customary law. The appeal to fundamental principle in this context suggests a distinctly innate cosmopolitan means of satisfying some attribute or interest identified with the world as a whole, one not adequately provided for in positive international law. Likewise, the resort to fundamental principle also appears to satisfy the custodial role suggested by Judge Álvarez in his series of opinions.

The Court’s discussion of fundamental principle, however, is limited. On the whole, the Nicaragua judgment does not devote considerable attention or energy to innate cosmopolitan terms. The decision itself affirms norms of non-intervention, and by and large supports the independence of sovereign states. Nonetheless, taken in historical context, the Nicaragua Court’s invocation of fundamental principle to help establish jurisdiction over the international use of force – where previously the use of force defied jurisdiction even where it might have been ripe for treatment – suggests at least a small but pertinent (and not uncontroversial) expansion of the rule of international law.

Moreover, in finding the prohibition on the use of force to be fundamental principle, the Court quotes approvingly from references to jus cogens:

The international Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens”. Nicaragua in its Memorial on the Merits … states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter … “has come to be recognized as jus cogens”. The United States, in its Counter-Memorial … found it material to quote the view of scholars that this principle is a “universal norm”,… and a “principle of jus cogens”.402

402 Ibid., p. 100-01.
Though the Court does not expressly find the 2(4) rule to constitute a peremptory norm, its approving reference to the possibility invites speculation. The Court has created a special category of customary law, and uses it to establish the possibility of a peremptory normative status. Thus the Court raises the possibility that an abstract commitment to communal good is normatively privileged above any contrary expression of *raison d’état* (short of another peremptory norm achieved among states according to their will). Though speculative, the argument demonstrates sympathetic treatment of a cosmopolitan potential for international law.

While the Court's invocation of fundamental principle and peremptory norms touches speculatively on a cosmopolitan norm controlling the use of force, the separate opinions and dissents more vigorously revive a reconsideration of the role of the Court, including its mission or mandate and its powers, squarely raising more cosmopolitan issues. The separate opinion of Judge Singh, for example, understands the mandate of the Court in terms of “a major opportunity to state the law so as to serve the best interests of the community. The Court as the principal judicial organ of the United Nations has to promote peace, and cannot refrain from moving in that direction.” In keeping with the innate cosmopolitan model, there exists an international community with interests of its own, and those interests begin with peace and public order. Moreover, the Court is tasked with promoting the values of the community as opportunity allows, which would appear to exceed an adjudicatory mandate limited to those rules consented to between the parties before the Court.

Judge Lachs, by contrast, posits a different role for the Court in his separate opinion: “The Court's primary task is to ascertain the law, and to leave no doubt as to its meaning.” The Court’s task arises from the reality that “the world we live in is one where certain notions, though part of the vocabulary of law, continue to be controlled by subjective evaluations.”

The competing visions of Singh and Lachs for the Court are meaningful for the different systemic propositions they represent, which difference will come up again in later opinions from subsequent cases. Judge Singh suggests a Court tasked to

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prosecute a clear mandate founded in a common good, understood according to the “best interests of the community”. Judge Lachs, on the other hand, draws a classic picture of the Court in more neutral terms, with a special mandate for dispute resolution, according to which the Court overcomes subjective pretensions by objectively determining the legal rule to be applied.

Judge Lachs describes an apparently neutral court, one charged with fealty to the law as it exists, whatever it might be. Judge Singh, by contrast, describes a more clearly innate cosmopolitan institution: a court charged in the name of the community to promote peace and best interests, which calls for more than ascertaining the law: it involves knowing what is in the best interests of the community, and using the power of the court “so as to serve” them. For both, however, the authority of the Court, in its area of competence, is paramount over the subjective interests and claims of the parties that may appear before it. In that sense, both suggest a basically cosmopolitan institution, bound to give expression to objective normative authority in a consolidated international system, as against the subjective parties that will appear before the Court.

Judge Oda, in his dissent, draws a contrast with the cosmopolitanism represented by Judges Singh and Lachs. Judge Oda suggests, in keeping with the nature of voluntarily-accepted jurisdiction, that the dispute before the Court in Nicaragua was not necessarily a legal dispute within the meaning of Art. 36(b) of the ICJ Statute. Rather, Judge Oda acknowledged the argument by the US that the dispute was “‘not susceptible of decision by the application of the principles of law’ – or, in other words, that the sense of ‘legal dispute’ had not evolved so far as to embrace the subject-matter of the application.”

International law, Judge Oda suggests, could not cure the subjective dispute before the Court; there was no objective ground for resolution. His opinion shows sensitivity to the limitations of a legal system founded on consent, and suggests that the international law did not – or not yet – support a cosmopolitan treatment of the use of force.

As against the three, the Court's opinion can be seen as a mix of considerations raised by Judges Singh and Lachs, and a rejection of Judge Oda's denial of objective authority. The Court, à la Judge Lachs, grounded its decision in terms of the

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407 Thus, he explains: “It must be added that the Court should not allow any sentiment that States ought to accept its jurisdiction to affect its perception of the voluntary nature of such acceptance or its caution not to overstep the limits of individual acts of acceptance.” Ibid., p. 238.
available law, rather than any primary obligation to a communal mandate. But in doing so, the Court’s references to fundamental principles and peremptory norms suggest a tacit acknowledgment that it was obliged to step outside of the narrow rules at its disposal, appealing instead to the innate cosmopolitan model to pronounce on an objective norm not otherwise or expressly agreed to in advance by both parties. In any event, the Court rejected the argument that the intensity of the subjective interests implicated in the case rendered it non-justiciable.

**Lockerbie**

The *Lockerbie* case is worth raising here, though the case was withdrawn pursuant to negotiations among the parties, and the Court was stopped short of ruling on the merits. The case arose out of the bombing of Pan Am flight 107 over Lockerbie, Scotland, and the subsequent demand by the US and UK (as well as France) that Libya transfer suspects in the case from Libya to the US or UK. Libya applied to the ICJ on the grounds that the demands constituted a use of force against Libya and were illegal under the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention). Following Libya’s application to the ICJ, the Security Council ordered measures against Libya, with resolutions 748 and 883, to effect the transfer of the suspects. In its Memorial before the Court, Libya argued that the pressures applied against Libya were “at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States.”

At the preliminary stage, the US argued, among other things, that the Security Council resolutions imposing sanctions left Libya without remedy: “Libya's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object; any judgment which the Court might deliver on the said claims would thenceforth be devoid of practical purpose.” Thus, even if the Court found the original measures illegal under the Montreal Convention, they would remain legal under the subsequent Security Council resolutions. The UK

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argued, separately, that, by virtue of the Security Council resolutions, “the relief which Libya seeks from the Court under the Montreal Convention is not open to it, and that the Court should therefore exercise its power to declare the Libyan Application inadmissible”. In all of their arguments, the US and UK employed a simple logic: if the authority of the Security Council was not at stake, the measures ordered could not be overturned, and if the measures pressuring Libya could not be overturned, the Court did not need to go to the merits under the Charter or Montreal Convention to try the case.

The Court rejected the arguments of the US and UK under its rules of procedure as not strictly preliminary in character, and as more appropriate to an argument on the merits. Because proceeding on the merits meant that the Court, as a preliminary matter, did not hold itself precluded by Security Council action, scholars and observers anticipated a judgment that might assert ICJ review over the legality of Security Council actions. In this vein, Judges Bedjaoui, Ranjeva and Koroma, concurring in the Court’s judgment, wrote separately and briefly to emphasize their approval of preserving “débat judiciaire au sujet des décisions du Conseil”.

Such a judgment (or “débat judiciaire”) would have effectuated a capacity for judicial review similar to the capacity famously asserted by the US Supreme Court in *Marbury v. Madison* under the American constitutional system. Thus the nature of the Court’s preliminary judgment raises the possibility of a new exercise of the Court’s authority, one typically associated with judicial powers under a constitutional division of government. Division of government suggests an ordered political organization. A potential assertion by the Court of authority under a constitutional or quasi-constitutional system of divided powers corresponds on its face with constitutional cosmopolitanism. But ordered political organization, absent any formal or discrete constitutional settlement, also suggests the innate cosmopolitan model, insofar as the Court would have been obliged to assume powers over the Security Council on the basis of a latent world political organization and the

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objective normativity it might represent. Once again, the distinction between a constitution and proto-constitutional phenomena underscores the distinction. Had the Court ultimately exercised power according to the recognition of a constitutional order, the Court would have affirmed the constitutional cosmopolitan argument – especially Charter constitutionalism – thereby signaling its approbation of a formal constitutional achievement capable of establishing a cosmopolitan community under law. Had the Court, on the other hand, assumed constitutional powers without recognizing an express constitutional mandate, the Court would be leveraging the presumption of a constituted body politic in whose interest the Court might rule even absent formal constitutional legitimation. The latter reflects the innate cosmopolitan pretension to autonomous authority absent positive law grounds.

Legality of the Threat or Use of Nuclear Weapons

In its Advisory Opinion in *The Legality of the Threat or Use of Nuclear Weapons*, the Court treated the question before it according to two different legal regimes, namely, *jus ad bellum* and humanitarian law. As a matter of *jus ad bellum*, the Court found the legality of nuclear weapons to depend “upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether,

415 Moreover, the cosmopolitan potential thickens in light of arguments about ICJ authority and peremptory norms raised in the context of *Lockerbie*. Alexander Orakhelashvili, reflecting on the *Lockerbie* case, and drawing on *Nicaragua* before it, would hold the Security Council additionally accountable before the ICJ to peremptory norms of international law, foremost among them the prohibition on the use of force. (Alexander Orakhelashvili, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, 16 European J of Int’l Law at 60, 63, 81 (2005).) The argument suggests that there exists a normative authority governing the use of force that supersedes the Chapter VII authority of the Security Council and even the conventional (and consensual) law-making powers of the member states of the UN – a fixed norm of world public order that adheres beyond all discretionary political authority. Thus another commentator writes: “The SC may derogate from treaty standards and customary international law in the exercise of its discretionary power but, as an organ of an international organization, it is bound by international law and limited by the absolute norms that are not at the disposition of the UN Member States vesting the Council with its powers.” (Lutz Oette, Peace And Justice, or Neither? The Repercussions of the Al-Bashir Case for International Criminal Justice in Africa and Beyond, 8 J. Int’l Crim. Just. 345, 352 (2010).) The argument from *jus cogens* suggests that the Court is empowered by and responsible for world norms that are independent of and superior to all world actors, making the Court the preeminent actor in an autonomous and superior world normative order.
in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality."\(^{416}\)

In the context of humanitarian law, the Court went farther:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" \(^{416}\) that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.\(^{417}\)

From that reasoning, the Court found that: “methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.”\(^{418}\)

In its *dispositif*, however, the Court declined to hold nuclear weapons necessarily illegal under otherwise “intransgressible” humanitarian law. Instead, the Court deferred to states’ fundamental – and apparently inalienable – subjective interest in self-defense, holding that “the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter when its survival is at stake.”\(^{419}\)

The Court’s *dicta* under humanitarian law attains to a liberal cosmopolitan normative posture for its statement, derived from the nature of humanity, of equal and paramount concern under international law for all human beings. But the Court then meets that norm with a fundamental right to sovereign self-preservation and survival of the state. The Court’s awkward negative resolution – or non-resolution – of the conflict between the two underscores a deep normative ambivalence, an unstoppable normative force meeting an immovable normative object. On the one hand, there is the acknowledgment of an interest in an objective value beyond the

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\(^{417}\) Ibid., p. 257.

\(^{418}\) Ibid., p. 262.

\(^{419}\) Ibid., p. 263.
will of states; on the other, there is an inherited normative foundation in the state as the ultimate unit of value in a subjective international system. The latter continues to check the former in the opinion of the Court, rendering the question of nuclear weapons effectively non-justiciable – not unlike the ruling proposed by Judge Oda in his dissent in Nicaragua.

Select separate opinions took pains to elevate the illegality of nuclear weapons above the contingencies of self-defense, despite the ambiguity in the Court's judgment. Judge Koroma, in his dissenting opinion in favour of holding the use or threat of nuclear weapons illegal under all circumstances, touches on a theme that runs throughout the attached opinions embracing the Court's jurisdiction, and echoes the separate opinions of both Judge Singh and Judge Lachs in Nicaragua:

the prevention of war, by the use of nuclear weapons, is a matter for international law and, if the Court is requested to determine such an issue, it falls within its competence to do so. Its decision can contribute to the prevention of war by ensuring respect for the law. The Court in the Corfu Channel case described as its function the need to "ensure respect for international law, of which it is the organ".420

The institution of international law itself represents interests the defense of which ostensibly falls within the ambit of the Court’s juridical responsibility. Likewise, the possibility to contribute to the prevention of war becomes grounds for issuing a decision. Each suggests a sort of custodial responsibility vested in the Court, in line with the custodial role adumbrated in Judge Álvarez’s jurisprudence.

