The New Global Law

Rafael Domingo
THE NEW GLOBAL LAW

The dislocations of the worldwide economic crisis, the necessity of a system of global justice to address crimes against humanity, and the notorious “democratic deficit” of international institutions highlight the need for an innovative and truly global legal system – one that permits humanity to reorder itself according to acknowledged global needs and evolving consciousness.

A new global law will constitute, by itself, a genuine legal order and will not be limited to a handful of moral principles that attempt to guide the conduct of the world's peoples. If the law of nations served the hegemonic interests of ancient Rome and international law served those of the European nation-state, then a new global law will contribute to the common good of all humanity and, ideally, to the development of durable world peace. This volume offers a historical–juridical foundation for the development of this new global law.

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The New Global Law

Rafael Domingo
In memory of Emilio Nadal
Contents

Preface
Acknowledgments

PART ONE: FROM THE IUS GENTIUM TO INTERNATIONAL LAW
1 The Ius Gentium, a Roman Concept
   1. A Law for Every Age
   2. A Word about Dike
   3. Cicero, Father of the Ius Gentium
   4. The Ius Gentium in Other Roman Writings

2 The Ius Commune, a Medieval Concept
   1. The Ius Gentium in the Middle Ages
   2. European Common Law
   3. English Common Law Contrasted with Civil Law
   4. Ius Canonicum
   5. Islamic Sharia and Siyar

3 International Law, a Modern Concept
   1. From Ius Gentium to Ius Inter Gentes
   2. Ius Gentium Europaeum
   3. Kant, between Staatenrecht and Weltbürgerrecht
   4. Bentham and International Law
   5. Public and Private International Law
   6. New Attempts at Conceptualization
       A. Philip C. Jessup's Transnational Law
       B. C. Wilfred Jenks and the Common Law of Mankind
       C. John Rawls and The Law of Peoples
       D. Álvaro d'Ors and Geodierética
   7. Ius Naturale in the Shadow of Ius Gentium

PART TWO: TOWARD A GLOBAL LAW
4 The Crisis of International Law
   1. International Law and the Globalization of Law
   2. The Basic Primacy of States as Subjects of International Law
   3. The Death Throes of the State
       A. Sovereignty and the Sovereign People
       B. The Crisis of Territoriality
       C. Jurisdiction: Does It Belong to the State?
D. The Nation-State: A Marriage of Convenience Doomed to Divorce

4. The Future of the United Nations

5 Global Law, a Challenge for Our Time

1. The Need for Global Law
2. International Society versus Global Community
3. Cosmopolitanism and Global Law
4. Crisis of Nationality, Global Citizenship, and Patriotism
5. Global Law and Nonstate Law
6. Arbitration and Globalization
7. The Usus of the Earth
8. Humanity as Anthroparchy

6 The Global Legal Order

1. The Person, Center of the Global Legal Order
   A. Are Persons Legal Persons?
   B. Are Animals Persons?
2. Personal Dignity, Liberty, and Equality
   A. Human Dignity
   B. Personal Liberty
   C. Equality among Persons
3. Human Rights, at the Heart of Global Law
4. Quod Omnes Tangit ab Omnibus Approbetur
5. United Humanity
6. Culmination: The New Pyramid of Law
   A. Structure of the Pyramid
   B. Legal Three-Dimensionality

7 Legal Principles of Global Law

1. Rules-Based Principles and Principled Rules
2. Principles Common to International and Global Legal Orders
   A. Principle of Justice
   B. Principle of Reasonableness
   C. Principle of Coercion
3. Specific Principles of the Global Order
   A. Principle of Universality
   B. Principle of Solidarity
   C. Principle of Subsidiarity
   D. Principle of Horizontality or Democratization
4. Rules of Global Law (Iuris Universalis Regulae)

Conclusion: The Third Time Is the Charm

Index
Preface

We live in a world of profound change. The implementation of new technologies; the growing impact of mass media communications; the unprecedented development of a market economy on a global scale; the ubiquitous role of a civil society progressively consolidating, vertically and horizontally; the shared desire to address the problems afflicting humanity, such as international terrorism, arms trafficking, hunger and poverty, sexual exploitation, political and economic corruption, abuse of power, and increasing environmental challenges that threaten the configuration and peace of the planet – these are some of the issues that characterize our unique and never-recurring historical moment.

We are propelled through life at a dizzying speed. Perhaps this is the most salient difference from the past: the hectic pace of our social relations, which at times makes it difficult to adapt to the demands of justice. Our society is the product of a complex mosaic of political, economic, and cultural relationships, the intricacies of which are hardly recognizable merely by applying the social norms of yesteryear.

Faced with this reality, which is as certain as our own existence, we jurists cannot and should not turn a blind eye, thereby allowing the law of the jungle to take over in this age of globalization because of lack of foresight, consistency, or imagination. We cannot acquiesce to world domination by economic imperialism or political cryptocracy as if it were some kind of private estate. The science of law has become obsolete in many respects; it has been overwhelmed by new facts and circumstances. The increasingly opaque distinction between public and private spheres, the intrinsic complexity of facts to be ordered by law, and poor planning in the face of a rapidly changing future have eviscerated many legal principles that once might have seemed permanent and unchanging and now seem, at best, mercurial. At times, the weight of cultural idiosyncrasies and circumstance is so great that we think of them as part of nature. Nature itself, however, also changes – at least in part.

I am reminded of the famous words in Gaius’ *Institutes* (2.73), where the second-century jurist states that “what a man builds on my land becomes mine by natural law, although he built on his own account, because a superstructure goes with the land” (*superficies solo cedit*).¹ I doubt that the same jurist would repeat this precept, accepted by courts throughout the ages, if he had taken a stroll along Manhattan's Fifth Avenue. Today, this
principle has been overturned in many cases, with “structure prevailing over land.” Thus, natural law, in the modern sense of the term, does not embrace this tenet. In Ancient Rome, however, the inherent nature of things (rerum natura) prevailed as the standard of legal interpretation that led Gaius to formulate this principle. To be sure, though, for a long time, the stricture was observed.

In his classical essay *Revitalizing International Law*, Richard Falk complained that jurists – especially American jurists – are averse to paradigm shifts in response to the complexities of society and political phenomena. Globalization commands a reformulation of the law, an appropriate legal response to changing times to avoid becoming hostage to outmoded, transient paragons. It is a moral obligation. The time has come for a global law just as earlier, the time was ripe for the law of nations and what later became “international law.” Without the *ius gentium*, international law cannot be understood. Moreover, absent the development of international law, nascent global law would not come into being. These three legal domains (the law of nations, international law, and global law) are like grandfather, father, and grandson, respectively. They are part of one and the same family. Therefore, they have common traits that bind them even though they are based on different legal principles and were applied at completely different times in history. That they have coexisted and overlapped bespeaks this commonality and difference.

I do not, therefore, entirely agree with the great legal scholar Lassa Oppenheim (1858–1919) – nor with his followers – when he suggests that international law in the term's current sense is “a product of Christian civilization” that gradually began to develop in the Late Middle Ages, especially with Grotius, who was the originator of a later conceptualization of the law of nations. Such a point of departure is somewhat artificial. Is it possible to understand Grotius without at least Gentili or Vitoria, Vitoria without Thomas Aquinas, or Aquinas without Isidore of Seville? Can we understand St. Isidore without first knowing Ulpian, Ulpian without Gaius, Gaius without Cicero, the great Roman orator without the Stoics, and stoicism without Socrates? The litany of epistemological “moments” of development leads to a simple and succinct response: Of course not. Certainly, this penchant in favor of fragmentation has occurred within the history of international law, notable for platitudes that, like a family heirloom, have been passed down for generations.

I do accept, however, the happy turn of phrase with which Jean Monnet (1888–1979) closes his fascinating memoirs: “les nations souveraines du
It represents an outdated notion and pointless nostalgia, but it also underscores the need to acknowledge that tools useful at certain times in history, such as the concept of the sovereign nation itself, may lose their relevance in another era. The time has come for imagination and creativity. Humanity has common problems that must be addressed by the justice system and, therefore, by law – a law that, to use the well-known expression of the “Father of Europe,” must unite mankind, not merely nation-states.  

Better yet, the time has come for a law that integrates the highest values of different legal traditions while acknowledging the living synthesis of diverse and often disparate cultures. In this sense, it seems that global law calls for a “pure theory of Law,” although not in a Kelsian paradigm, because nothing can be farther from a pristine construct than “hyper-conceptualization.” The approach to global law must employ new legal instruments, concepts, and rubrics to order, in accordance with law, new social realities. There is an attendant need to “refine” once again those legal tenets that have been misconstrued as instruments of economic and political power.  

We must recover the notion of *populus* in its most authentic sense, that is, as a grouping of mature adult citizens, and apply it to humanity. “The people” is inclusive, whereas the *enlightened nation* never was. Humanity will never be a global nation in a revolutionary sense. It will come closer to the concept of a people, a sort of *populus populum*, organized into an anthroparchy. People as most “popular” and “commonly accepted” is “we”; whereas it is the “they” who chart the course of any nation. Humanity refers to itself as “we” but not as “they.” In this respect, I agree with John Rawls.  

We should not forget that the American Revolution was carried out by the people, the French Revolution by the nation, and the Russian Revolution by the party. This is one reason why the American Revolution has, conceptually speaking, best withstood the passage of time. It is this proposition that most likely will contribute to the system of global law.  

The ancient Roman concept of *maiestas*, which was replaced by sovereignty in the sixteenth century, must be subjected to sustained analysis. In the formation and transformation of a new global law designed to coexist with its domestic and international counterparts, we must restore to the law the notion of person, which has been lost in analytical jurisprudence. The human person, and not the state, should constitute the cornerstone of global law. Humanity is the global amalgamation of *persons*, not states. Consequently, a global law must find its normative foundation in the *person*,
that is, the individual in space and time who ultimately is responsible for and is the reason for being of all jurisprudence and positive law. Uniquely situated as spectator, spectacle, legislator, and target of all normative precepts, it is the concept of person in all its richness that constitutes the first principle of the global law. Indeed, contrary to Kelsen's assertions, all law stems from the person (ius ex persona oritur). It is the very “personification of the state”\(^9\) that has caused the dehumanization of the person, its objectification and stripping of the special properties of human dignity. This proposition constitutes the lodestar for securing a comprehensive understanding of the effort that this text embodies.

