Chapter 8
Legal Equality and Innate Cosmopolitanism in Contemporary Discourses of International Law

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Abstract Peter Kooijmans' inquiry into the doctrine of the legal equality of states and, with it, the foundations of international law, reflects a peculiar brand of cosmopolitan thought, namely innate cosmopolitanism. Though under-recognized, innate cosmopolitanism is an argument for re-conceiving the modern international legal order according to a deep unity underlying the whole of human relations. As such, innate cosmopolitanism is distinct from better-recognized examples of cosmopolitan thinking, including liberal cosmopolitanism and cosmopolitan constitutional theory. Rejecting the normative individualism of liberal cosmopolitanism, and eschewing the formal orientation of constitutional theory, innate cosmopolitanism envisions the world as a viable collectivity that is perceived to exist, irrespective of formal recognition, as a matter of historical fact. But while innate cosmopolitanism operates according to a top-down model of collectivity, it nonetheless recognizes and incorporates smaller units of collectivity. As such, it holds especial relevance at a time when international legal doctrine looks beyond the preeminence of states, but continues to be bound to them in practice. Following innate cosmopolitanism, the international system incorporates all members equally when it takes into account the different material position of each member vis-à-vis the collective whole. The rights and responsibilities enjoyed by each, and their political situation within the community, will vary accordingly. This article will explore the innate cosmopolitan contribution to international law by reference to two current discourses, concerning ethical legitimacy and constitutional theory, as they grapple with justifications for and the doctrinal viability of an expanding public order globally. Additionally, examples drawn from the activation of the

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crime of aggression in the Rome Statute, and the *Kadi* case, will be considered for the critical light they throw on innate cosmopolitan theory.

Keywords Legal equality · Innate cosmopolitanism · World collectivity · Individualism · Constitutionalism · Legitimacy · Crime of aggression · *Kadi*

Contents

8.1 Introduction

Kooijmans' inquiry into the doctrine of the legal equality of states is a reconstruction of fundamental international legal doctrine, in favour of a cosmopolitan argument for sovereign equality. The basic premise from which Kooijmans proceeds, concerning a deep and pre-legal unity in world relations, however, reflects neither the ethical doctrine of liberal cosmopolitanism, nor a formal aspiration to a cosmopolitan world constitution. Rather, his cosmopolitanism reflects what has been a central school of thought in international law throughout its history, but one that has been overlooked by comparison with these other schools of cosmopolitan thought. I refer to his brand of cosmopolitanism as innate cosmopolitanism, because it purports to recognize an underlying unity in the world that is innate to humanity as a whole.[1]

Viewed through the prism of cosmopolitanism, Kooijmans' treatment of the doctrine of the legal equality of states is a forerunner and example of what innate cosmopolitanism has to offer to current doctrinal controversies in international law. Those controversies include joined questions of ethical legitimacy and constitutional viability. In cosmopolitan terms, and particularly liberal cosmopolitan terms, ethical legitimacy has largely been understood according to normative individualism, demanding justifications of international norms and institutions according to their effects on individuals. Human rights, for example, have been comprehended under international law according to standards of individual rights

[1] Gordon 2013.

and responsibilities. Innate cosmopolitanism, by contrast, identifies legitimacy with a fuller appreciation of collectives generally. Though innate cosmopolitanism elevates the normative authority of the world collective, it also would preserve substantial room for regional and local agency within the international legal system. In this sense, the innate cosmopolitan argument supports the advances of regional organizations in international law, and dovetails with certain constitutional proposals that preserve a role for the sovereign state.

The dovetail reflects a point of relative commonality between innate cosmopolitanism and cosmopolitan constitutional theory in international law. Innate cosmopolitanism comprehends a sort of proto-constitutional condition, which Kooijmans reflects in terms of a doctrinal shift from equal sovereignty to sovereign equality. That shift is central to formal constitutional innovation in international law, but remains an elusive strategy: the achievement of constitutional community remains impeded by orthodox terms of sovereignty and voluntary positivism in the international system. Innate cosmopolitan theory, by contrast with formal constitutional theory, comprehends an international community that is already constituted in such a way that a formal constitutional achievement under law is manifestly feasible, even if the perceived fact of the world community means that the formal constitutional achievement is not necessarily urgent. Moreover, the innate cosmopolitan position leads as well to a critical follow-up distinction between equality before the law and equality in the law. States, together with regional collectives and still other actors, are comprehended as equal members in the legal cosmopolitan community: the rights and responsibilities that flow from that relationship will vary with historical circumstance.

Consider the recent activation of the crime of aggression into the Rome Statute (delay until 2017 notwithstanding). The achievement has been much discussed and dissected, but I raise it for a single purpose: as an example, for better or worse, of a step in an innate cosmopolitan project to establish public order for an inclusive world community, one founded on states as equal members. Many commentators have expressed scepticism regarding the role accorded to the Security Council following the terms of 15*bis* (and 15*ter*) as emblematic of contemporary power politics, and reflective of nothing more than the status quo – hardly typical of cosmopolitanism.[2] Certainly, 8*bis*, 15*bis* and 15*ter* together do not constitute a straightforwardly liberal cosmopolitan development, nor do they constitute a clear example of cosmopolitan constitutional development – but the activation of the crime of aggression can and should be understood according to the terms of innate cosmopolitanism. Putting to one side the delay in implementation, 8*bis*, 15*bis* and 15*ter* achieve all of the following, in accordance with the innate cosmopolitan project: they elevate a first principle of public order for any community to the level of criminal delict in international relations; in doing so, they extend the sanction to individuals; but at the same time, they incorporate states to a substantial degree for the interpretation of the delict, its application and sanction, and do so largely