Other opinions recall still more of Judge Álvarez's opinions. Pres. Bedjaoui, confronting the tension in the Court's opinion, initially frames it as a conflict of moral and legal norms: “Le drame de conscience auquel les uns et les autres ont été confrontés se reflète à bien des égards dans le présent avis. Mais la Cour ne pouvait à l'évidence pas aller au-delà de ce que dit le droit. Elle ne pouvait pas dire ce que celui-ci ne dit pas.”421 In his declaration, however, Pres. Bedjaoui insists that the balance of the Court’s judgment does not tip in favor of a potential use of nuclear weapons; he makes this clear in vividly cosmopolitan language, including a


psychological assessment of the human condition, not unlike Judge Álvarez's description of a world psychology with normative repercussions. Moreover, in his treatment of what the law says, Pres. Bedjaoui stresses the changed circumstances of international conduct in a globalized world, much as Judge Álvarez emphasized changed law for a new regime of interdependence. Thus, just as Judge Álvarez diminished the importance of sovereignty and was dismissive of traditional international law insofar as it was constrained by the same, Pres. Bedjaoui seeks to minimize the contemporary import of the classic statement of sovereign right in the *Lotus* case:

La décision en question exprimait sans aucun doute l'air du temps, celui d'une société internationale encore très peu institutionnalisée et régie par un droit international de stricte coexistence, lui-même reflet de la vigueur du principe de la souveraineté de l'Etat.... Il est à peine besoin de souligner que la physionomie de la société internationale contemporaine est sensiblement différente.422

From there, Pres. Bedjaoui touches on a number of familiar ideas and principles, worth reciting:

[O]n ne saurait nier les progrès enregistrés au niveau de l'institutionnalisation, voire de l'intégration et de la ((mondialisation)), de la société internationale. On en verra pour preuve la multiplication des organisations internationales, la substitution progressive d'un droit international de coopération au droit international classique de la coexistence, l'émergence du concept de ((communauté internationale)) et les tentatives parfois couronnées de succès de subjectivisation de cette dernière. De tout cela, on peut trouver le témoignage dans la place que le droit international accorde désormais à des concepts tels que celui d'obligations *erga omnes*, de règles de *jus cogens* ou de patrimoine commun de l'humanité. A l'approche résolument positiviste, volontariste du droit international qui prévalait encore au début du siècle - et à laquelle la Cour permanente n'a d'ailleurs pas manqué d'apporter son soutien dans l'arrêt susmentionné - s'est substituée une conception objective du droit international, ce dernier se voulant plus volontiers le reflet d'un état

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422 "No doubt [the *Lotus*] decision expressed the spirit of the times, the spirit of an international society which as yet had few institutions and was governed by an international law of strict coexistence, itself a reflection of the vigour of the principle of State sovereignty.... It scarcely needs to be said that the face of contemporary international society is markedly altered." *Ibid.*, pp. 270-71.
de conscience juridique collective et une réponse aux nécessités sociales des Etats organisés en communauté.\footnote{\text{[T]he progress made in terms of the institutionalization, not to say integration and "globalization", of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of "international community" and its sometimes successful attempts at subjectivization. A token of all these developments is the place which international law now accords to concepts such as obligations \textit{erga omnes}, rules of \textit{jus cogens}, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the century – and which the Permanent Court did not fail to endorse in the aforementioned Judgment – has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.} \textit{Ibid.}, p. 271.}

The passage makes clear appeal to aspects of the innate cosmopolitan model. The international community has successfully been ‘subjectivized’, giving rise to objective norms under international law reflecting the juridical conscience of the world and responsive to the social necessities of the subjectivized world collective. Elsewhere, Pres. Bedjaoui reinforces the cosmopolitan tone of his declaration in general by reference to unifying terms and phenomena including “la condition humaine”, “la première nature de l'homme”, “la situation de l'homme”, “son destin”, “sa conscience” and “ses coordonnées éthiques”.\footnote{\textit{Ibid.}, pp. 268, 271 (emphasis in original).}

Thus the international community, following Pres. Bedjaoui, has achieved, at least in part, the status of its own subjective community, autonomous of the subjective will of states, and thereby recalls the innate cosmopolitan method, and develops on its recognition of a subjective international community with a collective juridical conscience. The objective conception of international law that Judge Bedjaoui proposes includes those norms responsive to social necessities and moral dilemmas appropriate for resolution in accordance with the realities of a unitary world phenomenon, rather than subjective international custom and convention. Throughout, Judge Bedjaoui’s declaration approximates in brief the jurisprudence of Judge Álvarez, as well as the scholarship of other figures identified in Chapter 2, including Hudson, Lansing and Madariaga.

Pres. Bedjaoui was not the only Judge to recall innate cosmopolitan theory, and particularly the views of Judge Álvarez. Judge Shahabuddeen, in his dissent, makes express reference to Judge Álvarez’s opinions in the \textit{Corfu Channel} and \textit{Conditions of
Admission cases. Moreover, Judge Shahabuddeen finds credence for Judge Álvarez's new international law, founded in interdependence, in the work of other prominent jurists. His analysis is also worth quoting at length:

[T]he previous stress on the individual sovereignty of each State considered as *hortus conclusus* has been inclining before a new awareness of the responsibility of each State as a member of a more cohesive and comprehensive system based on co-operation and interdependence.

These new developments have in part been consecrated by the Charter, in part set in motion by it. Their effect and direction were noticed by Judge Álvarez (Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), 1948, I.C.J. Reports 1947-1948, p. 68, separate opinion). Doubts about his plea for a new international law did not obscure the fact that he was not alone in his central theme. Other judges observed that it was "an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States" (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 46, joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo).

Though elsewhere critical of "the theory which reduces the rights of States to competences assigned and portioned by international law", Judge De Visscher, for his part, observed that "[t]he Charter has created an international system", and added: "[I]n the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice." (International Status of South West Africa, I. C.J. Reports 1950, p. 189, dissenting opinion.) The Charter did not, of course, establish anything like world government; but it did organize international relations on the basis of an "international system" ... 426

Thus Judge Shahabuddeen recognizes a “cohesive and comprehensive system” based in part on interdependence. The passage reflects that area of cosmopolitan thought where innate and constitutional cosmopolitanism overlap. In part, the Charter “consecrates” a pre-existing interdependent phenomenon and is a mere

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vehicle for its normative expression; in part, the Charter is the impetus for its development.

Judge Shahabuddeen further affirms an undifferentiated world “public conscience”, borrowed from the Martens Clause in the preamble of Hague II, as a global presumption by which to measure the particular will of states:

The Court could reasonably find that the public conscience considers that the use of nuclear weapons causes suffering which is unacceptable whatever might be the military advantage derivable from such use. On the basis of such a finding, the Court would be entitled, in determining what in turn is the judgment of States on the point, to proceed on the basis of a presumption that the judgment of States would not differ from that made by the public conscience.427

The argument presents a relatively new use of the innate cosmopolitan model. The state, as an actor in international law, apparently remains the law-making entity. Now, however, the expression of international law by states will be presumed to conform with the interests and will associated with the public conscience of the world, barring express conflict. The innate cosmopolitan phenomenon becomes a constraint on the law-making prerogative of states, and a principle of interpretation by which the Court is able to give effect to the normativity of the world as a whole.

It remains to find the means by which to ascertain the public conscience of the world. Echoing Judge Álvarez’s partial reliance on the General Assembly for the articulation of world norms, Judge Shahabuddeen turns to the same:

The standard being one which is set by the public conscience, a number of pertinent matters in the public domain may be judicially noticed. … Among these there is the General Assembly. … Whatever may be the position as regards the possible law-making effects or influence of General Assembly resolutions, the Court would be correct in giving weight to the Assembly’s finding on the point of fact as to the state of “human conscience and reason” on the subject of the acceptability of the use of nuclear weapons ….428

In sum, state will as the source of international law is formally retained, but subjugated to the will of the world public, however it may be represented or expressed, such that the public conscience as comprehended by the Court dictates
how to interpret the will of states. Again, there is at least a germ of constitutional
theory alongside the innate cosmopolitan argument, though in this case the appeal
to constitutional principle is an attenuated one, and the innate cosmopolitan model
takes precedence: the world public conscience exists, and the system of international
law has been constituted in such a way as to give legal form to the norms for which
the world public conscience calls.

Judge Ranjeva, in his separate opinion shares an attention to moral norms with
Judge Bedjaoui. In doing so, he also shares aspects of Judge Shahabuddeen’s
method: orthodox, positive law tenets of international law are not overthrown;
rather, they are harnessed to a different normative mandate. For Judge
Shahabuddeen that separate, constraining normative mandate was represented by
the world public conscience, such that state will would be interpreted in the first
instance to be in accord with the will of the world. Judge Ranjeva also preserves
conventional and consensual sources of international law, but subjects them to
other moral requirements: the law, following Judge Ranjeva, incorporates ‘un
minimum d’exigences éthiques’ expressive of the values of ‘les membres de la
communauté dans leur ensemble’, representative of ‘les grandes causes de
l’humanité’, undivided. Judge Ranjeva identifies the world collective, coextensive
with an undivided humanity, and attributes to it moral interests capable of effective
normative authority under international law.

Further, Judge Ranjeva asks: ‘La proclamation répétée de principes, considérés
jusque-là comme seulement moraux mais d’une importance telle que le caractère
irréversible de leur acceptation apparaît définitif, n’est-elle pas constitutive de
l’avènement d’une pratique constante et uniforme?’ The question suggests that regular
expression of principle will have the effect of achieving something like the value of
customary law, even where it that expression does not achieve conventional status
in any single instance. Again, the innate cosmopolitan idea is joined to an
unorthodox affirmation of general principle as a matter of international legal
discourse. In part on the basis of the appeal to principle, Judge Ranjeva’s dicta here
would affirm an authority vested in the Court to announce law conforming to the
will or interests of the world collective, and the moral constraints recognized by that
collective, even absent effective positive law or traditional customary law expression
by states in their individual capacities.

226, at 296 [Judge Ranjeva].

430 Ibid., at 297 (emphasis in the original).
I pause here for a moment to consider more closely the consistent appeal to principle, which will arise again in a moment in consideration of Judge Weeramatry’s opinion. The appeal to general principle, still not identical with the term as it exists under Art. 38(1)(c) of the Statute of the Court, appears to reflect a particular appreciation by the Court, or judges of the Court, of the sentiment of the world as a whole. As such, the consistent resort to principle joins the innate cosmopolitan mandate to a mandate flowing from Art. 9 of the Court’s Statute: the Court is the unique institutional site of competence within the system of international law for assessing all of the principle legal systems and main forms of civilization in the world; as such, it enjoys a unique capacity to pronounce on uniform normative principle discernible across or emerging out of the world as a whole. When the world as a whole is understood as a subjectivized collectivity, with a will, interests or moral sense of its own, the Court’s unique institutional competence to pronounce on general principle reinforces the innate cosmopolitan mandate to exercise authority in the service of the perceived world collectivity.

The final opinion from the Nuclear Weapons case to adopt an innate cosmopolitan posture is the dissent of Judge Weeramatry. He purports to remain within the lex lata, echoing the efforts of Judges Shahabuddeen and Ranjeva to remain within the strictures of international law, as well as Judge Álvarez’s insistence that his new international law was good law, rather than anything more speculative. Further recalling Judge Álvarez, he expands the body of international law by reference to the aims of the Charter captured in its Preamble. The Charter Preamble, however, contains no binding articles or terms. Thereby, echoing Judge Bedjaoui as well, Judge Weeramatry would have the collective will of the peoples of the world, as captured in the Preamble, take on a normative authority independent of operative terms expressly agreed to among states as a matter of law. Thus:

The Charter's very first words are ‘We, the peoples of the United Nations’ - thereby showing that all that ensues is the will of the peoples of the world. Their collective will and desire is the very source of the United Nations Charter and that truth should never be permitted to recede from view. In the matter before the Court, the peoples of the world have a vital interest, and global public opinion has an important influence on the development of the principles of public international law.432

432 Ibid., at 441-42.
The affirmation of the collective will of peoples, in the form of global public opinion, is joined once again, as noted, to an elevation of principle: Judge Weeramatry holds that power must be restrained by principle as well as statute.433 In insisting on situating his opinion at once in lex lata and in broader principle, Judge Weeramatry also recalls the Nicaragua Court's reliance on fundamental principle to achieve its ruling in that case. Again, innate cosmopolitan principle is comprehended to enjoy some purchase under the law available to the Court.

Arriving at a different conclusion about the contents and means of ascertaining the lex lata of international law, Judge Guillaume, in his separate opinion, rejects the pretension that arises, in the opinions canvassed here, to innate cosmopolitan law-making available to the Court beyond a foundation resting ‘sur le principe de la souveraineté des Etats’ and their consent.434 The court and judge are empowered solely according to the traditional terms of state consent in a subjective international system. Thus:

le rôle du juge ne consiste pas à se substituer au législateur…. et la Cour doit se borner à constater l'état du droit sans pouvoir substituer son appréciation à la volonté des Etats souverains. C'est la grandeur du juge que de rester dans son rôle en toute humilité, quels que soient par ailleurs les débats intérieurs qui peuvent être les siens au plan religieux, philosophique ou moral.435

Accordingly, Judge Guillaume rejects the turn to policy and law-making authority that is bound up with the cosmopolitan, custodial role variously articulated by Judges Bedjaoui, Shahabuddeen, Ranjeva and Weeramatry. Judge Schwebel echoes Judge Guillaume’s sentiment, identifying an ‘antinomy between practice and principle’, and finding it therefore ‘the more important not to confuse the international law we have with the international law we need’.436 His language describes a positivist understanding of international law that presents a stark counterpoint to the recognition of normative authority vested in the interests of the world as a whole.

433 Ibid., at 494.
435 Ibid., at 293.
It bears recalling, in light of the opinions of Judges Guillaume and Schwebel, that the Court’s decision in *Nuclear Weapons* appears to have traced the limits of cosmopolitan aspirations vis-à-vis still-viable subjective interests, insofar as the state’s right to survival as a state may trump even intransgressible principles drawn from elementary considerations of humanity in the system of international law.\(^\text{437}\)

But it also bears noting that while a right of survival vested in states may limit the outer bounds of what may be achieved in the name of the world, it does not overthrow the whole of the innate cosmopolitan conception. To a certain extent, it complements it in other ways. Innate cosmopolitanism preserves and, as seen, even proceeds from the possibility of discrete social and political collectives within the larger unity of the world as a whole. Moreover, they are conceived to be mutually constitutive; as such, neither can serve to deny the existence of the other. The one affirms the other, such that a foundational right to survival vested in the state is rightfully preserved, but must be understood to preserve as well a fundamental normative value vested equally in the world collective. Both rest on a common, ineradicable core identified with discrete constituent collectives: the baseline normativity of the particular collectivity affirms a baseline normativity in the universal collectivity.

Thus, though the Court’s opinion in *Nuclear Weapons* identifies outer bounds, in concerns of international security and the use of force, of what may be achieved as a matter universal norms under the in the name of the world as a whole, innate cosmopolitan juridical theory remains theoretically viable insofar as, within those bounds, the world as a whole also remains a legitimate and equally undeniable source of legally-valid norms.