This modest effort offers the academic community a historical–juridical foundation that may constitute the basis for this \textit{ius commune totius orbis}, whose coming into being is inevitable. It is the aspiration of this text to explain ideas and ideals but not ideology.\(^{10}\) I understand global law to be a world legal order that governs the ambit of justice as it affects humanity as a whole. Global law, compatible with the existing legal systems and traditions within the framework of international economics and politics, would gradually abandon the corset of the nation-states and employ a legal metalanguage in response to the new challenges of globalization in all its permutations.

The reader must not confuse global law with a closed legal system or juridical order, let alone a mere collection of more or less binding and sterile rules. Rather, it would be a system of systems, a \textit{iuris ordorum ordo}, which necessarily would develop into an \textit{ordo orbis} as it is gradually accepted by all communities and citizens of the world. Its purpose would be similar to that of the sun in the solar system that is mostly composed of planets but also of billions of smaller bodies: asteroids, meteorites, comets, and so on. In my example, each of the planets would correspond to a legal tradition on which various legal systems would depend. The principles of global law would be like the sun's nucleus, which radiates energy by thermonuclear reactions, whereas the gravitational force that attracts them, namely, global jurisdiction, would be different from what we now call universal jurisdiction.

To continue with the solar metaphor – just as there are varying intensities in the gravitational field as a function of acceleration – various jurisdictions must also coexist, principally as a function of subject matter. The urgency of a global criminal jurisdiction to combat international terrorism is not comparable to the need to harmonize the world's legal systems in matters concerning the registration of intellectual property, however important this
need may be, or to approve new common rules for the recognition and perfunctory enforcement of international arbitral awards.

Global law is born, then, with a cosmopolitan destiny, although this characteristic does not suggest that it would immediately achieve its destiny. The *ius* needs force – coercion – to prevail, and force is, in the final analysis, more political than juridical. If there is no political will to order, jurists cannot regulate society pursuant to law. This proposition explains how law is often subject to and conditioned by the science of the *polis*. Law is a check on injustice and can prevail (the rule of law) only by the free submission and acceptance of the political community, particularly that of its governing circles and ruling elites. On this act of acquiescence rest its greatness *and* its poverty, its controlling function and its subsidiary position, its all-encompassing calling and its limitations in practice.

Global law does not presuppose a break with earlier legal traditions, much less a revolution. Just as the law of nations coexisted with international law for a long time, global law has to work with international law, at least for a time. “Cosmopolitan right can supplement – but not replace – sovereignty-based public international law,” states Jean L. Cohen.11 This issue is not, as that writer forcefully suggests, a question of an updated international law or a cosmetic makeover, but rather the transcending of the notion of international law in the face of economic and cultural globalization. International law and global law are two different species of the same genus. Whereas international law is destined for extinction, or at least complete transformation, the future of global law is development and evolution.

This notion of the coexistence of laws is present in the history of the West and has been a benefactor in the development of juridical systems. In Ancient Roman law, Praetorian law (*ius praetorium*) coexisted for a time with the *ius civile* until the late classical period ushered in the birth of a *ius novum*, transcending both and founded basically on rescripts and the *orationes Principis*. A similar development was witnessed centuries later during the Middle Ages with the common law, which made possible an entirely independent and parallel equity jurisdiction. Here, law and equity were simultaneously applied in the administration of justice, but they never intersected. This waning jurisdictional duality found its way into Anglo-American law. It remains there, despite its diminished influence in the tradition stemming from the common law.

The new world legal order must above all be a jurisdictional law and not an interstate jurisdictional model: consensual, not bureaucratic, positive, or official. It should be proposed and not imposed – based more on mutual
agreement than on laws and codes and led by a civil society protected by
global institutions and not by hierarchical and technocratic state entities.
From this perspective, the common law system – because of its proximity to
the quotidian and its own methodology and system of sources – is better
suited to globalization than European civil law, which is one reason why
common law finds itself at such ease in the world of international business
and transnational arbitration. With the new global law, the public would be
identified more with social issues than with matters of state, which certainly
is not now the case in European and Latin American contexts.12

This book comprises two parts of a coherent whole. The first section,
historical in focus, addresses the conceptual continuity of the notion of the
law of nations as the solitary source of global law as well as its
relationship with the ius commune, the importance of which should be kept
in mind throughout this entire effort because ius commune latet, ius gentium
patet.

In the first chapter, I establish the view that each historical era begets a
unique juridical system embedded with its own idiosyncrasies. The aim of
developing this proposition is to highlight and underscore the inextricable
link between globalization and the birth of global law. I raise this assertion
without prejudice to the premise that enduring juridical strictures that
provide continuity to the development of the law need to be identified,
studied, and understood as contributing forces, that is, rectors in the
development of a new law. Perhaps it is the very tension inherent in
incorporating the past into the developing present and future that is
emblematic of the most important contribution of Ancient Greek philosophy
to the science of law. A legal system requires balance, moderation, and the
stability provided by both. The ius gentium comprises the centerpiece of
this chapter: a Roman construct but one pervaded by Greek thought. It is
here that we inevitably come across the origins of our global law. Cicero
was the first to use the term ius gentium, which would later be replaced by
the Roman jurists and medieval theologians, scholars, and canonical
writers, the Renaissance humanists, and rationalists of the Enlightenment,
ultimately becoming interstate law in the strictest sense of this term.

In the second chapter, the ius commune, the most salient contribution
arising from the Middle Ages to juridical culture, is analyzed. This task
seeks to illustrate the compatibility between what is commonly shared and
the idiosyncrasies of sovereign states. Both “sameness” and “particularity”
can be harmonized among all states and cultures. This chapter details a legal
system having “general” legitimacy and normativity harmoniously applied
together with local law (*iura propria*). The European Union as a juridical entity is indebted to the principle of a common unified law that for centuries accomplished the daunting task of unifying Europe while ensuring that the individual sovereigns comprising the union retained their cultural and political identities.

In the third chapter, the birth of the “modern” concept of “international law” is explored by taking its contours from the *ius gentium*, or the *internationes*. Here, both Bentham and Kant are distinguished and set apart as the fathers of contemporary concepts of international law and *Weltbürgerrecht*, respectively, which were centerpieces for the consolidation of international law. I also analyze some of the more recent efforts to conceptualize international law, such as those of Philip C. Jessup (1897–1986), C. Wilfred Jenks (1909–1973), John Rawls (1921–2002), and Álvaro d’Ors (1915–2004). Other authors could have been selected, but, in my opinion, these addressed this *vexata quaestio* from different perspectives from those presented here. Currently, Benedict Kingsbury, Richard Stewart, and other distinguished scholars at New York University School of Law are making significant contributions to our understanding of global administrative law.

In the second section, I attempt to detail from a person-based perspective the first principles and normative foundation of the new juridical global order, a legal system for humanity and not merely for the interrelationships between and among states. I selected as a logical point of departure the crisis that now plagues “modern international law,” which is inextricably bound to the failings of the current concepts of “state” and “sovereignty.” Doubtless, the “nation-state” was a marriage of convenience that may be justified and certainly had its reason for being. Modernity, however, has witnessed this marriage’s plight end in divorce. Habermas is on point in highlighting that “a world dominated by nation-states is indeed in transition toward the post-national constellation of a global society.” The crisis afflicting international law has its genesis in the once helpful concept of territoriality. The ostensibly attractive principle of territoriality diverted attention and importance from the less visible but much more fundamental concept of “person” as the rudimentary precept on which a global law construct for humanity must rest.

It is my contention that the principle of “territoriality” mostly serves a pragmatic organizational and administrative purpose and function. Therefore, it cannot help but be secondary in nature and subordinate at best. Put simply, territoriality cannot play the role of a conceptual protagonist in
forming and transforming international law, contrary to modernity's foolish belief. I tend to compare its mission and function with that of a handbrake that provides greater safety but at the expense of progress. The extent to which a society can be deemed postmodern is best measured by the degree to which it views, employs, and conceives of territoriality as a means and not an end that must have for its goal the furtherance of the concept of person.

The fifth chapter aims to develop certain novel concepts with respect to the *usus* of the earth, dealing with the global form of government that must be incident to a new global law. I have labeled this global governmental rubric “anthroparchy,” so that it may comport with the ubiquitous underlying “anthropos.” The connection aspires to be conceptual and hardly limited to a philological play on words. The term “*usus*” of the earth is of Roman origin and appropriately brings to mind Schmittian connotations, as most of this chapter constitutes an analytical and synthetic critique of the doctrinal exegesis articulated by Carl Schmitt in his work *Der nomos der Erde*. Anthroparchy is the form of government proposed for humanity, which conforms structurally and substantively to Western European models as well as to emerging paradigms of contemporary vintage. Deeply steeped in the principle that “what affects all must be approved by all,” anthroparchy shall gradually flourish and become institutionalized: a United Humanity. Conceptually, this government shall be a global institutional paragon, descended from the United Nations, and charged with the governance of anthroparchy. I underscore anthroparchy and not anthrocracy because at issue is a form of government predicated more on the legitimacy of rule (-*archy*) than on unbridled power of rule (-*cracy*).

The sixth chapter is dedicated to exploring the orderly arrangement of a global legal system that is indispensable for providing true and legitimate global justice. Without a global law, “global justice” would be reduced to little more than a chimera. The global order rests on the human being, specifically on the unique dignity of the individual and collective human person, the true spring of liberty and equality among all human beings. Borrowing from H. L. A. Hart's terminology, the rule of recognition of the global order is no different from the precept *quod omnes tangit ab omnibus approbetur*, which cannot be severed from the creation of any democratic institution. The fulcrum of the institution of a United Humanity rests with the global parliament, which will be charged with deciding how resources are to be allocated under the governance of a global legal domain. Accordingly, these resources and jurisdictional strictures shall remain within the auspices, at least in part, of national governments and
At the end of this chapter, I propose a new juridical pyramid that substitutes the pyramidal structure erroneously ascribed to Hans Kelsen. In this juridical pyramid an attempt has been undertaken to synthesize the different levels of the application of law: personal, local, national, supranational or transnational, and, finally, global.