[2] Van Braun and Micus 2012; Politi 2012, at 271-274; Ferencz 2010.

according to the historical situation of states reflected in the Charter regime generally, and the Security Council in particular, however imperfectly. The adoption of 8*bis*, 15*bis* and 15*ter* does not achieve a constitutional order, but reflects the assumption of a constituted community ultimately capable of expressing a norm applicable against individuals anywhere in the world, on the basis, as a criminal delict, of an offense against a unitary society. It bears noting, however, that the innate cosmopolitan dimension of the adoption of the definition of aggression does not overthrow the criticism of an operative scheme too much vested in the status quo. Rather, the criticism is applicable to the cosmopolitan scheme itself, addressing a curious and potentially compromising connection between innate cosmopolitanism and status quo conditions of international law and relations.

Below, I will look briefly but closely at Kooijmans' original text as an example of innate cosmopolitan scholarship. Thereafter, I will look at the application of the innate cosmopolitan argument for sovereign equality as it may be applied today to twinned questions of collective agency and constitutional possibility within the international system. I then conclude with another example of innate cosmopolitan development in international law, to bring out conflictual aspects of the innate cosmopolitan model, and offer some critical thoughts.

8.2 The Innate Cosmopolitan Tradition and Kooijmans

For his dissertation on the doctrine of the legal equality of states, Kooijmans adds the subtitle *An inquiry into the foundations of international law*. The interest in the foundations of international law belies his normative ambition to re-conceive the international legal order. In the course of his dissertation, Kooijmans makes clear his rejection of the then-traditional understanding of a subjective international legal order founded in consensual positive law among states, in favour of an objective cosmopolitan system of law founded in general principles that precede consensual rule-making.[3] His cosmopolitanism reflects the long tradition of innate cosmopolitan thought in international law, though that tradition has been only partially and imperfectly recognized. That tradition of innate cosmopolitan thought takes the temporal world – the whole of humankind at any given point in time – to be a unity, and from that unity draws the foundational authority for international law.

Cosmopolitanism is typically understood according to a liberal project founded in normative individualism, part of a Kantian tradition principally concerned with the equal dignity of the individual.[4] But Kooijmans sets his own cosmopolitan project against a reduction to individualism. Proceeding from theological premises, Kooijmans posits the irreducible unity of humanity as a whole at any given

[3] Kooijmans 1964, at 230.

[4] See, e.g., Tesón 1992.

point in time.[5] In so doing, he situates his own project among international legal theory that begins with Vitoria, includes Suárez, Gentili and Grotius, finds its antagonists in a line of thinkers including Hobbes, Vattel and Vattel's successors, and ultimately resolves into a distinct and nuanced position among contemporaries. By establishing this genealogy, Kooijmans repeats a procedure that may be observed in the history of innate cosmopolitan thought. Scholars and practitioners making innate cosmopolitan arguments – including figures such as James Brown Scott,[6] Hersch Lauterpacht,[7] Myers McDougal and the New Haven School scholars,[8] and successors such as Harold Koh,[9] among others – tend regularly to invoke a long and common history of innate cosmopolitan ideas, in each case largely as though for the first time. In part, that repetition reflects a curious failure among those 20th century scholars adopting innate cosmopolitan ideas to establish a self-aware discourse of innate cosmopolitanism, despite the long and commonly-cited history. Never achieving recognition as a discrete doctrine or discourse, the sum of innate cosmopolitan ideas and arguments instead consistently functions something like a heuristic device: a model to guide the development of the international system towards normative ends associated with the world as a whole at any given point in time.

In proceeding from theological premises, Kooijmans makes his innate cosmopolitan argument a relatively idiosyncratic one. Typically, innate cosmopolitan arguments are drawn from either of two sets of assertions, and often aspects of both together: empirical assertions of an interdependent social unity[10]; or assertions of a unity founded in common capacities, such as the capacity for communication.[11] The former tend to be largely sociological in nature, identifying normative authority with actual patterns of behaviour reflecting world interdependence; the latter tend to be roughly psychological in nature, invoked to 'subjectivize' the perceived unity of the world, thereby vesting the world as a whole with a will and interests of its own, capable of conveying normative authority. Kooijmans, however, rejects the unbridled empiricism typical of the sociological school in international law,[12] and instead of identifying the intrinsic unity of the world with a mind-state or the human capacity for communication, he identifies it with the Christian premise of 'one blood', unifying the whole of humankind in the image of the God, and in accordance with Christian faith.[13]

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[5] Kooijmans 1964, at 196.

[6] Scott 1934.

[7] Lauterpacht 1946.

[8] McDougal et al. 1987, at 812 ff.

[9] Koh 1997, at 2603-2613.

[10] Jenks 1959, at 87.

[11] Álvarez 1918, at 180-181; Bartelson 2009, at 221.

[12] Kooijmans 1964, at 154-162.

[13] Ibid., at 18.