*Oil Platforms*

If the Court itself stopped short in *Nuclear Weapons* from asserting jurisdiction over the most basic subjective interests and powers of states, the next case of interest, *Oil Platforms*, suggests a return to the trend of incrementally expanding jurisdiction, established by the Court in *Nicaragua* and *Lockerbie*. In certain respects, *Oil Platforms* represents a total institutional reversal from the earlier practice observed in *Fisheries Jurisdiction* and *Tehran Hostages*, where questions pertaining to the use of force were largely abandoned by the parties and the Court. In *Oil Platforms*, Iran’s complaint

\(^{437}\) *Legality of the Threat or Use of Nuclear Weapons*, supra note 416, at 257, 263.
against the US sounded in freedom of commerce according to a bilateral Treaty of Amity, but was in fact a controversy over the use of force and self-defense, and was treated as such by the Court. Moreover, while the record before the Court was limited to specific incidents from the late 1980’s, the various judges appear to have drawn substantially, in some cases expressly, on the public record of world affairs at the beginning of the 21st century.

The record before the court pertained to two separate incidents, in Oct. 1987 and April 1988, in which the US military struck Iranian oil installations on assertions of self-defense, following certain actions attributed to Iran, including the sinking of an oil tanker flagged to the US, and the mining of a US warship. The incidents took place in the wider context of the Iran-Iraq War, and the so-called Tanker War escalation, pursuant to which Iran and Iraq had begun targeting neutral shipping in the Gulf in an effort to disrupt one another’s trade. Though the gravamen of Iran’s complaint to the ICJ in 1992 pertained to the military actions of the US as actor in the Iran-Iraq War, Iran brought its suit under the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran, as the Treaty of Amity provided for automatic arbitration before the ICJ. In 1996, by preliminary judgment, the Court allowed the suit to proceed pursuant to a single provision of the Treaty of Amity, namely Art. X, paragraph 1, providing for freedom of commerce and navigation between the territories of the two contracting parties. Provisions suggesting broader terms for complaint were rejected.

In its defense, the United States raised, among other arguments, Art. XX(1)(d) of the Treaty of Amity, which states that the Treaty would in no event preclude measures by either party necessary to protect essential security interests. In deciding the case, the Court began with the United States’ defense, rather than the complaint itself:

In the present case, it appears to the Court that there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 (d), before turning to Article X, paragraph 1. It is clear that the original dispute between the Parties related to the legality of


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the actions of the United States, in the light of international law on the use of force.\textsuperscript{441}

Having signalled its intention to effect judgment on the use of force, the Court incorporated the standard for self-defense under Art. 51 and customary law into the treaty term “necessary to protect essential security interests”, thereby bringing its judgment under Charter law. Ultimately, the Court found that an armed attack had not been proved by the US, including a failure to demonstrate a specific intent on the part of Iran to strike the US. Accordingly, the US acts were not valid acts of self-defense. Having dispensed with the US defense, the Court turned back to the complaint – and dismissed it, on the grounds that there was no direct commerce between Iran and the US sufficient to trigger responsibility under Art. X of the Treaty of Amity for the acts complained of.\textsuperscript{442}

The Court's procedure was unusual, on the merits rejecting the defense first and the complaint second. A meritless complaint does not ordinarily entail a defense. In passing judgment on an unnecessary defense, the Court exceeds a narrow mandate for dispute resolution. Rather, the Court's unnecessary ruling demonstrates what might be called judicial opportunism, recalling Judge Singh's opinion in favor of the Court's seizing a “major opportunity to state the law so as to serve the best interests of the community.”\textsuperscript{443} Judge Simma, in his opinion, refers to his own agreement with the Court's opportunism as \textit{Rechtspolitiek}, to which I return in a moment. The Court acknowledged its interest, on behalf of the international community, in addressing the questions of the use of force and self-defense:

\begin{quote}
 as the United States itself recognizes in its Rejoinder, "The self-defense issues presented in this case raise matters of the highest importance to all members of the international community", and both Parties are agreed as to the importance of the implications of the case in the field of the use of force, even though they draw opposite conclusions from this observation. The Court therefore considers that, to the extent that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty authorizes it to examine and rule on such issues, it should do so.
\end{quote}

That acknowledgment is the closest the Court came to explaining its unusual procedure. Though the Court portrayed the interest in terms of the arguments of

\textsuperscript{441} \textit{Ibid.}, at 180.
\textsuperscript{442} \textit{Ibid.}, at 207.
\textsuperscript{443} \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) [Judge Singh]}, \textit{supra} note 403, at 153.
the parties before it, the interest is more coherently understood as an expression of innate cosmopolitanism, as the dissenting and separate opinions to the judgment make clear.

Judge Higgins, in her dissent, took issue with the allowing the importance of an issue to drive the Court's jurisdiction: “‘importance’ of subject-matter cannot serve to transform a contingent defence into a subject-matter that is ‘desirable’ to deal with in the text of the Judgment and in the dispositif.” Judge Parra-Aranguren states the objection plainly: “the Court should have considered Article XX, paragraph 1(d), as a defence to be examined only in the event of its having previously established that the United States had violated Article X, paragraph 1, of the 1955 Treaty”. Judge Kooijmans, in a separate opinion, makes clear the unorthodox nature of the Court's opinion:

The operative part does not immediately respond to the claim as formulated by the Applicant, but starts with a finding not essential to the Court’s decision on that claim…. I have checked the operative parts of all judgments of this Court and its predecessor, the Permanent Court of International Justice, in contentious cases and none of them starts with a finding that is not determinative for the Court’s disposition of the claim.

The irregularity that Kooijmans emphasizes underscores the progressive expansion of the Court's jurisdiction, in keeping with the relative expansion first observed in the Nicaragua and Lockerbie cases. The Court is empowered to try the questions of law that the parties have put before the Court by statute or by special agreement; a limitation that was accepted in the Fisheries Jurisdiction and Tehran Hostages cases. And if the complaint before the Court in Oil Platforms was not a valid one, the defense was never a question for the Court. Trying questions of law not properly before the Court is in tension with the consensual nature of the Court's jurisdiction, and in tension with the consensual nature of orthodox international law generally.

In trying a question not allowed the Court by some express demonstration of permission, the Court puts itself in a position to judge a state according to a norm

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that the state has not affirmatively provided to be justiciable, or not justiciable by the ICJ, in the case at hand. Thus the Court, on behalf of the international community, can be seen in its Oil Platforms judgment to include within its authority non-consensual law: objective norms that will not be denied according to the subjective rights of states. The Court, and the law according to which it is empowered, becomes in this instance autonomous of the will of states.

Judge Simma writes in support of key aspects of the Court's ruling. In doing so, he presents perhaps the most compelling understanding of the Court's purpose in ruling on a moot point. Moreover, to the extent his opinion offers a persuasive rationale by which to understand the Court's opinion, it also offers perhaps the clearest affirmation yet of aspects of Judge Álvarez's alternative jurisprudence. Judge Simma describes his concurrence with the Court's judgment as a matter of Rechtspolitiek, which he explains as follows:

I welcome that the Court has taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state its view on the legal limits on the use of force at a moment when these limits find themselves under the greatest stress. Although I am of the view that the Court has fulfilled what I consider to be its duty in this regard with inappropriate restraint, I do not want to dissociate myself from what after all does result in a confirmation, albeit too hesitant, of the jus cogens of the United Nations Charter.447

By reference to the jus cogens of the UN Charter, Judge Simma treats it as a constitutional document, one establishing an autonomous normative order, with norms that supersede the subjective rights of states. Within that constitutional scheme, perhaps by virtue of its rudimentary nature, the Court enjoys a role that includes advocacy, as well as adjudication. As such, Judge Simma recalls the turn to policy observed as a matter of scholarship in Chapter 2, as well as Judge Álvarez's innate cosmopolitan embrace of politics and a political role for the Court under a new international law. The Court is responsible for the defense and development of an international public order that is independent of the will of states.

Moreover, in arguing in favor of the Court's role in international politics, Judge Simma's language is reminiscent not only of Judge Álvarez's opinions, but Judge Singh's opinion in *Nicaragua* as well. Judge Simma's language is worth quoting length:

> Everybody will be aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2 (4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter. In this debate, "supplied" with a case allowing it to do so, the Court ought to take every opportunity to secure that the voice of the law of the Charter rise above the current cacophony. After all, the International Court of Justice is not an isolated arbitral tribunal or some regional institution but the principal judicial organ of the United Nations. What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force. If such voices are an indication of the direction in which legal-political discourse on use of force not authorized by the Charter might move, do we need more to realize that for the Court to speak up as clearly and comprehensively as possible on that issue is never more urgent than today? In effect, what the Court has decided to say - or, rather, not to say - in the present Judgment is an exercise in inappropriate self-restraint.448

Just as Judge Singh advocated the Court's seizing an opportunity to promote certain interests as a matter of international law, Judge Simma would have the Court take advantage of a chance to amplify “the voice of the law” against a threat perceived outside of the courtroom. Thus, though Judge Simma begins from a roughly constitutional argument in favor of Charter jus cogens, the broad responsibilities that he gives the Court suggest an innate cosmopolitan premise, shared by Judge Álvarez: the world normative community already is an objective reality, though it lacks elements of traditional political organization, such as legislative or executive bodies capable of exercising positive authority. The Court's

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cosmopolitan responsibility is not only a matter of law, but “a matter of principle”.449 In this way, Judge Simma marries constitutional cosmopolitanism to innate cosmopolitanism in keeping with the overlap between the two as constitutional and proto-constitutional doctrines, observed in Chapter 3.

Perhaps most importantly, if there is no better way to understand why and on what authority the Court decided a question that was never properly asked as a matter of law, then Judge Simma’s separate opinion offers a coherent account of an enactment of cosmopolitan normative authority on the part of the Court. The relationship between the Court’s majority opinion and Judge Simma’s opinion resembles the relationship between the Court majority and Judge Álvarez in the *Fisheries* case decided in 1951,450 as described by J.H.W. Verzijl: “The Court has evidently hesitated to openly follow the lead given to it by the Chilean Judge, Alejandro Alvarez.…. But what else, in reality, has the Court done?”451 The Court rendered judgment on its own motion, in a sense, to adjudicate a question not properly before it, doing so in defense of an objective public order associated with the Charter. As such, the Court approximates legislative as well as executive duties within that order, by virtue of responsibility for the development and defense of world norms for the world collective. Thereby, principles of innate cosmopolitanism discernible in the jurisprudence of the Court reach a new height in the *Oil Platforms* decision.

**Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory**

In the *Wall* advisory opinion, the question put to the Court for the most part raised issues of humanitarian law, rather than questions directly concerning the resort to force. Accordingly, I will treat it here only briefly for those aspects applicable to the jus ad bellum. The Court began its inquiry into the law with the text of Art. 2(4), then took the occasion to indicate that the Israeli wall, insofar as it was built on land

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449 Ibid., p. 327.
taken in the Six-Day War of 1967, transgressed the principle stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States: “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”

Holding the non-acquisition principle to represent binding customary law, the Court further noted that “[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination.” The Court’s opinion exhibits a close connection, in its brief treatment of the resort to force, with concern for territorial and political integrity, as well as the right to self-determination.

Elsewhere, the Court considered the legitimacy of the wall as an act of self-defense under Art. 51. The Court rejected the possibility, holding that the wall was responsive to activity within territory controlled by Israel, not imputable to a foreign state, thus falling outside the ambit of Art. 51. The Court denied self-defense under the circumstances on the grounds that Art. 51 “recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State”, thus not in the case of an armed attack by non-state actors against a state. Thereby the Court maintained an understanding of the Charter that limits the right of self-defense under Art. 51 to situations of armed attacks by other states. That holding in and of itself might suggest an understanding of the Charter rules concerning resort to force predicated wholly on the acts of states, basically at odds with any more expansive cosmopolitan understanding.

For the most part, the Court’s opinion does not appear to allow much purchase for a cosmopolitan normative scheme in the international law controlling the resort to force. Nonetheless, the Court’s willingness to confront an especially controversial issue of peace and security, namely the Israeli-Palestinian conflict, at least demonstrates a continued appreciation of the broad responsibility Judge Álvarez described for the Court, part of a trend begun with Nicaragua and sustained through Oil Platforms, including assumption of responsibility for matters of juridical conscience in the interests of the world as a whole.

In addition, the opinions of Judges Higgins, Kooijmans and Buergenthal opine in

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454 Ibid., p. 194.

455 Ibid., p. 194.
favor of the capacity of the Charter to treat states and non-state actors alike, thus extending Charter norms outside the context of purely inter-state relations, and recalling the assimilation of individuals alongside states under the innate cosmopolitan model. Moreover, Judge Koroma, in his separate opinion, opened with an affirmation of “the fundamental international law principle of the non-acquisition of territory by force.” Judge Elaraby, too, in a separate opinion noted the “fundamental principle” that “[t]he territory cannot be subject to annexation by force.” Pursuant to that principle, he stated: “The prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a jus cogens principle, a peremptory norm from which no derogation is permitted.” Both opinions, then, recall an invocation of fundamental principle that once again is not exactly identical with general principle under Art. 38(1)(c) of the Court’s Statute, but may be observed throughout the jurisprudence of the Court. Fundamental principle is not dispositive of reliance on the innate cosmopolitan model, but the more regularly the Court turns to statements of general principle, the more it appears to be relying on norms manifest broadly in patterns of behavior observed in the world as a whole, rather than anything more clearly or rigourously in keeping with a subjective system of law or positivist legal analysis.

**Armed Activities on the Territory of the Congo**

The **Congo** case concerned, among other things, the right of self-defense in situations where the alleged underlying use of force was not necessarily attributable to another state. The Democratic Republic of the Congo had alleged illegal use of force on the part of Uganda, and Uganda in turn defended itself on grounds of self-defense, among other things.