The last chapter explains the seven constituent principles of the new global legal order. Three of these tenets – justice, reasonableness, and coercion – are common to any legal order, including an international legal rubric. The remaining four strictures – universality, solidarity, subsidiarity, and horizontality – are the principles that clearly distinguish global law from international law. Consonant with a millennium-old tradition, the reader is then presented with a handful of juridical rules that succinctly summarize the fundamental doctrines articulated in the entire text. I resorted to Latin as the language with which to express these rules for philological, conceptual, and historical reasons.

These global legal propositions are small and modest steps that aim to initiate an open and inclusive intellectual dialogue, that is, a conversation and exchange of ideas that can best take place within a transcultural and purely academic framework. The aspiration is for this dialogue to serve as a point of departure and fertile ground for the development, formation, and transformation of this embryonic legal discipline. To be sure, these strictures are completely separate from the dangerous and perfidious precepts that seek to eviscerate national identity or international Machiavellianism (twenty-first century Realpolitik), a Machiavellianism that has succeeded even the most radical expressions of Marxism. National citizens, cultures, and peoples simply shall not and should not disappear as if by magic. The governing principles of this new global law certainly do not constitute the tools or means to be employed by persons aspiring to create a world government. Here the construct and framework are substantially and materially different. Global law is not amenable to implementing norms that in turn would have as their objective rendering the world monolithic or homogeneous as a methodology for global governance. Instead, its aim is to organize a system that renders it viable for the challenges and problems afflicting humanity to be addressed universally by citizens of the world, and not states, all acting in concert. This aspiration is the single path that leads to the much-longed-for pax perpetua.

This text is far from the goal of constructing a normative or conceptual theory of global law that comports with Dworkin's demands. An attempt is made, however, to take the first steps toward developing the nascent reality of global law. A medieval phrase is helpful for expressing the
universal truth that the law comes after the fact: *ius ex facto oritur*. So too does theorizing, or at least the theoretical undertaking that seeks to be both constructive and interpretative. Here the law and language have a common phenomenon. They are both so gradually molded that it becomes difficult to determine when each began by sprouting from a common stem. Global law is starkly “splitting off” – creating a new *ordo* – from international law, as Castilian separated from Latin, English from Old English, or, more recently, American English from British English.

I anticipate the reader's awareness of my European – although not Eurocentric – training and education. It certainly is not my intent to overlook the roots of our legal tradition or to assume an inflexible Western arrogance. It would be a mistake to purport to create, *ex nihilo*, a new global law as if it were a sculpture to be cast from bronze. It is more feasible to construct a *ius novum* on the solid foundation offered by the most universal legal systems than by creating a *tabula rasa*, which would be tantamount to destroying the fertile *hereditas iuris* constructed over the ages.

Finally, it is the author's opinion that the science of law should take flight on two wings of theory and experience. I believe what the great internationalist C. Wilfred Jenks reminds us of in his book *A New World of Law?*: “We need the right mix of scholarship and shrewdness, of detachment and experience.” In this delicate but healthy balance between theory and practice, between intuition and cognition, strategy and execution, lies the real development of an enlightened society.


2 Richard Falk, *Revitalizing International Law* (Iowa State University Press, Ames, 1989), p. 10: “Paradigm changes are especially uncongenial to the American lawyers who tend to view constructive social change as necessarily incremental and who distrust overall explanations of complex social and political phenomena.”

3 See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University
Press, Oxford, New York, 2007), p. 432: “The task of international legal reform is no longer merely a morally permissible option, something to be pursued only so far as it promotes the ‘national interest’; it is a moral necessity.”


9 For more on the analogy of the person and the state in international law, see Charles R. Beitz, *Political Theory and International Relations* (with a new afterword by the author) (Princeton University Press, Princeton, Oxford, 1999), p. 70: “Perceptions of international relations have been more thoroughly influenced by the analogy of states and persons than by any other device.”

10 In this vein, see J. H. H. Weiler, “Fine-de-siècle Europe: Do the New Clothes Have an Emperor?,” in J. H. H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge University Press, Cambridge, New York, 1999), pp. 239–240: “We should not confuse ideals with ideology or morality. Ideals are usually part of an ideology. Morality is usually part of ideals. But the terms do not conflate […] Ideology is part of an epistemology, a way of knowing and understanding reality; and in part a program for changing that reality to achieve certain goals. Ideals, in and of themselves, constitute neither an epistemology nor a program for realization, and are often the least explained elements of any given ideology.”

Moreover, this corresponds to the etymological sense because the adjective *publicus* is a hybrid of *pubes* and *populus*, the result of a linguistic conflation. Cf. Álvaro d’Ors, *Derecho privado romano* (10th ed., edited by Xavier d’Ors, Eunsa, Pamplona, 2004), §16, p. 53, note 2.


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PART ONE FROM THE *IUS GENTIUM* TO INTERNATIONAL LAW
1 The *Ius Gentium*, a Roman Concept

1. A LAW FOR EVERY AGE

Every age has its law. *Cuius tempora eius ius* – one may say in the language with which Europe was built. In every age of history, the law has had its own language – Latin, German, French, and English mainly – and its own idiomatic way of generating concepts.¹

Law is life; it is experience. The words U.S. Supreme Court Justice Oliver Wendell Holmes uses to begin his well-known work, *The Common Law*, have gone around the world: “The life of the law has not been logic: it has been experience.”² As different sociological conditions arise, new forms of juridical–political organizations, laws, jurisprudence, and mechanisms for conflict resolution become necessary, and with them new ideas, new concepts, and new paradigms.

The Hellenic *polis*, the Macedonian Empire, the Roman Republic and the later Roman Empire, the medieval *Res Publica Christiana*, and the rise of nation-states are all responses to different times and places. Something similar may be said of the forms of organization and conflict resolution within the ambit of Islamic, Chinese, Japanese, or Hindu law.³ The structure and government of these political systems and their cultural worldview determined their idiosyncratic concept of law. Despite this, all stages in humanity’s legal development have a common thread: the presence of relationships of justice among persons or groups needing rules to resolve disputes. The etymology of the word “justice” appears to confirm this juridical ethos: *ius stitium* – the cessation of claims. In this sense, “peace is the fruit of justice” (*opus iustitiae pax*).⁴

The various garments in which law – fundamentally a mediator of intergroup relationships – has been cloaked throughout history denote the various stages of the science of law, which developed in a particular fashion during the twilight of the Roman Republic and the dawn of the principate. Greek natural law (later developed by Roman jurists and in Christian thought); Roman *ius gentium*, as the source of inspiration in international relations; medieval *ius commune*; Islamic Siyar; vernacular variants of modernity, such as the German *Völkerrecht*, the French *droit des
gens, or, by the sixteenth century, the English “law of nations”; the *ius universale*, international law, and the interstate law (*Staatenrecht*) of the rationalist Enlightenment; and more recent descriptors, such as transnational law, the common law of humanity, or the law of peoples – all these mark intellectual efforts directed toward forming a more just intercommunitarian order.

However, the fact that each age is identified by its law does not mean that in the various legal systems, there are no common points, keys to mutual understanding, recurrent problems, or permanent solutions. This permanence imparts value and meaning to these historical projections and shows that although time may have had great influence in shaping new law, humanity remains the same regardless of the historical moment in which they live. This may be Greece's great contribution to law – adequately resolving the tension between change and permanence by finding a point of equilibrium that makes it possible to go forward without forgetting the past, and building without dismantling what has already been built.

2. A WORD ABOUT DIKE

Although justice exists in all civilizations – especially in Israel, as an expression of the Covenant of Sinai\(^5\) – it was the Greek concept of justice that truly opened the doors to *ius gentium*, already a Roman construct, as we shall see.

In Greece, justice was personified by the goddess Dike, the daughter of Zeus and his second wife, Themis (sister of Eunomy and Eirene). Writing about Dike in the eighth century B.C., Hesiod\(^6\) tells how Dike, unlike Themis, who in the Homeric epics passes on the gods’ mandate that must be followed, prosecutes earthly injustice by punishing the guilty and imposing a reciprocal equality – the correlation demanded between different people's actions.

This idea of justice as equality was elevated by the Pythagoreans to the plane of arithmetic and was symbolized by the numbers 4 and 9, which are the squares of an even and an odd number, respectively. This illustrated the relationships among justice, equality, the comparison of people's actions, the reciprocation of benefits, and the correlation between infraction and punishment – indeed, the idea of harmony and proportion.

Plato\(^7\) attributed the status of virgin to the goddess Dike to show her
incorruptible nature. As mentioned by Aristotle in the fifth book of the *Nicomachean Ethics*, the antithesis between natural justice (*dikaion physikon*) and positive or conventional justice (*dikaion nomikon*) is fundamental in this regard. One finds the same thought in his *Rhetoric* and in the earlier thinking of Alcibiades, whose dialogue with his uncle Pericles appears in Xenophon's *Memorabilia*. In this work, the Greek historian writes about the Socratic idea equating justice with law, but he understands the latter comprises written laws approved by citizens as well as unwritten laws that come from a divine lawgiver.

The conviction that nature (*physis*) transcends human will by limiting its decisions is the foundation for the universality of certain norms (*nomos*) applicable to all people at all times, just by virtue of their humanity. What initially were contrasting terms – *physis* and *nomos* – over time became complements of justice – and of a Hellenic customary law (*hellenika nomina*) concerning prisoners of war, which the historian Thucydides described in his writings.

Greek thought, like no other, recognizes a limit on free will imposed by nature, custom, reason, law, or religion. Sophocles’ famous tragedy (442 B.C.), based on the myth of Antigone, is well known. In disobedience of Creon, the King of Thebes, Antigone fulfilled the religious mandate to bury her brother Polynikes, for whom the king had denied funeral rites. Several hundred other examples can be cited. Ultimately, Greek philosophy provided a permanent substratum on which Roman Law could be built; its principles continue to influence the most developed legal systems of our day.