The effect that Kooijmans intends, however, remains in keeping with the innate cosmopolitan project. In the first place, he intends to reconcile the sovereign state and an invigorated international order. He would displace the absolute, subjective prerogative of the sovereign state with an objective and universal normative authority, while at the same time preserving the political identity and a measure of authority vested in the state.[14] He would do so according to a top-down appreciation of the world as a social and political unity; that top-down model, predicated on a discrete understanding of the world as a whole, is definitive of innate cosmopolitanism. Moreover, Kooijmans refers to other innate cosmopolitan authors and ideas under the guise of modern natural law, which, following Kooijmans, provides at once for universal norms and varying historical expression.[15] Likewise, innate cosmopolitanism holds that the social and political expression of the unity underlying world relations can only be appreciated according to – and will vary with – historical circumstance.

Kooijmans' argument ultimately militates in favour of a more integrated international order, and bears notable resemblance to aspects of the more recent theory of Jens Bartelson, who lately has offered an innate cosmopolitan reconstruction of the history of international political theory. Kooijmans and Bartelson alike, by means of doctrinal reconstruction, would circumvent the tension between the sovereign state and the international order, but without disposing of either. Each takes the somewhat paradoxical maneuver of making the state and the international order independent of one another, while consolidating an appreciation of both. Bartelson, in his 2009 work *Visions of World Community*, describes the ambition as '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.'[16] Kooijmans before him held that '[i]f we want to avoid the irreconcilability, the mutual exclusion of the national and the international community, however, we must keep in mind the intrinsic nature of these communities.'[17] By this understanding, equality becomes the proper appreciation of an innate commonality under historical conditions of diversity.

Bartelson, to make good on his agenda, proposes a 'concept of a world community [that] 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] Kooijmans had already put it as follows:

> The sovereignty of the state is no longer a hindrance to the validity of international law, just as the sovereignty of the international legal order does not limit the independent

[14] Ibid., at 202-203.

[15] Ibid., at 215.

[16] Bartelson 2009, at 3, 11-12.

[17] Kooijmans 1964, at 197.

[18] Bartelson 2009, at 155 and 162 (emphasis in the original).

> significance of the state. Both are sovereign, but each according to its own structural principle, which do not exclude one another, but are in indissoluble coherence.[19]

Following the top-down logic of innate cosmopolitanism, both the state and the world as a whole are understood as units in themselves, not reducible to atomized individual constituents – but also not capable of existing without its constituent members. The collective is comprehended as an agent composed of agents, a relationship which by which the phenomenon of autonomous agency is enjoyed by both.

From the discrete communal character that each collectivity will enjoy, flow the structural principles (as Kooijmans calls them) that will establish legal order among equal members of the community. In legal terms, equality is expressed as the proper apportionment of legal rights and responsibilities.[20] Altogether, the legal argument serves to apportion duties as well as responsibilities on the basis of a measurement of historical differences exhibited by states within an integrated order maintained according to common objective principles. Thus, by an inquiry into the doctrine of legal equality of states, the innate cosmopolitan argument arrives at an apportionment of rights and responsibilities according to the differences among states. For Kooijmans, '[i]nequality springs from the same root and hence has the same dignity as equality'.[21] According to the top-down model of innate cosmopolitanism, equality and inequality are measured by the distinction of member units in their relation to the whole: the overarching commonality is what makes actual differentiation among members possible, and distinction is only meaningful within an objective frame of reference, or by a common measure. It is against and within the objective whole that historical distinctions among individual subjects may be measured.

Innate cosmopolitan theory typically identifies norms of the underlying cosmopolitan whole as general principles.[22] Kooijmans, too, draws on general principle, as part of what he calls modern international law.[23] But general principle, as the term has been used for innate cosmopolitan purposes, is not identical with general principles as the term is used in Art. 38(1) of the Statute of the World Court. Neither is Kooijmans' use of the term identical with Art. 38(1): he derives the general principles that order conduct in the world by reference to a fixed idea of what collectivity represents, as observed by him in Judeo-Christian lessons of the Creation. But in keeping with the innate cosmopolitan model, Kooijmans holds that the fixed idea of what collectivity represents must at the same time allow for historical variation in the manifestation of collectivities over time and place.[24] Accordingly, equality among members is an inherent aspect in the nature of

[19] Kooijmans 1964, at 202-203.

[20] Kooijmans 1964, at 41.

[21] Ibid., at 26 (citing Brunner).

[22] See, e.g., Schlesinger 1957.

[23] Kooijmans 1964, at 192-193.

[24] Ibid., at 215.

collectivity, but the actual measure or expression of equality remains to be worked out anew in each historical instance. Thus, general principles represent an appeal to bedrock norms discernible, despite historical variation in the precise terms of their expression, in any temporal community guided by law. In sum, general principles reflect essential aspects of law necessary to any legal community – but law itself, to avoid reduction to formalism, is conjoined to material values fundamental to the nature of community.[25]

Here, the innate cosmopolitan idea finds correspondence with the work of Lon Fuller, and, through Fuller, the contemporary work of Jutta Brunnée and Stephen Toope, and their interactional theory of international law. Elements necessary to law itself – or 'internal morality' in the language of Fuller and interactional theory – are joined to the contingent expression of historical values – an 'external morality', using the same vocabulary.[26] International law, as the ordering principle for a collective, must demonstrate conformance with necessary attributes of law generally – but at the same time the legal system itself must reflect the historical expression of values particular to any given legal community in time. Thus, fundamental rights, closely related to general principles, are 'the direct consequences of the elements that are of necessity inherent in a legal order'.[27] But, Kooijmans asks, 'does this mean that the resulting rights precede this order? Not at all, for they can only receive their concrete content from the whole of the [historical] legal relationships'.[28]