Notably, before proceeding to the questions of law before it, the Court expressly raised its own role in resolving the case. Acknowledging in this case a “complicated and tragic situation”, the Court nonetheless made clear

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458 Ibid., p. 254.
a narrow role: “the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.” The Court’s language here appears at odds with arguments for progressively expansive authority and responsibility that have been traced up to the *Oil Platforms* and *Wall* judgments. Having limited itself to a narrow answer for the question before it, the Court produced a ruling on the resort to force and self-defense that was closely tailored to the complex facts of the case, if somewhat ambivalent as a matter of law. The Court held that Uganda did not enjoy a right of self-defense against the DRC, putting to one side questions raised concerning the right to self-defense against other parties and non-state actors.

Moving on from the arguments of self-defense, the Court elsewhere affirmed, with respect to the resort to force generally, “that acts which breach the principle of non-intervention ‘will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations’.” In that light, the Court followed its ruling on the facts with a straightforward endorsement of the collective security system under the express terms of the Charter:

> Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

Two principal aspects of the Court’s judgment came under criticism in the separate opinions of the judges to the *Congo* case. First, Judge Kooijmans lamented the lack of clarity regarding the Court’s treatment of self-defense in response to non-state actors, reiterating an argument he made in a separate opinion to the *Wall* advisory opinion, in which he held that the

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460 Ibid., p. 22.

461 Ibid., p. 227.

462 Ibid., pp. 223-24.
right to self-defense under Art. 51 is not limited to situations of armed attack by states only.\textsuperscript{463}

Second, Judge Elaraby, while concurring with the Court’s finding that Uganda violated the prohibition on the use of force, forcefully criticized the Court on the grounds that it “should have explicitly upheld the Democratic Republic of the Congo’s claim that such unlawful use of force amounted to aggression”.\textsuperscript{464} Despite the absence at the time of a definition of aggression under conventional and customary international law, Judge Elaraby found the Court obliged and able, largely by reference to its own dicta in prior cases, to “establish a normative test [for aggression] which should be operational across the board”.\textsuperscript{465}

Aggression represents for Judge Elaraby a heightened violation of Art. 2(4), rising to the level of an international crime. Thus he would have used the Court to establish norms conducive to the development of international criminal law. He acknowledges that the Court enjoys no criminal jurisdiction, but favors the expansion of the Court’s authority on the basis of potential benefits for the international community: “The International Court of Justice has not been conceived as a penal court, yet its dicta have wide-ranging effects in the international community’s quest to deter potential aggressors and to overcome the culture of impunity.”\textsuperscript{466}

In arguing to act on behalf of the interests of the international community – a community sufficiently cohesive to support the development of criminal law sanctions for violations of public order principles – Judge Elaraby, in his dissent, takes farther the innate cosmopolitan discourse from the bench of the Court, despite the countervailing posture of the majority in its decision. Moreover, Judge Elaraby claims to find contemporary consensus where once Judge Álvarez was in the minority, purporting to identify a progressively disappearing distinction between law


\textsuperscript{465} Ibid., at 331.

\textsuperscript{466} Ibid., at 332-33.
and politics in the jurisprudence of international security: “There is now general recognition that … “the dividing line between political and legal disputes is blurred, as law becomes ever more frequently an integral part of international controversies”.”

The argument, mixing appeals to law and politics, in favor of an ability effectively to legislate and try cases for their capacity to effect the development of international criminal law, represents a radical appeal to expand the Court’s role and authority. Moreover, expanding the Court’s role and authority as a platform for international criminal legal development presupposes, absent any clearer positive law grounding, the sort of social organization that is inherent in the nature of criminal sanction. As such, Judge Elaraby’s proposal appears to be one of the more radical appeals since Judge Álvarez to the world unit as a social and political collective capable of sustaining discrete normative authority, broadly administered by the Court.

Judge Simma joined the critiques of both Judges Kooijmans and Elaraby. Further, in his own opinion, Judge Simma laments the Court’s failure to confront an issue of importance, as it had done in its Oil Platforms case, irrespective of formal limitations:

the Court could well have afforded to approach the question of the use of armed force on a large scale by non-State actors in a realistic vein, instead of avoiding it altogether by a sleight of hand, and still arrive at the same convincing result. By the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of “aggression”, the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations.

In this respect, if Judge Simma’s separate opinion in Oil Platforms made clear a high-water mark of progressive authority assumed by the Court, in the manner of Judge Álvarez’s cosmopolitan jurisprudence, Judge Simma’s separate opinion in the Congo case makes clear a retreat.

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467 Ibid., at 330 (citing Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Provisional Measures, Order of 14 April 1992, [1992] I.C.J. Reports 114, at 139 [Judge Lachs]).

Conclusion

Looking back across the jurisprudence of the Court and its judges, cosmopolitan norms, and especially norms flowing from the innate cosmopolitan model, can be seen to have entered the discourse in three related forms. First, and most broadly, norms predicated on innate cosmopolitanism have been cited as foundational to new international law announced with the Charter, effectively displacing the sources of international law with a primary focus on law arising from norms of interdependence. This is most clear in the alternative jurisprudence of Judge Álvarez. Second, somewhat less broadly, norms have been adduced in favor of expanding the traditional sources of international law, to include norms identifiable with the interests or will of the world. Examples of this can be seen in the separate opinions that would base their ruling on terms of innate cosmopolitan phenomena, such as the demands of world public opinion, or an international juridical conscience.469 Third, and most narrowly by comparison with the other two categories, norms drawn from innate cosmopolitanism are discernible in opinions favoring an expansive jurisdiction for the Court. An expansive jurisdiction may be observed in a line of the Court’s own judgments, amounting to a sustained jurisprudence, from Nicaragua through Oil Platforms.

The first category is revolutionary in nature. Judge Álvarez posits an objective, cosmopolitan law to have succeeded in place of pre-Charter international law. The Charter is a touchstone, and the organization of the UN represents an aspect of the new international order, but neither is definitive of it.470 Rather, the new international order is bound up with the reality of an interdependent world collective, and the Court is its primary exponent. The second, though still radical, does not displace the tradition of modern international law, so much as it adds to that tradition with new sources of valid legal norms drawn from the innate cosmopolitan model. Opinions in this category carry forward the progressive project by supplementing the subjective sources of international law (positive expressions of state will) with objective ones (positive expressions of world community). The third category operates, by contrast, entirely within the system of

469 See, e.g., Legality of the Threat or Use of Nuclear Weapons (Judge Weeramatry, Dissenting Opinion), supra note 431, and Legality of the Threat or Use of Nuclear Weapons (Judge Shahabuddeen, Dissenting Opinion), supra note 425.

470 “L’actuelle Organisation des Nations unies … n’est donc qu’une institution à l’intérieur de ladite société internationale universelle. (“The present United Nations Organization … is therefore merely an institution within the universal international society.”) Admission of a State to the United Nations (Charter, Art. 4) [Judge Álvarez], supra note 362, p. 68.
international law, but would give that system a more cosmopolitan character by
expanding the jurisdiction of the Court, and, by extension, the objective authority of
international law. The Court, independent of the will of states, is responsible for the
continued development of progressive norms sanctioned by them. This represents
the thinnest appeal to the innate cosmopolitan model, but also underscores overlap
between the innate cosmopolitan model and theories of constitutional
cosmopolitanism, as treated in Chapter 3, positing a constituted international
society, however rudimentary, on the basis of various normative developments
within the modern, subjective system of international law.

Altogether, the three categories of cosmopolitan jurisprudence represent a sort of
joined normative leitmotif recurring throughout the Court’s varied body of work.
Despite differences in their scope and substance, all three categories represent
continuations of efforts to assert the unity of international law above and beyond
the constraints imposed by a subjective system of law. Moreover, the three
categories can be seen to build on one another in a sort of pyramid structure,
proceeding over time from the first, broadest category, to the third, narrowest
category. As such, Judge Álvarez’s alternative jurisprudence represents both a
beginning, in terms of precedent, and a telos, in terms of substance. In sum, the
cosmopolitan jurisprudence running through the history of the Court reveals a
normative purpose founded on the innate cosmopolitan model – one that is not
necessarily an exclusive or even a paramount purpose assumed by the Court, but
which purpose, dedicated to the objective expression of the will and interests of the
world as against competing assertions of subjective right, reflects an historical
objective bound up with the innate cosmopolitan idea, and the tradition of its appeal
from Vitoria forward, as observed in Chapter 2.

The Court’s exercise of its own authority suggests a principled and professional
belief that the world as a whole enjoys interests and a general will capable of giving
rise to objective norms, and the Court is responsible for the expression, defense and
further development of those norms and, with them, the world phenomenon by and
for which they exist. The cosmopolitan purpose of the Court, then, understood
according to the dialectic of the Court over time, is to provide for those norms in
the interest of the world as a whole, while operating within the technical limitations
imposed by a system still defined by subjective powers. Thus the discourse of the
Court can be seen to favor the introduction of objective norms and objective
normative authority into the traditionally subjective system of international law. In
that context, however, the innate cosmopolitan model also suggests a superior
responsibility and competence, vested in the Court, over the politics of a world phenomenon in conformance with the innate cosmopolitan model.
Conclusion

Mapping the cosmopolitan schools 180
Innate cosmopolitanism and some criticism 185
Criticism reflected 192
Working with the intuition 197

What is cosmopolitanism in international law? It is not identical to liberal cosmopolitanism, nor is it identical to constitutional arguments of international law, though both of these represent important streams of cosmopolitan thought in international legal discourse. Cosmopolitanism in international law, at its broadest, means an inclusive and harmonious legal system predicated on universal norms applicable uniformly across the world. But arguments at international law concerning cosmopolitanism – including arguments for cosmopolitanism and arguments critical of cosmopolitanism – have been insufficiently precise and insufficiently thorough in their adoption and treatment of cosmopolitan terms and principles. Moreover, in addition to liberal and constitutional cosmopolitanism, there exists the third stream of cosmopolitan thought, namely innate cosmopolitanism, which has never achieved the level of a discrete doctrine, but which has been central to the historical narrative and development of modern international law. In this work, I have explored the discrete domains of the three streams of cosmopolitan thought – their distinct terms and principles, as well as their areas of convergence – and have looked in particular at the set of ideas represented by the various expressions of innate cosmopolitanism over time. Because innate cosmopolitanism has not been comprehended as a discrete doctrine, study or stream of thought, it in particular – more so than liberal or constitutional cosmopolitanism – has not been confronted, supported or treated with adequate specificity in international legal discourse.

Liberal cosmopolitanism is an ethical theory predicated on normative individualism, applying regardless of political boundaries, and associated with core moral rights vested in all individuals equally. Constitutional cosmopolitanism is for the most part a positive legal theory predicated on the valid achievement of universal norms
supporting a cosmopolitan arrangement in world affairs, associated with a hierarchy of norms recognized under international law. Innate cosmopolitanism is a theory that posits the world as a whole to represent a discrete social and political complex with a will and interests of its own, irrespective of any such expression in positive international law, but capable of sustaining a unique normative mandate in the international legal system. Innate cosmopolitanism represents the elevation of certain ideas of political theory to provide for normative authority outside of the traditional, consent-based strictures of the international legal system. Thus an idea of social connectedness and interdependence in the world is taken to establish a valid source of world norms and, with them, international legal norms, even absent any allowance for the same under the traditionally-recognized sources of positive international law. Innate cosmopolitan ideas may be seen, in Chapter 4, to lend themselves to the practice of international tribunals such as the World Court, where the appeal to an innate cosmopolitan mandate allows the Court an ad hoc authority to rule in the perceived interest of the world, where narrow terms of positive international law might not allow a comparable exercise.

The relative lack of sophistication and differentiation in the treatment and appreciation of cosmopolitanism in international law to date has impeded both the adequacy of the arguments for cosmopolitan ends, as well as the criticism of them. Liberal cosmopolitanism, for instance, has suffered for a failure to acknowledge alternative cosmopolitan visions as a matter of contemporary political and legal theory. Constitutional cosmopolitanism too often conflates the cosmopolitan ambition with positive terms of international law. Innate cosmopolitanism, for want of any discrete treatment heretofore, has approximated liberal and constitutional cosmopolitan arguments in ways that have not always been perfectly coherent. More than that, however, the relative lack of awareness of a discrete body of innate cosmopolitan ideas has allowed those ideas to escape sustained and specific critical attention, just as it has impeded the thoroughness of their development in any self-aware doctrinal sense.

Focused critical attention on innate cosmopolitanism reveals an ostensibly progressive doctrine that may nonetheless serve as cover for the maintenance of status quo interests, to which critique I will turn in greater depth, below. But focused critical attention also suggests that the deconstructive technique (from which derives much of the recent criticism of cosmopolitanism in general, as well as the critique that I apply to innate cosmopolitanism in particular) may itself be compromised by certain shared attributes with innate cosmopolitanism; I turn to
this matter following my critique of innate cosmopolitanism, below. That compromise leads to a final consideration of the enduring appeal of innate cosmopolitan arguments as a matter of legal theory, and their possible redemption, which I consider in conclusion of this work. First, immediately below, I will review and map the respective domains of the three schools of cosmopolitan thought, drawing on Chapter 3, followed by a closer look at arguments central to innate cosmopolitanism in particular, drawing largely on Chapters 2 and 4.

Mapping the cosmopolitan schools

As Chapter 3 makes clear, liberal cosmopolitanism generally effects a critique of the institutions and norms of international law, doing so for the most part from an ethical orientation situated outside of typical international legal doctrine and discourse. Constitutional cosmopolitanism, by contrast, operates for the most part within the discourse of international law, however creatively. Constitutional cosmopolitanism observes the achievement of a hierarchical, constitutional arrangement of norms and institutions under international law, and joins the recognition of a world body politic to its positive expression as a matter of law. In this context, innate cosmopolitanism is situated between the two. By comparison with liberal cosmopolitanism, innate cosmopolitanism operates within a typically legal discourse, but by comparison with constitutional cosmopolitanism, innate cosmopolitanism operates outside of orthodox constraints of international law, conceived according to a tradition of voluntary positivism. Innate cosmopolitanism identifies in the international system a normativity that is vested in a world body politic, or world collectivity that exists independent of any formal constitutional achievement or other positive expression under international law.