3. **CICERO, FATHER OF THE IUS GENTIUM**

One of the virtues of Marcus Tullius Cicero (106–43 B.C.), educated in the Hellenism of the Stoa, was applying the Greek philosophical system to international relations, coining the expression *ius gentium* in the process. This concept and category of universal law went beyond the so-called *ius fetiale* produced by the priestly College of Fetials, whose sacred duties included overseeing international treaties and celebrating the rites preceding a declaration of war.

Thus, we safely attribute *ius gentium* to this *homo novus* of the twilight of the republic. But we cannot forget that as early as the second century A.D.,
Aulus Gellius, in *Noctes Atticae*, recalled Cato the Elder's famous speech in favor of the Rhodians, which Tiro delivered to the Senate in 169 B.C. Cato argued that the intent to declare war on a people does not justify (*bellum iustum*) a declaration of war. Gellius' *verbatim* quote of Cato in paragraph 35 has led some to conclude that the reference to *ius gentium* in paragraph 45 (*quae non iure naturae aut iure gentium*) may also be Cato's. It is also possible that Tiro, one of Cicero's followers, may have used his master's terminology. Max Kaser's conclusion is that Tiro's authorship, based on the Ciceronian pattern, cannot be dismissed offhand.

Cicero's reflections on the law of nations were not free from confusion. But this should surprise no one; concepts and terms need to be refined over time. Otherwise, they remain hidden and their use becomes haphazard or fleeting.

Nowhere in Cicero's many works does he clearly define *ius gentium*. The most significant mention is in *De officiis* 3.17.69, a work steeped in the Stoic humanitarian ideal. Cicero begins by saying that because of the degradation of social mores, certain things not forbidden by customs, statutes, or civil law are nonetheless punishable under the law of nature. After speaking of society in the broad sense as uniting all people with each other (*societas omnium inter omnes*), he refers to lesser societies made up of *gentes*, or those formed into cities. Finally, Cicero points out that the ancients desired two kinds of law: the law of nations and civil law – the former ideally being a part of the latter. As a matter of fact, the norms of the law of nations were applied not only by the *Praetor Peregrinus* but also by the *Praetor Urbanus*.

In Cicero's third book, *On Duties*, the expression *ius gentium* appears for the second time in connection with the now-classic rule that it is wrong to cause harm to another to obtain a benefit. Cicero considers the law of nations to be the juridical embodiment of nature (*natura, id est iure gentium*). For him, the *ius gentium* oscillated between the two great coordinates of human justice set down by the Greek philosophers and refined by the Roman jurists: *natura* and *fides*. People should follow nature as they follow a ruler; they should observe faith (*fides*) as the cornerstone of justice.

In his *Tusculanae Disputationes*, Cicero draws a connection between *lex naturae* and *ius gentium*: What is accepted by all peoples is to be held as natural law. In his *De partitione oratoria*, after analyzing the elements common to the law of nature – by influence of the *aequitas* belonging to
religio – Cicero writes that what properly belongs to law (propria legis), as distinct from nature, is written down. Nevertheless – and here he follows the Greek model – there is also an unwritten law made up of the ius gentium and the mores maiorum, which is also binding. The force and effect of this unwritten law – a legacy of Greek thought – would flow from a tacit agreement among people.\(^{24}\)

Cicero makes use of this concept in some of his speeches: in De haruspicum responso (14.32), on the prohibition of appropriating things belonging to the immortal gods, and in Pro Roscio Amerino (49.143), when he cites cold weather as a reason for suspending wars. He also employs it in his dialogue De re publica (1.2.2), in a rhetorical question about human duties: unde ius aut gentium aut hoc ipsum civile quot dicitur? And he uses it again in De oratore (1.13.56), in a beautiful passage that alludes to the issues contained in his speeches.

4. THE IUS GENTIUM IN OTHER ROMAN WRITINGS

Two decades younger than Cicero, Sallust employed the expression ius gentium in his famous narration of Rome's war against Jugurtha, the King of Numidia, written about 40 B.C., four years after Cicero's De officiis. The Amiternian historian explains that the Roman people were militating against justice and the good when they forbade others to invoke the law of nations.\(^{25}\) In a later passage dealing with the arrest of Bomilcar – a close friend of Jugurtha, at whose request Bomilcar killed Jugurtha's cousin and rival Massiva – Sallust indicates that the prosecution was motivated more by equity and good will than by the law of nations: magis ex aequo et bono quam ex iure gentium.\(^{26}\)

Livy, however, offers further confirmation. He employs the expression ius gentium some forty times to refer, sometimes imprecisely, to the relationship between Rome and other peoples of the world through the legati, foedera. The prohibition of the maltreatment or killing of ambassadors,\(^{27}\) the possibility of noxal abandonment of a legate who misbehaves on the territory where his mission takes him,\(^{28}\) observance of the foedera,\(^{29}\) and lawful defense against an armed attack not preceded by a declaration of war\(^{30}\) are for him characteristic issues in the law of nations.\(^{31}\)

We find ius gentium in Seneca\(^{32}\) and in Tacitus,\(^{33}\) and again in the jurists
of the second century: Celsus, Gaius, Cervidius Scaevola. It is also found, in the beginning of the third century, in Papinian and Triphoninus – advisors to the Emperor Septimius Severus – and in Ulpian.

Of all these, one passage in Gaius and one in Ulpian deserve some attention because of the part they played in the history of the concept's subsequent development. Gaius speaks of ius gentium at the beginning of his Institutes (1.1.1) and contrasts it, as does Cicero, with ius civile. He says that civilized peoples – that is, those organized according to law and custom – govern themselves partly by their own law and partly by the law common to all people. The law proper to the city is civil law; the one established by natural reason among all people (quod vero naturalis inter omnes homines constituit) is called the law of nations because of its universal observance. Thus, ratio naturalis determines, in the abstract, what the law of nations is or could be, and its enforced general application inter omnes homines makes it so concretely. Thus would ius gentium and ius naturale become synonymous, both derived from the ratio naturalis.

With Ulpian, however, Cicero's and Gaius' bipartite division becomes tripartite (ius civile, ius gentium, and ius naturale). According to Ulpian, the reason for this is that the law of nations would be common only to people, whereas the natural law would in general encompass animals as well (quod natura omnia animalia docuit). It would, to use Honoré's well-founded phrase, be “morally superior” to ius gentium, which would be reserved for what is common to people (hoc solis hominibus inter se commune sit).

In fact, the application of ius civile throughout the Roman Empire, particularly under the Antoninian Constitution of A.D. 212, which extended Roman citizenship to all inhabitants of the empire, meant that the importance of the distinction between the law of nations and civil law would gradually fade.

After Ulpian, Aurelius Hermogenian takes up ius gentium in his Liber Primus Iuris Epitomarum: “under this law of nations wars were introduced; peoples were divided; kingdoms were founded; properties were separated; fields were bounded; buildings were erected; and purchases and sales, leases, and obligations, with the exception of those instituted by the civil law, were instituted.” As the great Austrian Romanist Max Kaser rightly remarked, Hermogenian no longer knew what to do with the ius gentium.

Gaius’ definition of ius gentium and its later three-way division by
Ulpian were adopted in the sixth century by the Emperor Justinian in his *Institutes*\(^47\) and *Digest*\(^48\). Later, these passed through the Byzantine Empire to medieval Europe with the discovery of the *Digest*.

In the West, Isidore of Seville (560–636) was the vessel transmitting Gaius’ concept of the *ius gentium*. In his well-known *Etymologiae*, he says, following a heterogeneous list of institutions proper to the law of nations,\(^49\) that this law is so called because it is in force among almost all peoples.\(^50\) Isidore modifies Gaius’ definition subtly by adding the adverb “almost” (*fere*) to distinguish it from the original concept of the *gens*.\(^51\) Moreover, he eliminates the mention of *commercium*. This, as Álvaro d’Ors rightly points out, implies “a decisive step for the formation of the modern concept of the law of nations as public international law.”\(^52\)

1 The linguistic question is not insignificant. The issue posed by the historian Paul Vinogradoff in “The Foundation of a Theory of Rights” (1924), in *Collected Papers* (Wiley & Sons Ltd., London, 1963), has not lost currency: “Why is right contrasted with law in English, while *Recht* stands for both right and law in German, *ius* in Latin, *droit* in French, *Pravo* in Slavonic languages? Obviously, the nations of Continental Europe laid stress in their terminology on the unity of legal order – on the fact that it is constituted and directed by the general authority of the commonwealth.” On the meaning of the word “law” in different languages, *vid.* also Hans Kelsen, *Reine Rechtslehre* (2nd ed., Verlag Franz Deuticke, Vienna, 1960; reprint 1967), § 6, pp. 31–32.


The Classical Foundations of the American Constitution  

4 Isaiah 32:17.

5 Exodus 24:3–8.

6 Hesiod, Teogonia, 901.


Cicero, *De officiis* 3.17.69: “itaque maiores aliud ius gentium, aliud ius civile esse voluerunt, quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet.”

Cicero, *De officiis* 3.5.23.

In *De officiis* 1.1.23, Cicero defines *fides* as the constancy and truth of what is said and agreed to: “dictorum conventorumque constantia et veritas.” An overview of Roman *fides* is provided by Amelia Castresana, *Fides y bona fides. Un concepto para la creación del Derecho* (Tecnos, Madrid, 1991), and by Dieter Nörr, *La fides en el Derecho internacional romano* (2nd ed., Fundación Ursicino Álvarez, Madrid, 1996).

Cicero, *De officiis* 1.1.23.

Cicero, *Tusculanae Disputationes* 1.13.30: “omni autem in re consensio omnium gentium lex naturae putanda est.”

Cicero, *De partitione oratoria* 37.130: “Atque haec communia sunt naturae atque legis, sed propria legis et ea quae scripta sunt et ea quae sine litteris aut gentium iure aut maiorum more retinentur.”