By this complicated interrelationship of essentialist reasoning and historical sensitivity, innate cosmopolitanism contemplates a factual predicate for the expression of universal norms. The innate cosmopolitanism affirmation of the world as a whole is typically founded on some claim of observational validity. Thus the innate cosmopolitan program is methodologically linked to sociological pretensions or some other observational science. The New Haven School is an example par excellence of legal inquiry joined to the observation of acts and expectations actually occurring in the world.[29] The New Haven School conceptions of configurative jurisprudence, world public order and a world constitutive process remain guiding examples of a world normative regime derived from a comprehensive appreciation of actual behaviour observed in the world.[30] Kooijmans, it bears noting, resisted reducing law to an empirical science, but was clear in his affirmation of the historically-contingent nature of legal systems:

> The acceptance of unchangeable legal rules, even within temporal reality, is nothing less than an under-estimation of historicity, of the value of man as culture-forming creature. This world is subject to continuous change; new social structures emerge; new views break

[25] Ibid., at 213.

[26] Brunnée and Toope 2000, at 59; Fuller 1957, at 644-648; Kooijmans 1964, at 234-235.

[27] Kooijmans 1964, at 217.

[28] Ibid., at 217.

[29] McDougal et al. 1987.

[30] See., e.g., McDougal et al. 1966, 1967, 1987.

> through. These new social structures demand new legal systems; the new views call for serious and continuous reflection on the part of those who are engaged in concretizing the legal norms.[31]

The mixed reliance on general principles and historical conditions, construed from a top-down perspective, leads to a roughly equitable understanding of the relations among constituent members in the innate cosmopolitan community. The formula that Kooijmans espouses – *suum cuique* – reflects sensitivity to the shifting historical manifestations of relations among members of a deep, cosmopolitan community to which they are intrinsically joined. The historical community is the objective baseline from which the norms that control relations among members may be derived, and against which the respective rights and obligations of community members may be measured. Consequently, equal membership in the community will result in a differentiated apportionment of rights and responsibilities.

At its core, *suum cuique* appeals to Kooijmans for the simple reason that, 'typical of the essence of the community is, that each fulfils its own function with corresponding responsibilities and rights.'[32] It is an idea that equality must be a function of law, not merely as a formal term of being equal before the law, but in a material sense of being equally vested in the legal order. Equal in this sense entails the measure of a meaningful relationship that is not reducible to formal identity or mathematical abstraction. Crucially, the nature of the measure of the relationship will vary with the nature of the legal community. This is the crux of the innate cosmopolitan proposal: that the nature of the relationship among members of the international order is determined by reference, both essentialist and historical, to the discrete nature of the unity of the world at any given point in time.

8.3 Equality, Individualism and Collective Agency

The adoption of the top-down perspective of the world as a whole goes hand in hand with a rejection of individualism. Kooijmans, for example, rejects individualism for reducing law to a personal ethical code. In making the argument, he reflects a take on doctrinal history common to innate cosmopolitan scholarship:

> Pufendorf, Wolff, Vattel and others all spoke of a *societas humana*, *société humaine*, but theirs differed greatly from the world-community of Vitoria, Suárez and Gentili. This *société* is a vague notion, a manifestation of some feeling of solidarity, but not a real fact giving specific and concrete directives for the law. The world-structure retains its individualistic character and the principle of absolute equality remains an obstacle for the realization of the world-community in terms of a legal order.[33]

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[31] Kooijmans 1964, at 14.

[32] Ibid., at 203.

[33] Ibid., at 89.

Opposing the innate cosmopolitan idea to the various strains of individualism in international law consolidates the innate cosmopolitan normative vision around the nature of the community. Thus Kooijmans argues that '[b]asing all communities, all community-law, upon the individual, upon human individual personality, leads to a much too one-sided conception of these communities, for then too little attention is paid to their specific nature.'[34] As a result, '[t]he community-character, in the sense of the intrinsic nature of the community, will be more or less ignored.'[35]

It bears noting that Kooijmans' rejection of individualism tracks the distinction of innate cosmopolitanism from the more established school of cosmopolitan thought, liberal cosmopolitanism. Take, for example, Kooijmans' criticism of Wilfried Schaumann:

> We are … of the opinion that Schaumann's train of thought has, in fact, an individualistic character. Proceeding from the smallest unit, the human individual, he builds up his social philosophy to the greatest, the international community, via the various communities formed by these individuals. It is thus no coincidence that he commences his views on equality with the individual. The value of the principle of equality is contained, not in the concept of law itself, but in the natural equality of men, a natural equality that he considers to be present in the individuality of man, in that which distinguishes him from all other creatures and finds expression in human dignity. It is doubtful, however, whether one can speak of natural equality at all, as it is an outcome of an evaluation, of an abstraction, which does not find its origin in nature.[36]

The method that Kooijmans associates with Schaumann is largely the method of liberal cosmopolitanism that may be observed in contemporary authors such as Thomas Pogge,[37] Simon Caney,[38] and Kok-Chor Tan,[39] to name just a few. The rejection of liberal cosmopolitanism establishes the historical methodological orientation of innate cosmopolitanism by dismissing the possibility of finding natural equality in an abstraction. Moreover, the argument is predicated on an idea that the innate cosmopolitan inquiry is the properly legal inquiry, as opposed to the individualistic inquiry of liberal cosmopolitanism, which is moral or ethical in nature:

> to obscure the borderline between ethics and law, reducing law to an 'ethical minimum', involves a disregard for the intrinsic nature of law. Ethics appeal in the first place to the individual human dignity and often overlook the functional differences. Law aims at regulation and regulation may not overlook functional characteristics.[40]

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[34] Ibid., at 234.