Each of the three cosmopolitan theories of international law shares a common aim to transcend or circumvent a system of rules subjectively defined by discrete actors, and each does so by appeal to an objective grounds for announcing and applying universal norms. Powers and authority vested with subjective interests continue to challenge the integrity of public international law, and cosmopolitan theories in general address that challenge by meeting subjective authorities with an objective one. Accordingly, each school of cosmopolitan thought posits some harmonious set of universal norms, capable of sustaining a unified system of law that is global in scope. As noted, however, the effort to achieve objective normativity under international law in theory and practice remains a
controversial one. But while critical legal theorists such as Martti Koskenniemi, among others, raise important discontents associated with cosmopolitanism in international law, the critique suffers for a lack of precision.

Chapter 3 makes clear the different domains of the three schools of cosmopolitan thought. What differs among them is roughly threefold: first, the normative foundations; second, the nature of the norms that arise out of those foundations and the method for determining them; and, finally, the nature of the legal rules and legal system that follows on the normative grounds. Liberal cosmopolitanism is founded in a limited set of moral premises, specifically liberal moral axioms, which are posited to be universally acceptable, and are expressive of normative individualism. The norms that follow are constructively developed out of those premises. Observing some model of the social contract thought experiment, the relevant law and legal rules that follow are structured around the individual rights not ceded to the power and authority of the political community; as such, they are not subject to political control. They are indissolubly attached to each individual qua individual.

Constitutional cosmopolitanism, by contrast, is founded in positive settlement or convergence around constitutional norms among parties, which establishes an authority beyond each individual party to the settlement or convergence, together with a presumption of legitimacy. The settlement or convergence may be in the form of a discrete document, such as the UN Charter, or some other acknowledgment of hierarchically arranged norms recognized as a matter of international law. The rules that follow reflect a recognition of common legal authority, and are determined by means associated with the acknowledged terms of the world constitution as a formally valid legal construct. Thus a constitution identified with the UN Charter will produce norms in keeping with the organization as established by that document; a constitution identified with a hierarchy of norms including *jus cogens* lately inclines towards the superiority of human rights norms. Following constitutional cosmopolitanism, the constitution is achieved by presumptively legitimate authorities—in the first instance, states—capable of affirming a valid constitutional framework, which constitution in turn establishes and defines as a matter of law the world body to which it applies.

The source of normative objectivity for innate cosmopolitanism is the presumption of an ineluctable world collective, an interdependent social or political complex encompassing the world as a whole. As discussed in Chapter 2, the world collective
is larger by definition than all other worldly collectives, and inclusive of all of them, which contributes to the objective authority the world collective enjoys vis-à-vis all other collectives. The premise of the world collective is founded in the perceived reality of an autonomous phenomenon, an interdependent social or political unit, capable of manifesting interests and a will of its own, which may be perceived either by means of intuition or by scientific observation. The norms that follow are derived from the nature of that reality, insofar as it may be comprehended by the lawmaker or magistrate empowered to pronounce on the interests and will of the world as a whole. The rules to which the innate cosmopolitan model gives rise are universal, but historically contingent; they are supposed to reflect the lived reality of the world social complex as it exists in time.

The phenomenon of world collectivity exists prior to or irrespective of any positive acknowledgment of the same under international law; its normative potential is not contingent on its recognition as a matter of constitutional, conventional or even customary law. If anything, as noted in Chapters 1 and 4, the innate cosmopolitan phenomenon is acknowledged as a matter of international law according to terms of general principle, but in a loosely defined way that is not identical with the adoption of general principle as a source of law under Art. 38 of the Statute of the World Court. Consequently, association with terms of general principle has not brought the innate cosmopolitan model within the orthodox constraints of positive international law. Likewise, the recourse to terms of general principle has not given rise to any more systematic development of innate cosmopolitan argumentation at law, which association with Art. 38 might otherwise have promoted. Rather, innate cosmopolitanism continues to find expression in a largely ad hoc manner, as a tool used by a tribunal such as the ICJ to extend normative authority over a particular issue, as it arises, which issue might otherwise not be subject to the will of the Court according to terms of positive international law.

While innate cosmopolitanism typically arrives at ad hoc announcement of legal rules in application, however, it nonetheless begins from a more consolidated understanding of the unit that it observes to establish the cosmopolitan order than either or the other two streams of cosmopolitan thought. Constitutional cosmopolitanism involves a process that begins with states and peoples, whereby the traditional subjects of international law (who are not, or not necessarily, cosmopolitan) establish new cosmopolitan authority by means of constitutional settlement among themselves. Liberal cosmopolitanism, proceeding from an ideal of justice founded in normative individualism, observes a bottom-up
process driven by all the individuals in the world, from and for whom cosmopolitan norms flow. Innate cosmopolitanism, proceeding from a perception of interconnected social phenomena, observes a top-down process, by which cosmopolitan norms follow on the particular nature of the global social or political complex as a whole.

The difference between liberal and innate cosmopolitanism is stark: individuals qua individuals drive liberal cosmopolitan normativity, whereas the world as a whole, representing an interdependent and ‘subjectivized’ collective – as that term is used in Chapter 2 – drives normativity according to the innate cosmopolitan model. The seemingly inverse relationship of liberal and innate cosmopolitanism, however, goes farther, with a twist. Liberal cosmopolitanism, in beginning with the individual, begins with the individual abstracted, according to generalizable attributes of every individual that may be universally recognized. What looks like a bottom-up process produces a consolidated substance in keeping with the moral unity of normative individualism. Innate cosmopolitanism, in beginning from a unified world complex, attempts to assimilate the whole of the world’s diversity, taking theoretical account of the variety of acts and expectations relevant to world interconnectedness for their normative value. Instead of a constructive process developing on universally-recognized attributes shared by individuals, innate cosmopolitanism searches for patterns in the sum of engagements that make up the historical expression of interdependence. As a result, in theory, the potential normative content is more varied, and universal norms are typically tied to the changing demands of public order or public interest.

In establishing the cosmopolitan order differently – by the appeal to normative individualism or by the study of the world collective – liberal and innate cosmopolitanism emphasize different aspects of cosmopolitan thought. Liberal cosmopolitanism emphasizes universal rights; innate cosmopolitanism emphasizes the unity of world community. The former comprehends cosmopolitanism in terms of a world of individuals; the latter comprehends cosmopolitanism in terms of an individual world. Ultimately, the distinction in the different aspects of cosmopolitan thought underscores that there are at least two different ways by which to understand the nature of a cosmopolitan normative order, at least as a matter of international law: namely, in accordance with substance or source. Liberal cosmopolitanism is developed constructively out of select moral premises; the source of world norms is identified by means
of universal substance. Innate cosmopolitanism is developed inductively or intuitively out of observations (or assumptions) of world behavior; the universal substance of world norms is identified by means of historical source. The distinction underscores the point explored in Chapter 3, that liberal cosmopolitanism situates itself outside of international law, as a matter of ethical theory. Innate cosmopolitanism, on the other hand, situates itself within the legal discourse, and remains vested in a discrete theory of sources for purposes of law-ascertainment.471

As a matter of discourse, constitutional cosmopolitanism hews still more closely to the traditional terms of international law, at least insofar as it purports to observe a movement towards a constitutional arrangement as a matter of valid positive law. As between the normative individualism of liberal cosmopolitanism, and the communal orientation of innate cosmopolitanism, however, constitutional cosmopolitanism is agnostic. It is the demonstrable process of normative settlement or arrangement under the terms of international law that counts, whether those terms adopt substantive ethical criteria, a naturalist appreciation of public order, or anything else. But because innate cosmopolitanism posits a world social phenomenon capable of supporting normative authority, it may be understood to prefigure the constitutional project in a particular way. The norms observed and affirmed as a matter of innate cosmopolitan doctrine may be construed not only to be part of, but also to be constitutive of the world social or political phenomenon. As such, innate cosmopolitanism may be taken to prepare the grounds for identifying a uniquely global political community capable of adopting or recognizing a formal constitutional arrangement.

While innate cosmopolitanism may prefigure a constitutional project, however, it maintains a crucial distinction, as noted in Chapters 2 and 3: according to the innate cosmopolitan model, world collectivity precedes any expression or recognition of the world body politic as a matter of law. The reality of the world body, together with the normative potential it enjoys, is a matter of observational proof or appreciation, but is not contingent on affirmation under law. By contrast, following constitutional cosmopolitanism, the affirmation of the world body is contingent on its recognition as a matter of international law. The distinction is especially important in terms of the critique raised in Chapter 2, in

the context of the work of Hans Kelsen, according to which the recognition of a body politic may not precede its recognition under law, to which critique I return below.

Innate cosmopolitanism and some criticism

Within its particular domain of legal theory, the innate cosmopolitan argument that runs through the theory and practice of international law is, in its simplest terms, as follows: the ultimate source of authority in world affairs is the world itself, but that authority cannot be meaningfully effectuated in a system defined by the subjective interests and will of constituent actors. The argument responds to the perceived dilemma that, without recourse to a consolidated authority, such as the will of the world, international law resembles a contractual or cooperative venture, only as broad and as binding as each subjective inclination to cooperation, with no clear unifying mandate or purpose. Such a system, defined by the subjective interests of its constituent members, is not really normative in any meaningful sense of the term. Rather, reliance on subjective consent suggests that there is nothing normative outside of each individual, subjective entity or regime that the so-called international system comprises.

In response, as Chapter 2 makes clear, the innate cosmopolitan model posits a world collective that is an interdependent unit exhibiting its own subjectivity – i.e., its own interests and will. Failure to recognize the subjectivity of the world as a whole, following the innate cosmopolitan argument, reflects a failure to recognize the autonomous reality of an interdependent world, and results in a mistaken concept of international law. International law must be conceived, so the argument goes, in terms of the mandate and ends of the interdependent world complex, which is independent of, and cannot be unilaterally defined by any one or several of its constituent parts. Following the innate cosmopolitan model, the failure of positive international law to reflect the foundational mandate represented by the world as a whole, independent of constituent parts, is synonymous with a failure of normativity. Innate cosmopolitanism holds that, to escape nationalistic solipsism, it is only on account of the normative potential of the world as a whole that international law may truly be argued to exist in the first place. In that vein, the work of Scott, Hudson, Álvarez and Lauterpacht, from the first half of the 20th century, all variously hold that institutions of international law must be understood to operate in the service of the interests of the world collective, not strictly in the
interests of any one or several constituents. Carried into the jurisprudence of the ICJ, the reality of an objective world phenomenon also sustains the Court’s capacity to pronounce on norms in the world’s interest, over and against the limitations of consensual prerogative preserved by the sovereign states that appear at its bar.

Martti Koskenniemi, however, has argued that the 20th century turn (or return) to cosmopolitanism did not overcome problems for international law associated with subjective constituent powers in the international system. If anything, he observes, the turn to cosmopolitanism exacerbated the perceived diminution of international law’s normative force.\footnote{Martti Koskenniemi, The Fate of Public International Law: Between Technique and Politics, 70 Mod. L. Rev. 1 (2007), pp. 1-2.} The failure of normativity was exacerbated by a tendency, associated with cosmopolitan arguments generally, to suppress any appreciation of political contestation as a matter of law, thereby facilitating the exploitation of international legal norms and institutions as tools at the disposal of client constituencies, vested powers and subjective interest groups.\footnote{Ibid., \textit{passim}.} As noted, however, Koskenniemi’s critique is typical of a general deficiency in international legal argumentation concerning cosmopolitanism, insofar as it is insufficiently precise with respect to different cosmopolitan ideas, summoned to do different tasks, in the practice and discourse of international law. Thus Koskenniemi, like others, treats particular cosmopolitan strategies largely as part of an undifferentiated whole.

Following the analysis in the foregoing chapters, the critique can now be framed in more precise language with respect to innate cosmopolitanism: 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. I turn to each of these critical arguments now.

First, whether the innate cosmopolitan model is adopted according to intuitive assumptions or sociological assertions, it consistently resolves into an argument that

\footnote{Martti Koskenniemi, \textit{The Fate of Public International Law: Between Technique and Politics}, 70 \textit{Mod. L. Rev.} 1 (2007), pp. 1-2.}
universal norms will flow from the proper appreciation of acts, experiences and expectations bearing on interrelationship in the world. The nature of the argument is designed to accommodate variation in particular political arrangements. Because local political differentiation is an inescapable fact observed in the world as it is, the goal, as articulated by Jens Bartelson, must be “to reconcile some set of universal values with the actual plurality of values currently embodied in international society” such that “there is no need to transcend the existing order of states in order to bring a world community into being.”

Particular political communities exist, but they are reconciled with universal norms, rather than responsible for them. Thus, under the innate cosmopolitan model, the reconciliation will not be achieved by political contestation engaged in according to subjective argumentation by interested parties to a conflict. Rather, that reconciliation will be achieved by the body best situated to appreciate the full scope of diverse phenomena contributing to the comprehensive global phenomenon, from which universal norms may be derived and applied juridically.

The ICJ is the prototype institution for the purpose, by virtue of several characteristics, including a bench representative of diverse legal systems and political cultures around the world, its professional sensitivity to questions of normativity, and its mandate in the service of the organization of united nations, rather than a mandate devolved directly from any one or several constituent states. All of the qualifying characteristics of the ICJ, however, are characteristics that may be understood to insulate it from subjective political contestation. As Chapter 4 makes clear, the ICJ comes to resemble, in the absence of any other vigorous and central lawmaker that is also representative of the world, a sort of custodian for the world as a whole. The Court stands as the protector and mouthpiece of the cosmopolitan world phenomenon. But the norms that the ICJ pronounces on are comprehended by recourse to arguments of historical and sociological fact, or other purportedly cognitive phenomena such as world public opinion. Neither the judge, nor any party with an interest in a given controversy, nor any single lawmaker or lawmaking body, typically bears responsibility for the legal norm as it may be articulated in terms of innate cosmopolitanism. Restriction of the unilateral recourse to force, for example, is simply and naturally in the interest of an interdependent world as a matter of public order, rather than anything more limited.
as an article of positive law negotiated among states according to their consent. The opinion of the Court in the *Oil Platforms* case, in its extension of use of force law, reflects the interests of the world, in defiance of constraints of voluntary positive law, as though the interest of the world represents a naturally occurring norm.