This tacit understanding of hereditary succession appears in Gaius 3.82: “quod tacito consensu receptum est”; Julian, *Digest* 1.3.32.1: “sed etiam tacito consensu omnium per desuetudinem abrogentur”; and the *Epitome Ulpiani* 1.4: “mores sunt tacitus consensus populi, longa consuetudine inveteratus.”

Sallust, *Iugurtha* 22.4: “Populum Romanorum neque recte neque pro bono facturum, si ab iure gentium sese prohibuerit.”

Sallust, *Iugurtha* 35.7. He mentions the *ius gentium* yet again in the *Fragmenta historiarum* 3.88.17.

Livy 4.17.4: “consulentium de caede ruptura ius gentium”; 4.19.3:
“ruptus foederis humani violatorque gentium iuris”; 4.32.5: “cum hostibus scelus legatorum contra ius gentium interfectorum.”

28 Livy 5.36.6: “contra ius gentium arma capiunt”; 5.36.8: “ut pro iure gentium violato Fabii dederaentur”; 5.51.7: “quam gentium ius ab legatis nostris violatum”; 6.1.6: “quod legatos in Gallos – ad quod missus erat orator – contra ius gentium pugnaste.”

29 Livy 4.19.3: “ruptor foederis humani violatorque gentium iuris?” Livy 42.41.11: “ex foedere licuit et iure gentium comparatum est.”

30 Livy 42.41.11: “et iure gentium ita comparatum est, ut arma armis propulsentur.”

31 Livy 7.6: “turbato gentium iure comitia haberentur”; 8.5: “non legatus iure gentium tutus loqueretur”; 8.6: “quam ius gentium ab ira impetuque hominum tegeret.”

32 Seneca, De ira 3.3: “violatae legationes rupto iure gentium rabiesque infanda civitatem tulit.”

33 Tacitus, Annales 1.42: “hostium quoque ius et sacra legationis et fas gentium rupistis”; and Historiae 4.32: “quibus ad supplicium petitus iure gentium poena reposco.”

34 Digest 12.6.47: “quoniam indebitam iure gentium pecuniam solvit.”

35 Gaius 1.1.1.

36 Digest 43.8.4: “Respondit in litore iure gentium aedificare licere, nisi usus publicus impediretur.”

37 Digest 17.2.51; Digest 39.5.29.2; Digest 41.3.45 pr. and Digest 48.5.39.2.

38 Digest 7.1.62 pr.; Digest 12.6.64; 16.3.31 pr-1.

39 Gaius 1.189 provides an example with respect to the guardianship of minors. He says that minors are under guardianship according to the laws of all cities, and that it is in keeping with natural reason that those who have not reached the age of majority be under the guardianship of another. We might also point to the matter of the acquisition of property by warlike occupation (Gaius 1.69) or by alluvium (Gaius 1.70).

40 Cf. Gaius 1.56; 2.65 and 2.73.
Dig 1.1.1.2–4 and 6 pr.

**Digest 1.1.1.3.**


*Digest 1.1.1.4.*

*Digest 1.1.5.*


Gaius’ definition is found in Justinian's *Institutes* 1.2.1 and is repeated in *Digest* 1.1.9, but suppressing the word *populus*: “omnes [populus] peraeque custoditur.” Title II of the first book of Justinian's *Institutes, De iure naturali et gentium et civili*, also begins by employing the same expression as Ulpian's, namely that natural law is also applicable to animals: “ius naturale est, quod natura omnia animalia docuit.” In *Institutes* 1.2.2., Justinian distinguishes natural law from the law of nations on the basis of its subject matter. Thus, captivity and slavery would come under the law of nations and not natural law because, according to him, all human beings are born free: “iure enim naturali ab initio omnes homines liberi nascebantur.”

*Cf.* Ulpian, *Digest* 1.1.1.2: “ex naturalibus praeceptis aut gentium aut civilibus.”

*Cf.* Isidore of Seville, *Etymologiae* 5.6, where he mentions occupation of land; erection of buildings; fortifications; wars; prisoners; serfdom; restitutions; peace treaties; truces; the immunity of ambassadors; and the prohibition against contracting marriage with foreign persons. This list has similarities to Hermogenian, *Digest* 1.1.5, and *Institutiones* 1.2.2. Nevertheless, Isidore eliminates the mention of *commercium* and includes the prohibition against marriage to aliens (*conubia inter alienigena prohibita*).

Isidore of Seville, *Etymologiae* 5.9: “Et inde ius gentium, quia eo iure omnes fere gentes utuntur” (and it is called the law of nations because it has force and effect among almost all peoples).

In this regard, *cf.* Juan de Churruca, *Las Instituciones de Gayo en*

2 The *Ius Commune*, a Medieval Concept

1. THE *IUS GENTIUM* IN THE MIDDLE AGES

The doctrine of *ius gentium* was adopted in full by jurists (both civil and canon law writers) and by medieval theologians, although in a radically different context, where the law of nations occupies only a secondary place. The paradigm for the application of the law of nations in the Middle Ages was the law of the sea, employed, for example, at England's High Court of Admiralty, which ruled according to the universal law of the sea based on the *lex Rhodia* and customs of Oléron.¹

Among civil law writers, intriguing references are found to *ius gentium* in Accursius’ *Ordinary Gloss* and in the *Commentaria* of the great Bartolus de Saxoferrato, perhaps the most important jurist of the Middle Ages.² Here are two examples. In the gloss “ex hoc bella” on Hermogenian (*Digest* 1.5.5), it is noted that the law of nations, if it permits wars, “may lead to injustice” (*inducere iniquum*).³ In his commentary on Gaius’ passage in *Digest* 1.1.9, the great Bartolus writes that people with jurisdiction may establish their own law. Despite this, the law of nations “must be equally observed by all” (*ab omni genere aequaliter custoditur*).⁴

The law of nations is also mentioned in the original sources of the canon law and common law traditions, which will be discussed further in the following. Thus, in the canon law tradition, the *Decree of Gratian* mentions *ius gentium*.⁵ The canon law jurist Giovanni d’Andrea, following Cicero,⁶ proposed a *ius humanae societatis* of universal scope that can settle any conflict between Christendom and the infidels.⁷ In the common law tradition, Henry de Bracton, in his *De Legibus et Consuetudinibus Angliae*, forged a direct connection between English law and the Roman law of nations by adopting Ulpian's definition in *Digest* 1.1.1.4⁸ and incorporating this concept in the new English legal culture.

In the sphere of medieval Christian theology, Thomas Aquinas,⁹ disciple and successor to Albertus Magnus, who provided him with the keys to Aristotelian thought, shines in his own light. Starting from natural reason, Aquinas masterfully combines Aristotelianism and Augustinism, especially
in matters of law. Thus, the Angelic Doctor identifies the law of nations with natural law, because without it men cannot live together. Thus, Aquinas affirms the inseparability of the Greek concept of nature and the Roman concept of *ius gentium*.

Further, from the *Corpus iuris* through the *Basilica* – the compilation begun in the ninth century by the Emperor Basil I (Basilius Macedo) and published at the behest of “The Philosopher” Leo VI – as well as in relevant *scholia* dating from the tenth to twelfth centuries, Byzantine law adopted the concept of *ius gentium*.10

2. EUROPEAN COMMON LAW

The great contribution of the Middle Ages to juridical culture is the construction of the so-called *ius commune* (European common law). It is a Latin concept, broader in scope than English common law. H. Patrick Glenn reminds us of this at the beginning of his book, *On Common Laws*: “The concept of common law, with all its implications of universality and particularity, has been one of the great intellectual constructions of the western legal tradition.”11

Common law is considered valid and applied in harmony with local laws (*iura propria*), but it is not exclusive or unique because it acknowledges neither borders nor nations. It is an all-encompassing law insofar as it is based on *interpretatio* and on the interpretation and analysis of Justinian's *Corpus iuris* studied in the new universities following the discovery of the Digests. The legal duality of common law and local laws constitutes unity in diversity. It provides a homogenous but not uniform system that invigorated the science of law in the Middle Ages by avoiding a simplistic reductionism.

Nevertheless, the term *ius commune* was fairly well known to the Roman jurists, although not in the technical sense it acquired later.12 Thus, in his *Institutes*, later adopted by Justinian, Gaius points out that “all peoples are governed in part by their local law (*suo proprio*) and in part by the law common to all men (*partim communi*),” which he considers identical to the law of nations. Ulpian, too, in *Digest* 1.1.6 differentiates the civil law, which he considers *proprium* or local (*ius proprium, id est civile*), from a common law comprising both the law of nations and natural law.

This notion of common law was gradually enriched on the basis of the
glossators’ interpretation of *ius commune*, colored by legal doctrine and adapted to social changes. Attributed chiefly to the Roman law of Justinian (*ius civile*), it was acknowledged to be superior to customary or statute law. The universally valid canon law was also common. This, along with the *ius civile*, formed an *utrumque ius*, the *ius commune* of broader applicability: one for temporal things, the other for spiritual things. More on this follows.

The medieval *ius commune* at last became an instrument of imperial unity, firmly anchored in Christian moral principles and reviving Justinian's Eastern experience: *unum esse ius cum unum sit imperium.*16 This imperial unity was the natural expression of *humana universitas* – a true *communitas humanitatis* – which is ultimately ruled by the order established by Divine Providence. Traces of common law appear in local laws with the principle that the many issue from the one.17

The Italian historian Francesco Calasso's18 brilliantly executed mid-twentieth-century studies19 seem to confirm that European common law, as a legal phenomenon, developed differently in three contexts: Roman canon law (*ius commune*), English law (common law), and French customary law (*droit commun*).

The Italian *ius commune* is common because, as has been said, it was an object of study in nascent universities. It is thus common to all scholars initiated into the art of law through it. English common law, on the other hand, is so called because of its common application by judges, distinct from local customs, whose applicability is limited by territory. Lastly, the French *droit commun* is common because it is customary law (*droit coutumier*)20 made up of regional customs of the kingdom and not of the king. The latter, although also general, are not strictly *droit commun* (*etiamsi communes non faciunt ius commune*).21

One could also speak of a Castilian common law based on the *Partidas* of Alfonso X “the Wise,” as well as on Germany's modern-age common law (*Gemeines Recht*), based on the thirteenth-century *Saxon Mirror* (*Sachsenspiegel*).22 The great difference between any common law and the law of nations is that the latter does not presuppose the legal, political, or religious unity required by those communities that applied common law. Thus, the law of nations was reserved mainly for maritime matters and eventually for relations with non-Christians to the extent that the law of nations was based on nature common to all people. In this connection, it is said that European Union law is the descendant of the *ius commune* and modern international law is the descendant of the *ius gentium*. 