[35] Ibid., at 234.

[36] Ibid., at 233-234.

[37] Pogge 1992.

[38] Caney 2005.

[39] Tan 2004.

[40] Kooijmans 1964, at 28.

It is the idea of functional characteristics, which pertain to the dynamic relation of the individual to the historical community – and which must be understood *from the perspective of the community* – that provides the relevant frame of reference.

By contrast, liberal cosmopolitan norms, as ethical norms, are designed in the first place to achieve or encourage compliance with an ideal world that ought to exist – one in which individuals are the 'primary normative unit'[41] and the 'ultimate unit of concern'[42] – rather than any historical community as it is understood to exist. Accordingly, liberal cosmopolitan norms exhibit less attachment to historical conditions than is typical of legal norms and international legal norms. Liberal cosmopolitan norms are developed out of ethical premises, and typically demand justifications of institutions for variance from the way things ought to be.[43] Where norms of international law typically are oriented to rules of behavior that conform with some regime of public order in the world as it is understood to exist,[44] norms of liberal cosmopolitanism typically are oriented to rules of behavior that conform with an understanding of how the world ought to be.[45]

The emphasis on historicity in innate cosmopolitanism is intended to demonstrate that innate cosmopolitan norms flow from a source of authority that already exists, namely the world collective, and would produce norms that comply with the acts and expectations actually manifest in the world collective. Though innate cosmopolitanism is more or less radical for proposing to affirm legal norms on the basis of the world collective, innate cosmopolitanism remains nonetheless within the broader confines of legal discourse generally, insofar as it purports to identify a viable source of authority within the general structure of a historical social and political order in the world as it may be perceived to exist. The innate cosmopolitan source of authority 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. Likewise, the innate cosmopolitan model does not purport to describe a different world, nor an ideal world, but the historical world of the present, as it may be observed. Innate cosmopolitanism posits a model of the international system founded on the purported reality of historical constraints, within a discourse by which law represents a means for sustaining (perhaps incrementally changing) an existing order. The reliance on historical conditions is intended to satisfy a legal mandate for public order in a way that individualism purportedly cannot.

In sum, by contrast with the mandate of normative individualism, the method of innate cosmopolitanism is intended to support both public order and possible

[41] Tesón 1992, at 53.

[42] Ibid., at 54; Pierik and Werner 2010, at 2.

[43] Beitz 2000, at 519.

[44] Brilmayer 1995, at 614.

[45] Pogge 2005, at 718.

doctrinal change from within historical conditions of the international system. Kooijmans captures the sentiment when he writes that '[i]f the law were to take over the function of ethics it would no longer be law, and legal order would turn into chaos.'[46] In the international system, the appreciation of historical constraints in the interests of public order means an affirmation of states and other particular normative regimes. Even as it identifies in the world a collective subsuming all other collectives, innate cosmopolitanism recognizes a discrete and ineradicable value of collectives generally, vested equally in all of them. Moreover, the innate cosmopolitan regime arises out of the same phenomena as other collectives, such as regional regimes and states: they are co-constitutive of one another, such that neither can exist without the reality of the other. Consider the New Haven School appraisal of international law: '[t]he 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.'[47]

As Bartelson writes,

> [w]hile all human beings are members of this universal community simply by virtue of sharing in common the essential capacities for intercourse, they are also members of particular communities by virtue of the fact that the use of these capacities results in different symbols and values being shared by different peoples in different places.[48]

Distinctions of individuals and communities flow from and reinforce commonality, rather than eradicate it. Appreciating the intertwined relationship at all levels is key to appreciating the integral role of regional organizations and states within the international system:

> mankind constitutes one single community by virtue of its members sharing the capacities for forming social bonds. Consequently, if belonging to a community is indeed an integral part of what it means to be a human being, there is no need to transcend the existing order of states in order to bring a world community into being. Such a world community is already immanent by virtue of the shared capacities for intercourse.[49]

Brunnée and Toope make a similar point, transposed into constructivist terms:

> structures constrain social action, but they also enable action, and in turn are affected and potentially altered by the friction of social action against the parameters of the structure. In other words, agents and structures are mutually constituting, and both are inherently social.[50]

Actors are socialized into the overarching structure from which international law and relations derive their normative force, but which has no existence without the actors it comprises.[51] The actor and the structure in which the actor operates

[46] Kooijmans 1964, at 28.

[47] McDougal et al. 1987, at 808.

[48] Bartelson 2009, at 11.

[49] Ibid., at 11-12.

[50] Brunnée and Toope 2008, at 10.

[51] Ibid., at 19.

contribute to the identity of one another, but represent distinct units nonetheless. Altogether, the same communicative phenomenon that drives the international structure also requires recognition of the independence of actors within that process.[52] The particular and universal are both affirmed and conjoined.