Notably, however, there remains some ambiguity, among those adopting innate cosmopolitan arguments, in the means by which the interest or will of the world as a whole may legitimately be discerned, when intuition will not suffice. Judges of the ICJ, following the lead of figures such as Judge Álvarez, vary between recourse to roughly sociological assertions and assertions of world public opinion. Recourse to sociological assertions approximates a legitimacy conferred by science: the will and interests of the world collective must be comprehended according to proper observation. Recourse to assertions of world public opinion approximates a legitimacy conferred by democratic principle: the will and interests of the world must be comprehended according to some affirmation roughly identified with the world as whole. Both, however, assume that the world as a whole, so defined, is capable of giving rise to norms that will support the rule of law, and, likewise, rules of law. Likewise, in either case, the norm itself is derived from a source independent of the lawmaker and from outside the predominant sources of international law, treaty and custom. Thereby political contestation remains suppressed in the interpretation and development of international law, both among parties interested in an issue or controversy, as well as in an act of decision itself. In this context, the ICJ may be seen to act in its custodial role, according to innate cosmopolitanism, free of traditional constraints of political process or contestation. Recall, for example, the language of then-President Bedjaoui, from his separate opinion in the *Use or Threat of Nuclear Weapons* case:

> The resolutely positivist, voluntarist approach of international law still current at the beginning of the century … has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.

Judge Bedjaoui filled out the underpinning of objective international law by reference to “man's first nature”, “his ethical coordinates” and “[h]is life on earth”,

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as well as “the common heritage of mankind”. The attributes of “man” and “mankind” are not raised for their individual expression; rather, they contribute to the “subjectivization” of international community. The international community, in becoming a subjective phenomenon, acquired interests and a collective will of its own, distinct as a subjective collective from the individualized subjective entities it comprises, and demonstrating objective normative authority in its relation to them. International law, by Judge Bedjaoui’s formula, will reflect measurable attributes of the subjective collective, which is indivisible from “life on earth”.

But the methodologies of innate cosmopolitanism remain problematic. In light of the vast field contemplated to determine world norms, whether sociologically or otherwise, the method itself becomes the contested field of politics. There is too much data and too many ways to interpret it: any given set of methodological choices by which to arrive at norms that arise out of the world as it is comes to look like a particular policy and discrete political agenda. Thus the international scholarship of Alejandro Álvarez has been seen as a policy promoting Latin American interests. Likewise, Quincy Wright was clear about the perceived necessity of a turn from sociology to policy. Myres McDougal and the New Haven School, which attempted perhaps the most comprehensive effort as a matter of legal scholarship to comprehend the sum total of acts and expectations bearing on interdependence in the world – and largely introduced the vocabulary of acts and expectations into international law – ultimately defined itself as a policy science. McDougal’s policy science has since been denigrated as little more in application than propaganda for the United States.

Even where not reflective of indeterminacy, however, the limitations of method still underscore a consistent limitation evident in the various examples of recourse made to innate cosmopolitan ideas since Vitoria: the vision remains just that; it is still in the first place a matter of intuition, rather than anything more substantial or precise. Neither sociological method nor arguments from world public opinion have satisfied assumptions that the world as a whole exists as a social or political unity

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478 Ibid., p. 268, 271.
479 Ibid., p. 271.
481 Quincy Wright, Toward a Universal Law for Mankind, 63 Colum. L. Rev. 435 (1963), p. 443; and see Chapter 2, supra, pp. 62-72.
capable of sustaining its presumptive normative potential. Consequently, the most compelling invocations of the innate cosmopolitan model, from Vitoria through the political theory of Bartelson, remain fixed to a vocabulary of potentiality. As observed throughout Chapter 2, the world as a whole represents an immanent political or social community, the reality of which is identical with the possibility of its actuality. But there is something that can only be described as mystical in the turn to immanence. As Harry Jones wrote, addressing the Committee for the Study of Mankind, “any statement of social potentiality is less a matter of factual description than a declaration of faith.” The critique is particularly troubling for the innate cosmopolitan model, as the model represents an aspiration to depict the world as it exists more accurately than modern international law and politics typically allow. But instead of offering a more comprehensive rendering of the world as it exists, the theory and practice of international law founded on the innate cosmopolitan model comes to resemble a professional religion. I will return to this critique in another context in a moment.

First, there remains the third grounds for critique, perhaps counterintuitive, arising out of the premises and method of innate cosmopolitanism, namely that innate cosmopolitanism is too much invested in the status quo. The critique may be counterintuitive because the innate cosmopolitan idea is most apparent in conjunction with the progressive ambitions of the lawyers throughout 20th century who reinvigorated the innate cosmopolitan model, such as Scott, Álvarez and Lauterpacht, along with their contemporary legacy. They posited an objective, cosmopolitan authority capable of overcoming the limitations of a subjective system of so-called law, which appeared compromised and consigned to a rough state of anarchy by accommodation of the powers of independent, subjective regimes. But even as it defies traditional international law, innate cosmopolitanism appears uniquely contingent on – and thereby ultimately supportive of – historical conditions. It is the historical manifestation of phenomena such as public opinion or the patterns of behavior under conditions of interdependence that define the norms appropriate to the world as a whole under innate cosmopolitanism. The goal of international lawyers and legal scholars relying on the innate cosmopolitan model, from Vitoria forward, has been to create a more perfect formal system of law by reference to a historical reality – short of world government – capable of sustaining normativity beyond the prerogatives of subjective constituents. The ambition is similar to what Nicholas Onuf observes, in the idea of the international legal order,

concerning an intended reconciliation of the sociological jurisprudence of Myres McDougal with the pure theory of Hans Kelsen: “the order is treated by its makers and benefactors as historical reality and formal entity at one and the same time.”

In identifying the world as a whole as the proper basis of universal norms, the innate cosmopolitan model aspires to a more adequate grounding for international law as a matter of theory and historical reality. In achieving more adequate grounding, the innate cosmopolitan model defies the constraints of international law, traditionally conceived, even as it would perfect it.

But while the progressive ambition to which the innate cosmopolitan model has been harnessed is transgressive of the subjective terms of traditional international law, the innate cosmopolitan model can be seen to be nonetheless supportive of status quo conditions in fundamental ways. As Chapter 3 makes clear, where liberal cosmopolitanism expressly situates its normative authority outside of the status quo, to enable an external critique on the institutions of international law and the international system, innate cosmopolitanism expressly associates its normative authority 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 normative authority 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. That reliance on status quo conditions suggests, at least in theory, a model that ultimately serves to affirm – even in its application for reform – a historical distribution of powers and resources, favoring an established class of elites.

Recall in this light Kelsen’s primary criticism of appeal to community in the manner of the innate cosmopolitan model, for its tendency in common with natural law to allow law-makers and magistrates to observe or discover law, rather than to make or administer law by means of a more legitimate, volitional process: “the doctrine which denies that the positive law-makers really are what they pretend to be-the

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485 Chapter 3, supra, pp. 82-87.
creators of the law—has the effect, if not the purpose, of strengthening their authority.”

His reasoning is worth quoting at length:

The acts of human beings by which, from the point of view of legal positivism, the law is created, such as custom, legislation, judicial decision, consequently have a constitutive character, and which must be interpreted by natural-law doctrine as merely declaratory. From the point of view of that doctrine the organs of the community do not produce the law, they only reproduce a pre-existing law created by God, nature, human reason, or in some other mysterious way. The organs of the community may, it is true, fail to fulfill their task of finding the law and formulating it in an adequate way, but it must be assumed that, on the whole, they succeed; otherwise there would be no law realized in the world. Besides, who could be more competent to decide what natural law prescribes and whether the positive law conforms to the natural law, the true law, than the organs of the community whose task it is to find this law? To confer this competence not on the organs of the community but exclusively on the subjects supposed to obey the law, would amount to establishing anarchy.

The mystical elements of the innate cosmopolitan model—variously and optimistically referred to as immanence, a matter of potentiality, or even interdependence absent any more concrete understanding of what that term entails—serve to amplify or entrench the powers of individuals and institutions already in positions of authority. Thus the innate cosmopolitan model, however progressive its use as a matter of intent, appears nonetheless prone to reinforce the status quo in theory and effect.

Criticism reflected

Having refined the contemporary critique, I wish now to point out that elements of it may be so far reaching as to implicate the critic. Take, for example, the work of Koskenniemi, which has served as a template here. Koskenniemi’s critical theory regularly resolves into an affirmation of international law as a carrier of redeeming intuitions capable of addressing conflict in the world. In this way, it resembles the history of recourse to the innate cosmopolitan model,

487 Ibid., p. 386.
488 See, e.g., Koskenniemi, supra note 482, pp. 516-17; and Koskenniemi, supra note 472, p. 30.
by which an intuition or sense of world unity represents a lodestar for the international system. The innate cosmopolitan model stands throughout history for the intuition or proposition that some unified world conscience or consciousness, capable of giving rise to legally normative expression, represents a telos of objectivity for a system largely and conflictually defined by the subjective powers of constituent units; the failure of normativity observed in a conflict of subjective interests may be checked by the normativity assumed to exist in an immanent harmony attributed to the world as whole.

But, as was seen in Chapter 2, the underlying intuition, once employed to normative effect, comes to look like a manipulable device in the service of particular policy interests. Because critical legal theory also tends to resolve into an intuition capable of checking or at least exposing the failure of normativity in international law, the critique of innate cosmopolitanism may extend to the critic. The critical intuition that would provide a normative compass, as it were, appears to be of a kind with the innate cosmopolitan intuition. Ultimately, it is no longer just the norms and rules of international law that are indeterminate: the critical intuition that would redeem their normative validity and legitimacy appears indeterminate as well.

To summarize briefly, indeterminacy of substance and method vitiates the normative potential of the innate cosmopolitan model, such that its application in international law ultimately appears only to reaffirm, both in theory and as a matter of policy, a historical distribution of powers and resources. Moreover, that affirmation of the status quo appears to hold even when the model is joined to otherwise progressive ambitions for reform. As noted, however, the problems of indeterminacy reflect a problem with the underlying vision: the intuition of an objective normative authority identified with the world as a whole, if it is not a straightforward cover for a policy agenda, becomes instead an article of faith. In the latter case, it is an article of faith that is assumed to be necessary to overcome the contradictions and dysfunctions associated with a subjective system of law, and guide that system towards a more satisfactory normative disposition. In these terms, however, the innate cosmopolitan idea may be discerned in the critical legal school of thought. Koskenniemi’s critical work first explicates the dilemma of indeterminacy, then identifies a corrective, for purposes of international law, in the form of a sort of presumptive normative compass – which normative compass resembles the intuitive faith exhibited by innate cosmopolitanism.
In his earlier work, Koskenniemi identifies a normative compass with the imagination; in his later work, it takes on a still more spiritual dimension. He begins from a critique of international law and international lawyers for failing to recognize or acknowledge the inevitability of political contestation, such that the practice and discourse even of progressive and cosmopolitan international law becomes selectively associated with and co-opted by policy agendas:

our inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself, rely on essentially contested – political – principles to justify outcomes to international disputes.489

In *From Apology to Utopia*, in its first edition, the imagination is the corrective to the critical dilemma: “As international lawyers, we have failed to use the imaginative possibilities open to us”, and “[n]ormative imagination – reasoned folly – must take over where the technique of legal interpretation left off.”490 Imagination already suggests the visionary character that marks the long tradition and appeal of innate cosmopolitanism, and continues to represent perhaps its most persuasive attribute. As of *The Gentle Civilizer of Nations*, just over ten years later, Koskenniemi’s language is changed. The universal is no longer exactly or simply redeemed by imagination; in its place, in language that Bartelson would also approximate shortly thereafter, Koskenniemi explains that the universal “is neither a fixed principle nor a process but a horizon of possibility that opens up the particular identities in the very process where they make their claims of identity.”491

Finally, by the time of Koskenniemi’s 2007 address before the London School of Economics, which address represents one of the two fullest statements of revision to his earlier work and response to criticism it received,492 the nature of the normative compass that informs his critical project is further developed and changed. To begin with, the critical project is clearly presented as a project of critical universalism: “The task for international lawyers is not to learn new

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491 Koskenniemi, *supra* note 482, p. 506 (emphasis in original).
managerial vocabularies but to use the language of international law to articulate the politics of critical universalism.” Furthermore, the politics of critical universalism take on an apparently spiritual character. The horizon of possibility is changed to a horizon of transcendence, and what was once a matter of imagination has become a matter of faith. A passage from Koskenniemi’s conclusion from the article that was developed out of his address is worth quoting at length:

International law increasingly appears as that which resists being reduced to a technique of governance. When international lawyers are interviewed on the Iraqi war, or on torture, or on trade and environment, on poverty and disease in Africa – as they increasingly are – they are not expected to engage in hair-splitting technical analyses. Instead, they are called upon to soothe anxious souls, to give voice to frustration and outrage. Moral pathos and religion frequently fail as vocabularies of engagement, providers of ‘empty signifiers’ for expressing commitment and solidarity. Foreign policy may connote party rule. This is why international law may often appear as the only available surface over which managerial governance may be challenged, the sole vocabulary with a horizon of transcendence – even if, or perhaps precisely because, that horizon is not easily translated into another institutional project. I often think of international law as a kind of secular faith. When powerful states engage in imperial wars, globalisation dislocates communities or transnational companies wreck havoc on the environment, and where national governments show themselves corrupt or ineffective, one often hears an appeal to international law. International law appears here less as this rule or that institution than as a placeholder for the vocabularies of justice and goodness, solidarity, responsibility and – faith. I do not think international law is often invoked because of the sophistication of its rules or institutions. Those rules or institutions are as vulnerable to criticism as any other rules of institutions. The fact that they are ‘international’ is no proof of their moral value. But the tradition of international law has often acted as a carrier of what is perhaps best described as the regulative idea of universal community, independent of particular interests or desires. This is Kant’s cosmopolitan project rightly understood: not an end-state or party programme but a project of critical reason that measures today’s state of affairs from the perspective of an ideal of universality that cannot be reformulated into an institution, a technique of rule, without destroying it. The fate of international law is not a matter of re-employing a limited number

of professionals for more cost-effective tasks but of re-establishing hope for the human species.494

Like other innate cosmopolitans, Koskenniemi has reconstructed Kantian cosmopolitanism. Applied to international law, Koskenniemi would redeem cosmopolitanism by seeing international law reconceived such that it would finally fulfill a traditional role as a carrier of the regulative idea of universal community. Moreover, that role corresponds with the actual appeal to international law in the world and by the world. International lawyers are appealed to for the purpose of “soothing anxious souls” and “to give voice to frustration and outrage”. International law is a secular faith for the world at large, such that international lawyers resemble its priests, capable of “re-establishing hope for the human species”.