40
3. ENGLISH COMMON LAW CONTRASTED WITH CIVIL LAW

In the historical overview of juridical expressions of a universalist (or at least general) character, pride of place is held by English common law, with its uninterrupted tradition dating to the twelfth century.

The English translation of the European *ius commune*, common law – based chiefly on judicial law and therefore inductive in nature – spread worldwide. Displacing the dominant force of the *Code Napoléon*, common law consolidated in the United States to become the most influential legal system in the world. As common law developed in the British Empire, it turned expansionist, tending toward the universal; it became combative too because common lawyers ultimately treated all that was not properly English law (with the exception of canon law) as civil law.

Common law wrested its name from the Latin expression *ius commune* and restored its old name of civil law, distinct from canon law and common law. For the English jurists, speaking of civil law was tantamount to speaking of a “ghost story,” as Vinogradoff would say. It was to them an imperial, legislated law, distinct from classical Roman Law, which was essentially casuistic and in some respects closer to common law than to civil law. Peter Stein forcefully stated this in 1969 at the end of his inaugural lecture as Regius Professor of Civil Law at Cambridge University: “…For in these respects Roman Law itself is closer to the common law than is any modern codified system based on Roman Law.” He was right, although the wall artificially erected between civil law and common law renders its recognition difficult without effort.

Civil law and common law in time would become jurisdictionally exclusive systems and common only in part. A rift began to open between their proponents, especially in the sixteenth century, to the point that the defining mark of civil law was that it was not common law, and the defining mark of common law was that it was not civil law. The chief difference between them is that whereas civil law developed fundamentally in the nascent universities – a great Christian contribution to medieval culture – common law developed from the practices of the royal judges. Indeed, this was a system of judicial authority upheld by the principle of *stare decisis*, which limited royal authority through the rule of law. It contrasts with the principle of *princeps legibus solutus* adopted by Ulpian, which freed the monarch from being subjected to the law. In this lies the key to criticisms leveled by common lawyers against civil lawyers. As always, it
was a political matter to which historians attributed decisive importance.29

Anglo-American, Anglo-Chinese, and Anglo-Indian common law are heirs to medieval common law. The law of the European Union is an heir to the extent that it has become a jurisdictional unity despite its supranational character and territorial and material limitations. Common law may also be found today in the so-called lex mercatoria, which governs international commerce on the basis of common rules.30

4. IUS CANONICUM

Because of its universality, canon law31 played a determining role in Europe's formation. Harold Berman does not hesitate to call ius canonicum the first modern legal system of the West.32 This makes it the oldest legal system in existence. Canon law, with its ecclesiastical jurisdiction and juridical sources, was inspired by and based on the Holy Writ and Apostolic tradition. With the Roman Pontiff as caput Ecclesiae, canon law left its stamp on English common law and on medieval Roman law in such areas as equity, mores, good faith, and litigation.

Canon law was first systematized by the monk Gratian c. 1140 in his Concordia discordantium canonum (Gratian's Decree)33 from existing collections, foremost among them the Panormia of Yves de Chartres. Over time, canon law was gradually enriched, yielding Corpus Iuris Canonici, composed of Pope Gregory IX's Decretals or Liber Extra (1234), Pope Boniface VIII's Liber Sextus (1298), the Clementine Constitutions (1317) of Pope Clement V, Pope John XXII's Extravagantes, and an additional Extravagantes Communes promulgated by other pontiffs. In 1582, Gregory XIII promulgated a revised official version of the Corpus Iuris Canonici. It was not until 1917, however, that the Code of Canon Law was codified for the first time. Pope John Paul II promulgated the new Codex Iuris Canonici in 198334 and in 1990 ordered the publication of the Codex Canonum Ecclesiarum Orientalium.35

Because canon law was studied, taught, and commented on in medieval universities,36 it is a good example of universal law compatible with other laws and legal systems. In the formation of a global law, canon law contributes more than almost anything else: the principle of personhood against that of the state's territoriality, an appropriate combination of the common and the local, a respect for legal sources not strictly legislative,
and clear support for principles and rules. In addition, it is a legal system that suffered none of the serious consequences of radical legal positivism derived from excessive state involvement in juridical decisions.

As canon law is informed by Christian theology that gives it life and directs it to the Catholic world, a legal transplantation is, of course, unthinkable. But in the author's opinion the *ius canonicum* would make a good instrument for reflection on the formation of a global law, just as it did in the formation of Medieval Europe; it is universal and inclusive, and not, strictly speaking, a state law.

**5. ISLAMIC SHARIA AND SIYAR**

Some mention of Islamic law (sharia) in general and its law of nations (siyar) in particular is required. Sharia is a common law, like *ius commune*. Born in the Middle Ages, it is seen in varying degrees – most forcefully in Saudi Arabia or Iran, moderately in Egypt, and hardly in Morocco. (Turkey abolished *sharia* in 1926.) The *siyar* is also of interest because it is an Islamic law of nations; its purpose is to order relations with non-Muslims. The parallels between *siyar* and *ius gentium* are clear. Just as the Roman law of nations is an extension of *ius civile* for dealings with non-Romans, so is the extension of *sharia* by *siyar* for relations with those who have not embraced Islam.

Sharia is religious law *par excellence*. Its primary source is the Koran (*Quran*), the celestial and eternal book dictated by Allah to his Prophet Muhammad through the Angel Gabriel. The *sunna*, too, is a source of law; it is a compendium of Muslim social customs and practices, especially the tradition of the deeds and teachings of the Prophet (*hadith*). The various categories of *hadith* are accepted by Islamic law, depending on accuracy and authenticity of transmission, only when the chain of narrators (*isnad*) is sufficiently trustworthy. *Hadith* may never contradict the Koran.

Islamic law also classifies the consensus of the Muslim community (ijma) and reasoning by analogy (qiyas) as sources of law. Sharia constitutes a true science of law (*fiqh*) born of different schools, whether orthodox or Sunni, such as the Hanafi, the Maliki, the Shafi’i, and the Hanbali, or heterodox or Shiite, the greatest of which is the Ja’fari.37

As the common law for all Muslims, *sharia* is a noncodified legal system based fundamentally on interpretation. It differs from Western legal systems in that it holds that law is not the result of experience, nor does it develop at society's pace. In *sharia*’s view, the law itself must shape society, not vice
versa. The British Arabist Noel James Coulson, a great student of *sharia*, explains this clearly: “In the Islamic concept, law precedes and moulds society; to its eternally valid dictates, the structure of State and society must conform ideally.”

The Islamic law of nations (*siyar*) is inseparably bound to *sharia*. *Siyar* (the plural of *sira*: conduct), by definition the defender of a theocratic empire of universal scope because of Islam's expansionist force, is held to be, like *sharia*, a *pars religionis*. It began to develop when Muslims started dealing with non-Muslims and realized that many did not embrace their faith, even though the Muslims thought Islam was destined to be universal, and Islamic justice was destined to be the rule of the world.

*Siyar* deals with Muslims’ “forms of behavior” toward those who do not share their faith – infidels – whether within or outside Islamic territory. The father of *siyar* is Abu Hanifa, the founder of the Hanafi School in A.D. 767. The work of his disciple Muhammad al-Shaybani – known as “the Muslim Grotius” – is a milestone in the history of Islamic legal literature on this subject.

For Islam, the world is divided into two parts. Those communities that live under the *Pax Islamica* – either because they are Islamic (*umma*) or because they are protected by Islam (*dhimmi*) in exchange for payment of the *jizya* – form the “House of Islam” (*Dar al-Islam*). The other part, the “House of War” (*Dar al-Harb*), comprises the rest of the world. *Jihad* (better rendered as “holy struggle” than as “holy war,” the usual translation) is the internal and external means of transforming non-Islamic lands into *Dar al-Islam*.

*Siyar*, therefore, is not based on the principles of reciprocity and equality – even though it may admit them on occasion in the cases of diplomatic immunity and exchange of prisoners – but on the principles of imposition and sanction. Even though *siyar* is a personal law, as is the *sharia* law of which it forms a part, it frequently applies the principle of territoriality to govern relations with non-Muslims.

The basis of this law in interpretation of principles and its personal and nonterritorial nature – which even allows for a personal statute of legal application – may be of great use in designing a global legal system. Its essentially religious character, based on sources not narrowly legal and that do not distinguish morality from law, renders imitation or transplantation of *siyar* impossible.

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6 Cicero, *De officiis* 1.7.20–21: “Ex quo, quia sum cuiusque fit eorum, quae natura fuerant communia, quod cuique optigit, id quisque teneat; e quo si quis [quaevis] sibi appetet, violabit ius humanae societatis.”


9 Thomas Aquinas, *Summa Theologica*, I. II. 95, 4 c): “ad ius gentium pertinent ea, quae derivantur ex lege naturae, sicut conclusiones ex principiis, ut iustae emptiones, venditiones et alia huiusmodi,
sine quibus homines ad invicem convivere non possent, quod es de lege naturae.”


13 Gaius 1.1, also in Digest 1.1.9.

14 Institutiones 1.2.1.

15 Julian, Digest 19.1.20 pr. also utilizes common law as contrasted with the ius singulare of military wills.


17 Thomas Aquinas, De regno, Bk. I, Chap. 3. Also cf. Thomas Aquinas, Summa Theologica I Q. 115, Art. 3 co: “cum omnis multitudo ab unitate procedat.”


19 Cf. for all these, Mario Caravale, Alle origini del diritto europeo. Ius commune, droit commun, common law nella dottrina giuridica della prima età moderna (Monduzzi Editore, Bologna, 2005), and the cited bibliography.