Following the affirmation of the particular and the universal, the world collective may be comprehended according to attributes of diversity supported by common norms of public order. Thus, ideally, '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, perhaps with pockets of deeper normative communities.'[53] Brunnée and Toope hold that the international legal system will enjoy legitimacy and effectiveness 'only to the extent that law supports autonomy while facilitating social interaction'.[54] As with structure and actor in constructivist theory, universal norms are conjoined to particular norms, such that while universal norms undergird the world collective, they are conditioned on diverse particular norms reflective of moral and political autonomy within that collective. Thus interactional law comes to take the form of universal norms that underlie and facilitate interaction across diverse expressions of community and particular norms in the world.

In sum, innate cosmopolitanism identifies a regime for public order with humanity as a whole at any given point in time, but only alongside the legitimate exercise of coordinate normative authority at the level of states and regional organizations, who participate as equal members – and in accordance with their different capacities and limitations – in the overarching community. All of these enjoy collectivities and organizations enjoy normative legitimacy capable of giving rise to different political and legal norms contributing to the international system as a whole: the universal regime appears responsible for the global coordination of public order capable of securing human concord, and states and regional regimes for the expression of particular and historical values nested within that order.

The individualism of liberal cosmopolitanism, by contrast, does not allow for a proper appreciation of political collectives generally as a matter of law. Equality for the liberal cosmopolitan reduces solely to the equal dignity of all individual human beings. As a matter of international legal doctrine, however, innate cosmopolitanism proposes to affirm an equal membership of political collectives in the international or world community. The consequence of equal membership is a roughly equitable distribution of rights and duties among members, the distribution effected in accordance with relevant distinctions among those members. What results must be an international legal community in which substantial room or agency will be preserved for particular and regional political collectives in the development and application of world norms.

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[52] Ibid.

[53] Ibid., at 22.

[54] Ibid., at 18.

8.4 Innate Cosmopolitanism and Cosmopolitan Constitutional Theory

As noted, the affirmation of the agency of states and regional organizations as a matter of the equality of state members in the international system dovetails with the interrelationship of innate cosmopolitan theory and cosmopolitan constitutional theory in international law. While innate cosmopolitanism posits the reality of a constituted political collective including everyone in the world at any point in time, cosmopolitan constitutional theories posit the possibility of a formal constitution under international law encompassing everyone in the world. As such, innate cosmopolitanism resembles proto-constitutional theory: the world collective 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. Where constitutional cosmopolitanism proceeds according to the premise that a constitutional settlement will establish a world authority as a matter of law where none exists beforehand, innate cosmopolitanism posits a world authority to exist as a matter of law, independent of formal recognition. Innate cosmopolitanism identifies a community independent of and prior to formal juridical expression, whereas constitutional cosmopolitanism identifies the community with its formally-cognizable juridical expression. Accordingly, innate cosmopolitanism, though operating within the bounds of recognizable legal discourse, looks outside of the formal limitations of international law for the source of cosmopolitan legal authority, whereas constitutional cosmopolitanism would in the first instance develop that authority from within the formal limitations of the international legal system, though the formal argument might be a creative one.

One of the central difficulties with the constitutional thesis, however, is how to elevate a convention or treaty above conventional treaties in a manner beyond even what Art. 103 of the UN Charter purports to achieve. Bardo Fassbender's treatment of the UN Charter as a world constitution is instructive in this sense. To identify the Charter as a constitution, he relies on Art. 2(1), which, in articulating the basic principle achieved by the Charter, inverts the expression of equal sovereignty into an expression of sovereign equality. 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.'[55] As Fassbender describes it, what was a system of relations predicated on equal sovereignty becomes, under the Charter, a system of sovereign equality.[56] In an order founded on relations of equal sovereignty, law is concerned to maintain the juridical sovereignty of each constituent equally; in an order founded on sovereign equality, the law is concerned to

[55] Fassbender 1998, at 582; 1945 Charter of the United Nations, 1 UNTS XVI, Art. 2(1).

[56] Fassbender 1998, at 582.

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, reinforcing their individualism. 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. Fassbender explains the significance as follows:

> [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.[57]

Notably, the logic behind the appeal to Art. 2(1) is not limited to Fassbender's reading of the Charter. Take, separately, two other examples of international constitutional theory, articulated respectively by Jürgen Habermas and Anne Peters. Habermas posits a multi-level scheme of a constitutional international system, which he has posited similarly at both the global and regional levels, and in which the sovereign state retains a fundamental role as the primary well-spring and incubator of democratic legitimacy, even as the sovereign state is subjugated to the constitutional order.[58] Habermas's international constitutional order, in its essentials, involves some executive capacity together with a deliberative body with two chambers, one representing all individuals collectively, and one representing states. Persons would be citizens of states and the supernational collective. Despite the dual citizenship, the democratic process remains most closely identified with the state in the first instance.[59] For this reason, sustaining the viability of the state while subjugating it to a constitutional authority is a critical maneuver as a matter of law, corresponding with the innate cosmopolitan affirmation of states alongside the world collective.

Peters posits a hierarchy of norms that may be recognized in the terms of international law. Though it appears that the sovereign state will be a more diminished entity under Peters' perceived constitution than the constitutions articulated by Fassbender and Habermas, her theory of an international constitution and the processes by which she observes the development of a constitutional hierarchy of norms still flows at its source from the law-making capacity vested in states. Her constitutional argument is founded in what she observes to be at least four real developments in international law, or 'embryonic hierarchical elements'.[60] The four developments are: 'the erosion of the consent requirement';[61]

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[57] Ibid., at 582 (emphasis in original).