Taken together, the foregoing terms and propositions appear of a kind with the ideas and language that have marked innate cosmopolitanism in international law from Vitoria forward as part of a project intended to be progressive, as well as transgressive of subjective orthodoxy in the international system. Likewise, Koskenniemi’s language conforms to the criticism, noted above, that Harry Jones leveled at innate cosmopolitan ideas, namely that they represent articles of faith. The innate cosmopolitan model, like the critical universalism described by Koskenniemi, would be progressive and transgressive by virtue of providing a normative telos or orientation capable of moving a system of law otherwise subject to the historical vicissitudes of atomized powers and interests. Koskenniemi’s reliance on faith and hope, and his eschewal of more traditional terms of legal discourse and practice, represents a similar resolution into normative intuition, a sense of a normative endpoint, reference point or “horizon”, one that moves with history but cannot be made perfectly clear by technical means, and instead must rely as well on a “gut feeling”.495

494 Ibid., p. 30.
495 Koskenniemi, supra note 492, p. 18.
Working with the intuition

That even critical legal theory resolves into an intuitive assumption similar to that of innate cosmopolitanism attests to the enduring appeal of the innate cosmopolitan idea, despite its discontents. This project is not, however, directed at how the innate cosmopolitan model reflects on critical legal theory. Rather, the possibility that critical legal theory exhibits an innate cosmopolitan character even as it deconstructs the innate cosmopolitan model is meaningful here with respect to what it reveals about the seemingly inescapable recourse to innate cosmopolitan ideas or sentiment. The widespread persistence of the appeal of innate cosmopolitanism suggests that it will not simply be dismissed. Likewise, if the central dilemma facing the innate cosmopolitan model is that, in the end, it boils down to policy and politics, even Koskenniemi has recognized that “a demonstration that ‘it all depends on politics’ does not move one inch towards a better politics.” If, where other means are lacking, the resort to intuition represents a viable – or even merely irresistible – means of retaining some sense of normative orientation in the resolution of controversies under international law, then its role in the law must be acknowledged.

Consider, in this light, the comments of Judge Simma before the European Society of International Law in 2008, delivered in the context of the fragmentation debate. His comments are the more relevant by virtue of his position at the time on the bench of the ICJ, especially as appreciated through the prism of his opinion in the *Oil Platforms* case. Moreover, his remarks draw expressly on his experience as a practitioner who is obliged to render judgments in cases of controversy as a matter of international law. He begins with a relatively clear affirmation, taken in context, of the innate cosmopolitan model:

> international law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human beings. In so doing, it begins to display more and more features which do not fit into the ‘civilist’, bilateralist structure of the traditional law. In other words, it is on its way to being a true public international law.

496 Ibid., p. 8.
Within the system of true public international law, incorporating the common interests of the international community as a whole, the ICJ represents a pillar “of unity and coherence of universal international law.”\textsuperscript{498} Moreover, the Court enjoys a complementary relationship with the International Law Commission with respect to that body’s mission to foster universality under international law.\textsuperscript{499} Part of that complementary relationship is founded on “strong personal ties”.\textsuperscript{500} The same is true of the Court’s relationship with other international tribunals – the Court’s capacity to exercise “true public international law” is complementarily enhanced by virtue of personal association among members of various international tribunals: “quite a few international judges have moved from one court to another, thus also, more or less consciously, adding to the consistency of international jurisprudence.”\textsuperscript{501} Moreover, “such courts have explored other, less formal, cooperative mechanisms on their own initiative. For instance, more recently, meetings of judges of international courts also at the universal level have been organized upon the initiative of the ICJ, and are on their way to being institutionalized.”\textsuperscript{502} In saying this, however, Simma recognizes that such mechanisms “lack transparency”, among other things.\textsuperscript{503}

In critical terms, Simma’s frank comments may be taken to describe a cadre of elites developing international law according to their own policy, albeit in the name of the world. I do not intend, however, to use selective treatment of Judge Simma’s straightforward commentary as a straw man. Rather, in conclusion of this project, I raise his comments to recognize that one of the foremost jurists in international law offers clear-sighted recognition of an adjudicative function that resembles the custodial function, formerly sketched in the work of Judge Álvarez, in its wide allowance for the juridical development and maintenance of a “true public international law” serving the interests of the international community as a whole. In pragmatic terms, rather than critical, this may be understood in terms of especially qualified individuals resolving complex controversies as best they can, with the tools at their disposal and in accordance with some baseline sense of normative ends – however intuitive, or however hard to establish as a matter of positive law or empirical proof.

\textsuperscript{498} Ibid., p. 271.
\textsuperscript{499} Ibid., p. 271.
\textsuperscript{500} Ibid., p. 271.
\textsuperscript{501} Ibid., p. 279.
\textsuperscript{502} Ibid., p. 289.
\textsuperscript{503} Ibid., p. 289.
But if the innate cosmopolitan intuition has a proper – or simply unavoidable – role in international law, its ad hoc character will not enhance either its legitimacy or its utility. The various appeals to the innate cosmopolitan model must begin to coalesce around a common vocabulary. Likewise, recourse to innate cosmopolitan ideas must be seen by author and audience alike as part of a wider discourse making use of similar ideas. Thereby the different ends to which the innate cosmopolitan idea is put, and the different means by which the idea is articulated and substantiated, must be appreciated as a distinct doctrine serving a distinct purpose – and serving distinct masters – in international law and legal discourse. Doing so will, on the one hand, enhance coherence and the possibility for coordinated development, where recourse to innate cosmopolitan ideas is deemed necessary or desirable. On the other hand, doing so will more thoroughly and effectively expose the recourse to innate cosmopolitanism to clear criticism, which, if the practice will not be denied, is in the end the best check on the discontents of innate cosmopolitanism that international law and legal discourse is capable of administering.

504 For an example of recent work suggesting a common vocabulary of world law that might serve as a template for future inquiry, see Nico Schrijver, Internationaal Publiekrecht als Wereldrecht: een inleiding (Den Haag: Boom Juridische Uitgevers, 2012).
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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.
Samenvatting

Aangeboren kosmopolitanism: in kart brengen van een latente theorie van wereld normen.

Deze dissertatie is een onderzoek naar kosmopolitisme binnen het discours van het internationaal recht, voornamelijk met betrekking tot een specifieke stroom van kosmopolitisch denken die ik aangeboren kosmopolitisme noem. Aangeboren kosmopolitisme stelt dat de wereld als geheel een fenomeen met een eigen belang en zelfs met een eigen wil is, en dat die wereld bovendien een basis voor universele normen kan vormen. Aangeboren kosmopolitisme is nooit uitdrukkelijk als eigen doctrine ontwikkeld, en dus ontbreekt het aan een geconsolideerde vocabulaire en kritische aandacht die andere scholen van denken wel bezitten, zoals het liberale kosmopolitisme en theorieën over een kosmopolitisch constitutionalisme. Maar ondanks de relatieve verwaarlozing van het aangeboren kosmopolitisch denken neemt zij, in een verscheidenheid van termen en contexten, een centrale rol in het verhaal en de ontwikkeling van het moderne internationaal recht. Dit onderzoek brengt het aangeboren kosmopolitisme binnen het discours van het internationale recht in kaart, met inbegrip van zijn centrale concepten, termen en principes, als apart domein van verschillende stromen van het kosmopolitische denken. Daarnaast volgt in dit onderzoek een nadere kritische evaluatie van de rol van aangeboren kosmopolitische ideeën in het discours en de ontwikkeling van het internationaal recht.


Wanneer internationale juristen als kosmopolitisch worden beschreven, wordt hun denken en handelen geassocieerd met aspiraties naar een rechtssysteem dat in staat is om onder universele voorwaarden doelbewust orde in de wereld te bewaren. Hun
De kosmopolitische orde is een objectieve orde, een orde die in beginsel naar een normatieve autoriteit streeft die superieur is aan haar onderdanen en onafhankelijk van hen gedefinieerd wordt. In tegenstelling tot het subjectieve systeem van het internationaal recht zoals het traditioneel beschreven wordt, is kosmopolitism een normatieve voorwaarde die noch definieerbaar, noch herroepelijk is door individuele onderdanen, noch door enige andere subjectieve actoren in hun individuele capaciteiten. Kosmopolitisme vervangt de politieke autoriteit van soevereine staten (en hun analogen) door de autoriteit van universele normen.

Recentelijk zijn kosmopolitische aspiraties naar een wereldorde die onafhankelijk van de politieke wil van staten en andere subjectieve belangen opereert, bekritiseerd. In de literatuur is een kritisch licht geworpen op de progressieve ambities van het zogenaamde grotere goed van een universele kosmopolis van wereldrelaties, die niet gemiddeld wordt door subjectieve belangen. Dit kritisch denken maakt duidelijk dat de kosmopolitische doctrine – ondanks de schijnbare antinomie met orthodoxe ideeën van een dergelijk consensueel rechtssysteem tussen staten – in zijn verhouding tot het internationaal recht en doctrine geheel oppositioneel noch subversief is. Integendeel, de kosmopolitische ethos loopt als een leidmotief door het werk van diverse volkenrechtjuristen in het moderne internationaal recht. Het waarderen van de kosmopolitische onderstroom van het internationaal recht – en voornamelijk, zoals ik hier beweer, het waarderen van de aangeboren kosmopolitische onderstroom van het internationaal recht – kan cruciaal zijn voor het waarderen van het historische project van het internationaal recht, een project dat verbonden is met de spanning tussen aspiraties naar objectieve internationale normen en een subjectief internationaal systeem. De kritische aandacht voor kosmopolitisme in het algemeen heeft echter onvoldoende onderscheid gemaakt tussen de kosmopolitische doctrines, methoden en normen.

Liberaal kosmopolitisme is een goed ontwikkelde doctrine in de politieke theorie. Door middel van een apart constructivistisch proces – een bepaalde deductieve methode – ontwikkelt liberaal kosmopolitisme normen op basis van wat men ziet als universeel aanvaardbare morele uitgangspunten. Liberaal kosmopolitisme geeft uitdrukking aan normatief individualisme en is verbonden met de kernnormen en waarden van mensenrechten. Anderzijds identificeren constitutionele kosmopolieten, wereldnormen met de formele oprichting van een wereldwijd politiek akkoord tussen actoren in het internationale systeem, zodanig dat een nieuwe wereldorde geschapen wordt die onafhankelijk is van
zijn samenstellende delen. Constitutioneel kosmopolitisme is in het bijzonder verbonden met de methode van het internationaal recht, aangezien het zich richt op vragen van formele toereikendheid die voortkomen uit positieve vaktermen van het internationaal recht. Aangeboren kosmopolitisme deelt in grote lijnen de juridische methode van constitutioneel kosmopolitisme, in die zin dat aangeboren kosmopolitisme de wet in eerste instantie wenst vast te stellen door middel van een historische bron in plaats van door morele uitgangspunten. Maar aangeboren kosmopolitisme onderscheidt zich van constitutioneel kosmopolitisme door de verwijzing naar een historische bron – het fenomeen dat de wereld als geheel is – die voorafgaat aan de bevestiging door het positieve internationaal recht en voor zijn normativiteit niet afhankelijk is van positieve bevestiging door de wet.

Ondanks verschillen tussen het liberale, constitutionele en aangeboren kosmopolitisme proberen ze allen om een autonome normatieve kracht te vestigen, een objectieve normativiteit voor de gehele wereld als tegen het systeem van subjectieve autoriteit dat geïdentificeerd wordt met de relaties tussen gelijke en onafhankelijke staten. In het streven naar objectieve wereldnormen die autonome bases van legitimiteit zijn, streven ze alle drie naar wereldnormen die superieur zijn aan de internationale politiek. Maar liberaal en aangeboren kosmopolitisme benadrukken verschillende aspecten van het kosmopolitische denken: liberaal kosmopolitisme benadrukt individuen in de wereld; aangeboren kosmopolitisme benadrukt de individualiteit van de wereld. Daarentegen is constitutioneel kosmopolitisme relatief agnostisch: het potentiële constitutionele akkoord is relatief open in zijn voorwaarden, en – zolang de grondwet kosmopolitisch blijft – beide kosmopolitische visies, liberaal of aangeboren, kunnen in een grondwettelijke regeling opgenomen worden, mits deze voldoet aan een formele eisen van de constitutionele legitimiteit.

In termen van discours kunnen elk van de drie kosmopolitische stromen anders worden geplaatst. De verschillen kunnen worden opgevat als punten langs een lijn: aan de ene kant representeert het liberaal kosmopolitisme een op de wet toegepast ethisch discours; aan de andere kant representeert het constitutioneel kosmopolitisme een juridische discours dat grotendeels congruent is met traditionele termen in het internationaal recht. Tussen deze twee in vormt het aangeboren kosmopolitisme een juridisch discours dat een deel van de traditionele termen van het internationaal recht vermijdt. De verschillen kunnen worden onderscheiden aan de hand van de manier waarop elke stroming het recht vaststelt, alsmede door de
verschillen in de waardering van bronnen die door elke kosmopolitische school van denken ten toon wordt gespreid.