20 Of great interest for the understanding of the topic are the Institutes Coutumières of Antoine Loyer (annotated by Eusèbe de Laurière, Videcoq Père et fils Libraires, Paris, 1846).


§ 773. Originally, the aphorism was not general and referred only to certain specific laws. This imperial maxim should be complemented by the principle *quod Principi placuit legis habet vigorem* (Ulpian, *Digest* 1.4.1 pr.), which, although it originally had to do with the prince issuing rescripts, became over time the expression of imperial absolutism. Medieval canon law was against this rule, in *Decretum Gratiani*, pars I, distinctio IX, causa II (ed. Emil Friedberg, 2nd ed., Leipzig, 1879; reprinted by Akademische Druck- und Verlagsanstalt, Graz, 1959): “principes tenentur et ipsi vivere legibus suas” (“princes are obligated to live according to their laws”), as was the common law tradition, in Henry de Bracton (*De Legibus et consuetudinibus Angliae* III.1.9, ed. of Samuel E. Thorne and the Latin text of George Woodbine, Internet version: [www.bracton.law.cornell.edu](http://www.bracton.law.cornell.edu), Cornell University), which obligates the king to act according to the law: “nihil aliud potest rege, nisi id solum quod de iure potest” (“for the king can only act according to the law”), which means, as Bracton also says, “lex facit, quod ipse est rex” (“the law makes the king”), or, in 1.5: “rex non debet esse sub homine sed sub Deo et lege,” and William Blackstone, *Commentaries on the Laws of England*, Vol. I (ed. Wayne Morrison, Cavendish, London, Sydney, 2001), Chap. 7, No. 239, p. 182: “rex debet esse sub lege, quia lex fecit regem” (“the king should be subject to the law, because the law makes the king”).


30 Cf. Chapter 5.


New York, 2000).

34 Codex Iuris Canonici, auctorisate Joannis Pauli PP. II promulgatus (Libreria Editrice Vaticana, Vatican City, 1983).

35 Codex Canonum Ecclesiarum Orientalium, auctorisate Joannis Pauli PP. II promulgatus (Libreria Editrice Vaticana, Vatican City, 1990).


39 The work of Al-Shaybani has been translated into English, with an excellent introduction by Majid Khadduri, The Islamic Law of Nations, Shaybani's Siyar (The Johns Hopkins Press, Baltimore, Maryland, 1966).
3 International Law, a Modern Concept

1. FROM IUS GENTIUM TO IUS INTER GENTES

The discovery of the New World (1492), the breakdown of the Christian world with the Reformation that started with Martin Luther (1517), and the birth of the modern state – these were the events that laid the foundation for new theorizing about ius gentium. The theologians and jurists of the Salamanca School have pride of place, and among them Francisco de Vitoria and Francisco Suárez stand out. The thinking of this school is doubtless the greatest Spanish contribution to the science of law.¹

The father of this important turn of events is Francisco de Vitoria, the illustrious Spanish theologian. At the beginning of the third section of his Relectio de Indis, delivered at the University of Salamanca in January 1539, he argues in favor of Spain's voyages to the New World and her permanent presence there. In his speech, he replaces the word homines in Gaius’ formulation of ius gentium with gentes, thus emphasizing the idea that this law is fundamentally between peoples and nations (quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium).² He uses the word nationes as a synonym for gentes to convey that in every nation it is inhuman not to welcome guests and strangers without good reason.³ Thus, Vitoria opened the door to the concept of the law of nations, which is currently the public international law. Vitoria, for his part, reverts to Gaius’ old idea that the law of nations is a law of nature, or at least its derivative.⁴

Man's social nature allows the formation of such groups as communitas communitatum, a juridically organized universal society and a totus orbis governed by the ius gentium that none can evade.

Above all, it was the glory of Francisco Suárez – the most scholastic of the Scholastics – that shaped the idea of an international community, which existed at least from the time of the Stoic civitas maxima. In De legibus ac Deo legislatore (1612),⁵ this Granada Jesuit says that although humankind is divided into several peoples and kingdoms, there exists a certain unity (aliquam unitatem) that embraces all humanity and manifests the moral precept of love of neighbor. He thus warns that even though each of the
republics or kingdoms may be a complete community, they are all also part of this universe. “Therefore,” he concludes, “they have need of some law (aliquud iure) by which to be rightly directed and ordered in this kind of communication and society.”

It was not just in Spain, however, that significant advances were made in the new concept of *ius gentium*. Licensed in law from the University of Perugia and sought by the Inquisition for adopting Protestantism, Alberico Gentili settled in Oxford where he was appointed Regius Professor of Law in 1597. His professorial lectures formed the basis of his famous work *De iure belli* (1589), superior in many ways to Grotius’ work. A man of strong temperament, he wielded his pen fearlessly. His famous reproach to the theologians of Salamanca, exhorting them to stick to the last, became celebrated: “*silete theologi in munere alieno!*”

In a February 8, 1594, letter to John Rainolds, Gentili takes *ius naturale* as the basis for *ius gentium*, explaining to this English theologian (in the words of Vitoria) that the *ius gentium* is “*quod naturalis ratio inter omnes gentes constituit.*” Years later, his disciple and successor to the chair at Oxford, Richard Zouche, changed this already modern expression to *inter nationes* in his *Iuris et iudicii fecialis sive iuris inter gentes, et quaestionum de eodem explicatio*, which is considered the first manual of public international law.

Hugo Grotius was a light unto himself, perhaps because he was the first to offer a general statement of the law of nations in *De iure belli ac pacis* (1625) at the height of the Thirty Years’ War (1618–1648). A child of his time, and not as innovative as claimed by Samuel von Pufendorf or recognized by history, Grotius proposed a voluntary *ius gentium*, a positive law distinct from natural law. It was to be expressed in treaties or customs, which profoundly affected the soul of the European people ravaged by war.

Although he personally believed in God, Grotius’ aim was to organize a law that would exist even *etsi Deus non daretur*, even if there were no God or God did not concern himself with human affairs. And the source *par excellence* of this law, as well as of Roman law, is fidelity to one's word, obligatory compliance with covenants – the prerequisites for the existence of a society: “*deinde vero cum iuris naturae sit stare pactis, ab hoc ipso fonte iura civilia fluxerunt*” (*Prolegomena* § 15). The positive law of nations, or at least a good part of it, was to be founded on the consent of all nations, so that the common rules of conduct observed in international relations are applied.
Some years after Grotius’ work, Thomas Hobbes turned his arguments on their head in his *De cive* (1642) and *Leviathan* (1651). For this English philosopher, the law of nature is applied to men – in which case it is called *lex naturae* – and to states (*lex gentium* or, commonly, *ius gentium*). Although they differ in name, the precepts are the same (*praecopta utriusque eadem sunt*) for both. Thus, this law of nations would be no more than natural law applied to cities, nations, and peoples.¹² In his *Leviathan*, he made this point clearer: “The Law of Nations and the Law of Nature is the same thing.”¹³ Every sovereign has the same right to defend their people as that of a private person to defend him or herself, by virtue of the first natural precept “to seek peace, and follow it,” and to defend oneself if necessary by whatever means available.

2. IUS GENTIUM EUROPAEUM

The Peace of Westphalia (1648), which consolidated the system of European states, was a new milestone for intellectual reflection on the law of nations. Over time, it produced the true *Corpus iuris gentium europaeum*. This is the origin of what later came to be known as *ius publicum europaeum* (in German, *Europäisches Völkerrecht*). It is a territorial law – a balance of interstate sovereign forces, power, and wars between European states. These wars were not considered religious or civil struggles but, in Carl Schmitt's well-known words, something like “a duel” (*etwas einem Duell Analoges*), “a challenge between territorially determined moral persons.” The territory of Europe would thus become a theater of war (*theatrum belli*), whereas non-European territory would be called *res nullius* and therefore open to unrestricted occupation by European states.¹⁴

European public law, which was binding on all members of the European community of states (*europäische Staatengesellschaft*), is in large part an unwritten law (*ius non scriptum*) – pace certain jurists, such as Johann Caspar Bluntschli in his *Das moderne Völkerrecht* (1868). It is made up of the most diverse forms of conventional laws (*Konsensualgesetze*) occasionally adopted in international treaties or acknowledged in uniform declarations or unequivocal and constant usage of these laws by European nations and their rulers. These may come from institutions or national customs, provided they are not contrary to morals.¹⁵
Throughout this Eurocentric stage, the main exponents of *ius gentium* as interstate law included Samuel von Pufendorf, Cornelis van Bijnkershoek, Christian von Wolff, and his disciple Emer de Vattel. Georg Friedrich von Martens of Hamburg, an unoriginal writer but a good disseminator of ideas, contributed to the same effort, especially in his work in French, *Précis de droits de gens modernes de l’Europe* (1789), which was translated into several languages.

Samuel von Pufendorf, influenced by Grotius and Hobbes, is one of the most distinguished legal thinkers in modern times. His *Elementa iurisprudentiae universalis* (1660), 16 written during his eight months of captivity, offers a legal doctrine outside the ambit of the Decalogue and positive law. The publication of this opuscule earned him the Chair of Natural Law and Law of Nations at the University of Heidelberg, which he joined in 1661. In 1672, when he was teaching at Lund, he published *De iure naturae et gentium*, 17 a kind of *corpus iuris naturalis*, in contrast to Justinian's *Corpus iuris civilis*. Here, as in all his work, his interest in *ius gentium* takes second place, as evident in the scant space he allots to it. Indeed, for Samuel von Pufendorf, the theory of the law of nations is completely bound to and absorbed by natural law itself, a deductive law that cannot in any way be based upon the arbitrary and authoritarian criteria that Grotius wrote about. 18

Credit for structuring the international order as a system of *civitates* goes to von Pufendorf. He developed this idea in late 1667 or early 1668 19 in a *dissertatio* entitled *De systematibus civitatum*, from which developed the concept of Europe as an “international system of states” that would go beyond both the medieval *Res Publica Christiana* and the Salamanca School's doctrine of an international society.