[58] See, Habermas 2008, at 444; Habermas 2012, at 335.

[59] Habermas 2008, at 447; Habermas 2012, at 344-345.

[60] Peters 2005, at 46.

[61] Ibid., at 51.

'the creation of World Order Treaties';[62] 'changes in the concept of statehood and a legal evolution regarding the recognition of states and governments';[63] and 'the growing participation of non-state actors, such as Non-Governmental Organizations (NGOs), transnational corporations and individuals in international law-making and law-enforcement'.[64] Each of these is measured in clear developments within the corpus of international law. Moreover, Peters' constitutional model is designed in part to support the formal terms of international law. By her own words, Peters' 'constitutionalist approach to international law helps to prevent uncontrolled "deformalization" of international law.'[65]

Thus Peters is faced with the same dilemma as Fassbender and Habermas: how to elevate the conventional achievements of states to a level beyond the constraints of conventional international law. The solution of sovereign equality is appealing, even without reference to Art. 2(1): the states party to the international constitution (all of them) must exist in a relation to one another that may be reducible to a collective authority, rather than in a relation to one another that ultimately reduces to individualism. As a matter of legal doctrine, however, the question remains how to achieve a common authority against an orthodoxy that equates sovereignty with individualism. The innate cosmopolitan argument addresses the matter in two fundamental ways, and does so in a single stroke. Kooijmans, for example, in reconstructing the doctrine of sovereign equality, would establish that equal sovereignty was mere error to begin with; that states always and naturally existed – and continue to exist – in a state of sovereign equality. As states by their nature exist in a state of sovereign equality, the constitutional act is always feasible: states are of necessity a part of a larger community; they can always adopt a formal constitution to guide it as a matter of law.

Moreover, the same thing that establishes equality among states also supports their sovereignty. The innate cosmopolitan affirmation of the collective phenomenon at all levels – including the one global collective, regional collectives and particular states – is particularly useful to Habermas' vision of international constitutionalism, which he has articulated in similar terms for international law and the European Union.[66] In each case, as noted, the sovereign state enjoys a primary role as both fundamental well-spring and protector of democratic legitimacy.[67] Though the state is subjugated to the constitutional order, it nonetheless enjoys a basic and irreducible importance as an independent collective and political actor within that order.[68] Thus, the innate cosmopolitan reconstruction of the equality of states offers a doctrinal template within the terms of international

[62] Ibid., at 52.

[63] Ibid., at 53.

[64] Ibid., at 53-54.

[65] Peters 2009, at 409.

[66] Habermas 2008, 2012.

[67] Habermas 2008, at 447; Habermas 2012, at 344-345.

[68] Habermas 2008, at 447; Habermas 2012, at 344-345.

law for comprehending the role of states under Habermas' constitution. The state, among other actors, retains a fundamental value under innate cosmopolitanism that supports the constitutional scheme envisioned by Habermas.

Moreover, in explicating the validity of states under the innate cosmopolitan regime, the innate cosmopolitan argument suggests that sovereign equality is not mere equality before the law, though this is a question that Fassbender and others leave open.[69] Equality before the law is a formal condition that does not reflect the actual unity from which, according to innate cosmopolitanism, the collective phenomenon springs; rather, the proper relationship is one of equality in the law.[70] As such, the formalism of equality before the law does not meet the demands of public order, insofar as those demands are comprehended according to historical constraints and observed social phenomenon, as opposed to abstractions and formal relationships. Thus a cosmopolitan constitutional system founded on formal equality before the law represents a failure to appreciate the real normative basis upon which the community – and the law of the community – must be founded.

By contrast, the innate cosmopolitan regime elevates equality in the law, according to a just apportionment of rights and responsibilities under law – or a roughly equitable treatment of parties according to those distinctions valid with respect to any given community norm. Likewise, the communal scheme will reflect an appreciation of distinctions among members: not all parties will be equally or identically responsible for its maintenance. The apportionment of rights and duties for community purposes exists as a political matter that cannot be determined independent of the reality of historical circumstance. It bears noting, in keeping with the interplay of innate cosmopolitanism and constitutional theory, that Fassbender and Habermas alike implicitly endorse the idea of equality in the law. Each does so by retaining the Security Council, albeit according to certain reforms.[71] For both, the institution serves as an example of how select nations will retain distinct authorities and responsibilities according to a frank acknowledgment of their distinct status in world affairs. The reason is relatively clear: their proposed constitutional schemes share with innate cosmopolitanism a purported appreciation of historical conditions, such that the community as a whole, and equal membership in it, as measured in rights in obligations, together reflect (or are sensitive to) constraints of historical circumstance.

8.5 Conclusion

Kooijmans' inquiry into the doctrine of the legal equality of states and, with it, the foundations of international law, reflects a peculiar brand of cosmopolitan thought, namely innate cosmopolitanism. Though under-recognized, innate

[69] Fassbender 1998, at 582.

[70] Kooijmans 1964, at 113.