Meer in het bijzonder, hoewel aangeboren kosmopolitisme zelfs door zijn aanhangers niet als een aparte school van denken erkend is, hebben volkenrechtjuristen met betrekking tot aangeboren kosmopolitische ideeën de neiging om regelmatig een beroep te doen op een lange geschiedenis van aangeboren kosmopolitische ideeën, in iedere zaak alsof het voor de eerste keer is. De vocabulaire is als zodanig nooit voldoende geconformeerd of geconsolideerd. Dezelfde lessen worden in verschillende contexten herhaald, en volkenrechtjuristen verwijzen regelmatig naar een gemeenschappelijke geschiedenis voor een verscheidenheid aan doeleinden en op verschillende manieren. Die geschiedenis is een geschiedenis van ideeën ter ondersteuning van een normatieve potentieel in handen van de wereld als geheel dat in staat is om te dienen als een bron van internationaal recht. Omdat de aangeboren kosmopolitische premisse van een sociaal of politiek wereldcollectief dat in staat is tot vaststelling van normen en normatief gezag, zo moeilijk empirisch is vast te stellen, speelt de geschiedenis van aangeboren kosmopolitische ideeën een buitengewoon belangrijke rol in het pleidooi voor aangeboren kosmopolitische normativiteit. De geschiedenis van het idee, gevangen en opnieuw gevangen in repetitieve oefeningen, dient als een stamboek en *bona fides* waar andere ondersteuning ontbreekt. Bovendien heeft het regelmatige beroep op een intellectuele geschiedenis van aangeboren kosmopolitisme het aangeboren kosmopolitische model sterker gebonden aan het historische verhaal van kosmopolitisme in het internationaal recht dan andere, beter erkende vormen van kosmopolitisme.

Verschillende kenmerken definiëren de consistente inhoud van het aangeboren kosmopolitische idee. Om te beginnen fundeert aangeboren kosmopolitisme een fundamentele normativiteit in het internationaal recht op de wil en de belangen van de wereld als een collectief geheel. Wat volgt uit deze fundering is het als centraal uitgangspunt aannemen dat de wereld van mensen en volkeren een collectief is, dat in staat is een verenigde wil of verenigde belangen te vertonen. Door de wereld voor te stellen in termen van een ingetogen collectief dat in staat is om de uitoefening van normatief gezag te vertonen en te behouden volgens eigen wil wordt de wereld tot een autonoom fenomeen gemaakt. Het wordt opgevat als onafhankelijk van de kleinere collectieven en entiteiten die ze omvatten. Bovendien wordt het fenomeen van de autonome wereld meestal beschreven met iets als persoonlijkheid – het wordt tot een subjectieve actor gemaakt, en geniet daardoor
een speciaal soort van politieke werking, uitgedrukt in termen als ‘wereld publieke opinie’. Dit fenomeen van een subjectieve en onafhankelijke wereld wordt vervolgens een cruciale basis voor normativiteit in het internationale systeem: de wereld als geheel is de enige objectieve basis van internationale normen, en is in staat te ontsnappen aan de tegenstellingen van een rechtssysteem dat is vastgesteld op basis van consensus.

Een ander kenmerk van aangeboren kosmopolitisme is een waardering van het fenomeen wereld als een feit. De wereld als sociaal of politiek geheel wordt gezien als een functie van de uitgebreide onderlinge samenhang in de wereld. Bovendien gaat het fenomeen wereld vooraf aan enige positieve uitdrukking – of het ontbreken daarvan – in het internationaal recht, omdat de subjectieve persoonlijkheid van de wereld als geheel wordt opgevat als een feit of verschijnsel. Deze erkenning is verbonden met een nadruk op een observerende methode, in tegenstelling tot een meer formeel-juridische methode. Ook haar normatief potentieel vloeit voort uit het feit van haar bestaan, in plaats van uit een bevestiging door het positieve recht. De aard van de persoonlijkheid die de wereld laat zien, wordt duidelijk door goede observatie. Dienovereenkomstig is aangeboren kosmopolitisme vaak gebaseerd op beweringen naar aanleiding van ‘sociologische’ observatie – zo niet simpelweg intuition – om de kenmerken van de onderling afhankelijke wereld als een geheel op een bepaald punt in de tijd te beschrijven. Van de waargenomen kenmerken op uiteenlopende terreinen als de economie, de politiek, cultuur en de psychologie, kunnen normen worden afgeleid waaraan de wereld als geheel op een bepaald punt in de tijd hecht, en op basis van die normen kan recht en beleid worden bepaald.

Het uitgangspunt dat de wereld als geheel staat voor een levensvatbaar – zelfs fundamenteel – normatief potentieel in het internationaal recht, onafhankelijk van enige bevestiging door het positieve recht, vormt een uitdaging voor de grenzen van het voluntaristisch positivisme, en in het bijzonder een uitdaging voor de beperkte lijst traditioneel erkende bronnen van internationaal recht, zoals die is opgenomen in art. 38 van het Statuut van het Internationaal Gerechtshof. Dit is een van de meest cruciale en meest controversiële aspecten van aangeboren kosmopolitisme zoals het in het internationaal recht wordt gebruikt. Eveneens controversieel is dat er binnen aangeboren kosmopolitisme een nauwe band bestaat tussen recht en beleid: het normatief potentieel dat wordt toegeschreven aan de autonome wereld als geheel wordt, in het werk van theoretici en juristen, synoniem met beleid op maat dat naar bepaalde doelen leidt, of op zijn minst ervoor zorgt dat andere doelen niet worden bereikt. De integratie van een beleidsmandaat, dat ook binnen een aangeboren
Kosmopolitische stroming in de jurisprudentie van het Internationaal Gerechtshof opgemerkt kan worden, weerspiegelt de uitgestrekte omvang van juridische argumentatie en juridische autoriteit onder aangeboren kosmopolitisme. Die reikwijdte wordt niet ingeperkt door de traditionele beperkingen van het positieve recht, noch door de traditionele kanalen van politieke twist.

Samenvattend, een normatief potentieel vloeit voort uit de bijzondere aard van de wereld als geheel, in de zin dat een goede observatie van sociale en politieke verbanden die deel uitmaken van het fenomeen van de sociale of politieke wereld als geheel, universele normen kan opleveren, die leidend zijn voor zowel recht als beleid. Bij de toepassing is het model van aangeboren kosmopolitisme gebruikt voor tribunen, zoals het Internationaal Gerechtshof, om hun bevoegdheid over een bepaald onderwerp uit te breiden op basis van wat in het belang van de wereld als geheel is. In deze gevallen kon het positief recht geen vergelijkbaar resultaat produceren. Bovendien heeft de uitbreiding van het gezag van het Internationaal Gerechtshof meestal een ad hoc karakter, en is die uitbreiding slechts van toepassing op afzonderlijke kwesties, zoals die zich voordoen. Voor een deel kan dat ad hoc karakter toegeschreven worden aan het ontbreken van een ontwikkeld vocabulaire of een gevestigd kader voor de doctrine van aangeboren kosmopolitisme, voor een ander deel kan het toegeschreven worden aan de specifieke aantrekkingskracht van aangeboren kosmopolitisme om normativiteit te vinden los van de beperkte gronden onder het positieve internationaal recht.

Na de contouren van aangeboren kosmopolitisme te hebben geschetst, met inbegrip van de aantrekkingskracht van aangeboren kosmopolitisme in het wetenschappelijke en jurisprudentiële discours van het internationaal recht, wend ik mij tot de kritiek op deze stroming. Aangeboren kosmopolitisme onderdrukt politieke conflicten ten gunste van beweringen van observerende aard; het verleent elite actoren de bevoegdheid om normen vast te stellen, ook al situeert het de verantwoordelijkheid voor de expressie van die normen elders (namelijk in de wereld als geheel, zoals die waargenomen dan wel aangevoeld kan worden); en het bevestigt de status quo van historische omstandigheden door gezag te funderen op de aard van de wereld zoals die bestaat op enig punt in de tijd. Om nog een stap verder te gaan: de drie gronden tezamen wijzen er uiteindelijk op dat de argumenten van aangeboren kosmopolitisme, opzettelijk of niet, voor een beleid kunnen staan dat de status quo ondersteunt.
Door de oprichting van een wereldrechtssorde op de aggregatie van geobserveerde normatieve handelingen en verwachtingen die van toepassing zijn op de wereld als een geheel op een bepaald punt in de tijd, is het rechtscsheppende proces van aangeboren kosmopolitisme geledigd van elke vorm van verantwoordelijkheid. De regels lijken zichzelf te scheppen en te herscheppen en ze worden slechts door constant wetenschappelijk onderzoek ontdekt, en door de vermoedelijk juiste persoon of instantie verkondigd. De norm wordt waargenomen in plaats van te worden vastgesteld middels beraadslaging of een beslissing, of hij is afgeleid van de internationale publieke opinie, in plaats van met redenen omkled te zijn vastgesteld door een wetgever of rechter. In het licht van het brede terrein waarin wereldnormen op een sociologische manier op enig punt in de tijd worden bepaald, herstelt de observerende methode echter zelf het bestreden gebied van de politiek in andere termen. Elke set van methodologische keuzes, waardoor de wereldnormen worden begrepen, kan een bepaald beleid en een bepaalde set van belangen weerspiegelen. De complexiteit van het onderzoek dat nodig is om de intuïtie van aangeboren kosmopolitische te ondersteunen suggereert dat het in feite niet kan worden onderbouwd of zelfs zinvol gedefinieerd. Aangeboren kosmopolitisme zou zo subjectieve internationale politiek onderdrukken met een beroep op de wetenschap of sociologische observatie, maar de wetenschap of de methode van observatie wordt zelf een nieuw terrein van de betwisting zonder dat dit tot een oplossing leidt.

De verscheidenheid van het fenomeen van aangeboren kosmopolitisme ondermijnt het leidende doel om te streven naar een objectieve autoriteit voor internationale juridische normen, namelijk de mogelijkheid om de paradox en innerlijke tegenstrijdigheid van een subjectief systeem van internationaal recht te overwinnen. Met verscheidenheid komt maakbaarheid, en de associatie van wetgeving en beleid die ook kenmerkend is voor aangeboren kosmopolitisme krijgt dan een bijzonder controversieel karakter. Bovendien stellen de beperkingen van de sociologische methode ook de onderliggende uitgangspunten van een onderling afhankelijk wereldcollectief bloot aan kritiek, die een voortdurende beperking van de leer van aangeboren kosmopolitisme sinds Vitoria onthult: de visie van een wereldcomplex blijft niet meer dan dat (het is nog steeds in de eerste plaats een visie of intuïtie, in plaats van iets meer substantieels of nauwkeuriger). Als gevolg hiervan kan het beroep op een normativiteit van de wereld door aangeboren kosmopolitisme onuitvoerbaar klinken, of, nog erger, terwijl politieke betwisting wordt onderdrukt wordt
verantwoordelijkheid verminderd bij een bevestiging van ongefundeneerde uiteinden.

Bovendien verbindt aangeboren kosmopolitisme normativiteit met de gepercipieerde historische realiteit van de wereld. Aangezien theoretisch verondersteld wordt dat de juiste waarneming van historische handelingen, ervaringen en verwachtingen van de wereld, de belangen en wil van de wereld baat op zullen brengen, wordt de normativiteit van de wereld opgevat in termen van historische feiten. Omdat de normen die uit aangeboren kosmopolitisme voortvloeien door observatie van historische handelingen en omstandigheden van de wereld ontdekt moeten worden, wordt ook verondersteld dat aangeboren kosmopolitische normen de wereld zoals die is vertegenwoordigen. De wereld zoals die bestaat vertegenwoordigen, betekent de belangen van de status quo behartigen. Hierdoor neemt het model van aangeboren kosmopolitisme een houding aan die ten diepste gebonden is aan historische omstandigheden, met als gevolg dat de normen die hieruit voortvloeien eveneens aan de status quo van bepaalde historische omstandigheden gebonden zijn. Als gevolg hiervan doet de historische contingentie van aangeboren kosmopolitische normen, althans in theorie, reeds het vermoeden rijzen van een model dat uiteindelijk - zelfs in haar poging tot hervorming - dient om de status quo voorwaarden te bevestigen, ondanks de traditionele verbinding tussen aangeboren kosmopolitische ideeën en een progressieve rechtstheorie.

Maar het verhaal eindigt niet met de kritiek. Aangeboren kosmopolitisme beweert een overtuigende visie van de wereld als fenomeen te bieden, die inderdaad lijkt te resoneren met een internationaal georiënteerd publiek, zoals diplomaten, wetenschappers, of een (los gedefinieerd) wereldpubliek. Het betoog van aangeboren kosmopolitisme onderbouwt het internationale normatieve regime op coherente wijze: er is een fundamenteel normatief potentieel dat het internationaal recht gezag geeft onafhankelijk van dat van haar onderdanen. Ook heeft aangeboren kosmopolitisme inderdaad een lange geschiedenis van aantrekkingsskracht, die misschien nog steeds wel haar grootste kracht vertegenwoordigt. Er is gesuggereerd, op andere plaatsen en in andere woorden, dat de aanhoudende historische intuïtie van aangeboren kosmopolitisme zijn beste bewijs is. In dat licht functioneert aangeboren kosmopolitisme als een heuristisch model, of, om een andere metafoor te gebruiken, als een soort Poolster: een gids waarmee men zich kan oriënteren in de uiterste contreien van het internationaal recht, en daarmee wordt het een middel om de normativiteit van de internationale rechtssorde te bevestigen. In dit verband zal blijken dat zelfs de scherpste criticus de fundamentele intuïtie die het aangeboren
kosmopolitische model aandrijft vaak deelt, door het tonen van een geloof in de uiteindelijke doelen van het internationaal recht, niettegenstaande het feit dat een definitief of wetenschappelijk betoog hieromtrent ontbreekt.

Als uiteindelijk de aangeboren kosmopolitische intuïtie in het internationaal recht niet zal worden ontkend, dan moet ze beter begrepen worden. De termen waarin die intuïtie wordt uitgedrukt en de doelen waarvoor deze begrippen worden ingezet in het discours van het internationaal recht vereisen meer consistentie en een consistentere erkenning. Hierdoor zal een duidelijker en uitgebreidere kritische behandeling van aangeboren kosmopolitisme als een school van denken - met inbegrip van zijn specifieke wijze van argumentatie, zijn uitgangspunten en de doelen waarvoor die worden ingezet, evenals zijn bijzondere concretiseringen - mogelijk worden. Dit boek is een eerste stap in dat project.