[71] Habermas 2008, at 451; Fassbender 1998, at 529.

cosmopolitanism plays a central role in the discourses of international law. It is an argument for re-conceiving the modern international legal order according to a deep unity underlying the whole of human relations. At the same time, the innate cosmopolitan argument also recognizes and incorporates smaller units of collectivity. As such, it holds especial relevance at a time when international legal doctrine looks beyond the preeminence of states, but continues to be bound to them in practice. This article has explored the innate cosmopolitan contribution to international law by reference to two current discourses, concerning ethical legitimacy and constitutional theory in an increasingly comprehensive international legal system. It demonstrates the significance of innate cosmopolitan theory to contemporary discourses that grapple with justifications for and the doctrinal viability of an expanding public order globally.

The innate cosmopolitan argument, represented here first by reference to Kooijmans' work, envisions a comprehensive communal order, one that reflects the constraints of historical circumstance. The order as a whole must be founded on certain universal norms, or general principles, but those principles remain to receive positive expression reflecting the lived reality of the historical community. Accordingly, there is no system of abstraction or formalism that can adequately sustain public order in the world community; rather, the effective unity of the system is made contingent on the appreciation of diversity. The community incorporates all members equally when it takes into account the different position of each member vis-à-vis the collective whole. The rights and responsibilities enjoyed by each, and their political situation within the community, will vary accordingly.

There remains a grounds for critique, perhaps counterintuitive, arising out of the emphasis on historicity, namely that innate cosmopolitanism is too much invested in the status quo. The critique may be counterintuitive because, as noted, innate cosmopolitan theory defies limitations of international law traditionally conceived, and is typically associated with progressive ambitions for international law. But even as it defies the constraints of traditional international law, innate cosmopolitanism is uniquely contingent on – and thereby ultimately supportive of – historical conditions. It is correspondence with historical phenomena that defines 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 system of law by reference to a historical reality – short of world government – capable of sustaining an objective normative authority above 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 Myers 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.'[72] In identifying the proper expression of

[72] Onuf 1979, at 256.

universal norms with the historical reality of the world, the innate cosmopolitan model aspires to a more adequate grounding for international law as a matter of theory and historical reality. And in achieving more adequate grounding, the innate cosmopolitan model defies the constraints of international law, traditionally conceived, even as it would perfect it. But the progressive ambition to which the innate cosmopolitan model has been harnessed, against subjective terms of orthodox international law, does not diminish the reliance on status quo conditions. As noted, where liberal cosmopolitanism expressly situates its normative authority outside of the status quo, to enable an ethical critique of the institutions of international law, innate cosmopolitanism expressly associates its normative authority with the perceived historical reality of the world. The positive expression of innate cosmopolitan norms is supposed to represent the world as it is – and 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.

The fundamental embrace of status quo conditions may, in its effects, undercut the progressive ambitions by which the innate cosmopolitan model is typically comprehended. Take the example considered at the outset, of the activation of the crime of aggression in the Rome Statute. The role provided for the Security Council under 15*bis* and 15*ter* reinforces status quo elements of the Charter regime that are typically considered regressive, rather than progressive. But they are nonetheless in keeping with an innate cosmopolitan perspective on public order for a world community.

There are additional dilemmas for innate cosmopolitanism. Principal among them, there is no single authority on historical fact, nor on the corresponding shape of the world community. Consider in this light another example, which reveals different and conflicting potentialities of innate cosmopolitan theory: namely, the *Kadi* case.[73] Even more so than the activation of the crime of aggression under the Rome Statute, the *Kadi* case has been inordinately treated. Innate cosmopolitanism cannot claim pride of place among the many competing theories for its interpretation. Nonetheless, aspects of the *Kadi* decision can meaningfully be understood according to innate cosmopolitan tenets, and I briefly raise the case here to serve the limited purpose of a concluding example.

At its heart, as is well known, the case stands for the European Court of Justice's rejection of the implementation of Security Council Resolution 1267, and its blacklist regime.[74] Much has been made of the Court's pluralist logic, which also professed not to reject outright the underlying Security Council resolution.[75] Whatever else may be said and has been said about it, the Court's reasoning can be seen to be compelling and coherent under the innate cosmopolitan model. Recall Kooijmans' language of the 'indissoluble coherence' of the cosmopolitan legal

[73] Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council and Commission* [2008] ECR I-6351.

[74] UNSC Res. 1267, 15 October 1999.

[75] Cardwell et al. 2009, at 233-240.

order and the state: because the European Community represents a valid political collectivity of its own, and an equal member in the innate cosmopolitan community, its legitimate norms cannot properly come into conflict with other international norms legitimately promulgated on behalf of the world collective. The ECJ was, in its own right, entitled to review the norm at issue, and in the absence of a clear rejection of the norm represented by the Security Council resolution, conflict between the resolution and its application in the European Union must have been a matter of error – or implementation – but not contradictory norms.

Kadi and the activation of the crime of aggression in the Rome Statute bring out separate, conflictual sides of the innate cosmopolitan coin. The activation of the crime of aggression appears regressive for its reliance on the authority of the Security Council. *Kadi* goes in an opposite, progressive direction, in accordance with a different historical mandate, but in so doing risks conflict in the expression of authority internationally.[76] The discrepancy between the two examples underscores the indeterminacy of a theory of international law in the service of a unified and autonomous world community, when that community defies any formal or definitive expression. As demonstrated, however, despite weaknesses, innate cosmopolitan theory continues to make a dynamic contribution to contemporary discourses and developments in international law.

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