Cornelis van Bynkershoek of the Netherlands drew the law of nations exclusively from reason and usage (ex ratione et usu) based on the evidence of treaties and ordinances (pacta et edicta). 20 For that reason, unlike Pufendorf, and in spite of his theological learning, he did not evince any interest in natural law. As Arthur Nussbaum observes, for him *ius gentium* meant international law. 21 He was familiar with the *corpus iuris civilis*, which he cites profusely and relies on consistently because of its rational character in considerations on international law that cover almost every field.

A different road was taken by Christian von Wolff, a university professor at Halle (which he had to leave) and Marburg. He was a follower of von Pufendorf and Leibniz and a great theorist in defense of enlightened
absolutism. A prolific writer, he approached the *ius gentium* from a philosophical perspective in his eight-volume *Ius naturale methodo scientifica perpetractatum* (1740–1748), followed by a supplemental volume, *Ius gentium methodo scientifica perpetractatum* (1749). He subsequently published a summary of his work under the title *Institutiones iuris naturae et gentium* (1750), which appeared in German four years later (1754).

At the beginning of his work on the *ius gentium*, he defines it as both the science of law applied by peoples among themselves and the obligations incumbent on them. He calls *gentes* the set of people who live in association in a city. These people are to be thought of as singular, free persons living in a state of nature. Under the influence of Hobbes, he takes as his point of departure a state of nature that he applies as much to persons as to *civitates*. Departing from that English philosopher, however, he considers it a nature of moral character.

Von Wolff differentiates an immutable, original, and necessary law of nations (§ 5), which he identifies with natural law (*ius naturae ad gentes applicatum*), from a *ius voluntarium* issuing from the *civitas maxima* (§ 22). Indeed, von Wolff considers people to be organized into a *civitas maxima* (§ 10), distinct from states or nations made up of individuals. This *civitas maxima*, like all societies, must have its civil laws (*leges civiles*) whose purpose is to seek the *bonum civitatis* (§ 11). Von Wolff calls the voluntary law of nations and that which arises from covenants (*pacta*) or customs (*consuetudines*) the positive law of nations because it is born of the will of the peoples (§ 35).

The famous treatise *Le droit de gens, ou Principes de la loi naturelle* (1758), which was influential in Europe and the United States, came from the pen of Emer de Vattel. Fully steeped in the spirit of the Treaty of Westphalia (1648) and the Peace of Utrecht (1713), this Swiss jurist began his work by making identical the concepts of nation and sovereign state, which he defines as a political body or society of men united by the wish to promote mutual security and progress by joining forces. Moreover, he extends moral personality to the state and the nation (§ 2). And, following his master von Wolff, he describes the law of nations as “the science of the law that exists between nations and states, and of the obligations that arise out of that law” (§ 3). This made clear that peace was a juggling act and a balance of alliances between states and dynastic successions.

3. KANT, BETWEEN STAATENRECHT AND WELTBÜRGERRECHT
The final shape of *ius gentium* as a true law of states (*Staatenrecht*)\textsuperscript{26} owes everything, essentially, to Immanuel Kant. In his *Grundlegung der Metaphysik der Sitten* (1785; 2nd ed., 1786),\textsuperscript{27} he advocates a law of states (*Staatenrecht*) rather than the traditional law of nations (*Völkerrecht*) – an expression that, in spite of everything, he continues to use in a broad sense. A few years later, two new works saw the light of day – *Zum ewigen Frieden* (1795; 2nd ed., 1796) and *Die Metaphysik der Sitten* (1797)\textsuperscript{28} – in which Kant, now an old man, summarizes and refines his thinking on law.

The law of nations would, for Kant, be a “fully juridical” law formed within a plural, universal political framework consisting of an alliance of states (*foedus pacificum*) in accordance with the *a priori*, rational idea of an originating contract. Under this contract, each state would coordinate with others in a regime respecting its equality, liberty, and full sovereignty to create the conditions necessary for peace.

Although this law of nations makes progress in ordering the relations between states, it is nonetheless insufficient, and Kant invokes a new reciprocity required among individuals within those states and among the states themselves.

These twin relationships must be ordered by a kind of cosmopolitan coordination resulting from a third juridical dimension beyond internal state law and external interstate law: cosmopolitan law (*Weltbürgerrecht* or *ius cosmopoliticum*). This cosmopolitan law is nothing more than the formal demand of the transcendental method, according to which synthetic divisions constitute *a priori* a triad. That is, cosmopolitan law is formed by a condition, a conditional, and a synthesis on the basis of the principle of derivation. It is not, therefore, an arbitrary formulation, but a methodical concretion, a transcendental requirement.\textsuperscript{29} In this case, it synthesizes the reciprocity between individuals proper to civil law with the reciprocity between states proper to the law of nations in accordance with the principle of derivation. The synthetic unit thus formed is cosmopolitan law.

Thus, a peaceful global order, says Kant, presupposes a cosmopolitan law. Limited solely to the conditions of general hospitality (*allgemeine Hospitalität*), embodied in a right to visit and trade, this cosmopolitan law makes all people citizens of the planet and members of a world republic (*Weltrepublik*) in which they have the right to live and travel because the Earth belongs to all.\textsuperscript{30} Transgression of the hospitality principle is not, strictly speaking, a matter of ethics; rather, it is considered a legal omission in the strict sense of the term because it contravenes the legal requirement of
exterior liberty.

For Kant, cosmopolitan law is destined to be the true guarantor of peace in the world, which, it was called for by the philosophers of antiquity and yearned for by the world's citizens, had not been conceptualized, prior to Kant, in legal–philosophical terms. It is precisely in this philosophical institutionalizing of perpetual peace fostered by cosmopolitan law that the final end (Endzweck) of the universal doctrine of law resides. Therefore, this cosmopolitan law is to be adopted by all ethical legislation as its actuating maxim.

Twenty-five years later, Hegel mentioned Kant's short work Zum ewigen Frieden in his well-known Grundlinien der Philosophie der Rechts (1821, § 333). There, the greatest exponent of German idealism laid the foundations for the criticism and negation of international law by concluding – in keeping with his theory of the state – that international law was an external state law (das außere Staatsrecht) dependent on the sovereign will of the state, which, as the incarnation of God in history, is the source par excellence of ethics and law.

4. BENTHAM AND INTERNATIONAL LAW

It was during the French Revolution that Jeremy Bentham first employed the expression “international law” in his famous An Introduction to the Principles of Moral and Legislation, printed in 1780 but not published until 1789. At the end, in Chapter XVII, The Limits of the Penal Branch of Jurisprudence, he includes the term when discussing the personal standing of those whose conduct is to be regulated by the law: “These may, on any given occasion, be considered either as members of the same state, or as members of different states: in the first case, the law may be referred to the head of internal, in the second case, to that of international jurisprudence.”

However, in the footnote he leaves an express record of this novel contribution: “The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible.” He criticizes openly the expression law of nations, which, were it not for its ordinary usage, should mean various national legal orders rather than the ius gentium itself. He mentions as an authority the French chancellor François d’Aguesseau, who employs the expression droit entre les gens instead of droit de gens, as Vitoria and Zouche did before.
For Bentham, the law of nations regulates international relations and is far from natural law, which he harshly criticizes. This is clear from the four short essays on international law written in French between 1786 and 1789 and published in an English translation under the title Principles of International Law in the 1843 edition of his complete works edited by John Bowring. There, he expounds uncompromisingly on the international nature of the new law he is developing. Thus, for example, at the beginning of the first essay he poses a rhetorical question on how a would-be universal international code ought to be worked out. Here, the word “universal” refers to the general validity of application and “international” to all nations. Thus, he makes it clear that the first objective such a code ought to satisfy if left up to a citizen is the common and equal utility of all nations.

The new term took no time to cross the ocean. As a matter of fact, in America James Kent, a judge and professor at Columbia University, New York, unreservedly defends Bentham's phrase as “an expressive and definite term.” In effect, for Kent, international law was in any case already a law (a “collection of rules, customary, conventional and judicial”) that independent states invoke to determine their rights, prescribe their duties, and order their dealings in times of war and peace.

In South America, Andrés Bello published Principios de Derecho de Gentes (1832), which is titled Principios de Derecho Internacional in its second and third editions (both 1864). In this way, a new name for the law of nations finally took hold: international law, that is, law between nation-states.

The expression “international law” also served as a new principle of law that advocated a science of law based on the principle of nationality. It was a long way now from the principle of legitimacy that inspired the Congress of Vienna (1814–1815). Peoples who erected themselves into nations based on self-determination became the Titleholders of the state's sovereignty. The American Declaration of Independence (1776) became a paradigm of self-government, thus opening the door to the independence of the world's peoples. The liberation of the thirteen American colonies began a process of decolonization that was destined to become a distinguishing mark from then until now, especially during the twentieth century, starting with the Second World War. Regrettably, this process is not yet complete. Kosovo is the latest example.

What seemed to be a happy expression turned out not to be. Within a short
span, John Austin (1790–1859) pronounced international law dead. If the law qua law is, as the founder of analytical jurisprudence (following Hobbes) argues, a command of the sovereign – and there is no common superior to the state – then international law is not a law, but ethics.\textsuperscript{43} Therefore, Austin concluded, each state may indeed adopt its own international law, impose it on its courts, or back it by force. But that is not international law; rather, it is national or civil law.

5. PUBLIC AND PRIVATE INTERNATIONAL LAW

What has happened to international law has happened to law itself. That is, law has gradually split into several branches based on the distinction – accepted and much disputed – between private law and public law. And, although in the \textit{ius Romanorum}, private law gave rise to public law, the opposite has taken place here: from international law \textit{par excellence}, which came to be called public law, a branch called \textit{ius privatum inter gentes} emerged.

The science of international law had fallen into a positivist reductionism, hidebound by the notion of a sovereign state. This created a small opening in the nineteenth century for a distinction to develop between public international law (i.e., between equal states) and private international law, or for conflicts of laws between states. Conflicts of law determine the law applicable in the relations between subjects of different states or of events that occur on territories subject to other sovereignties.

In fact, this was a necessary adjustment in the face of conclusive evidence that international law was a law between states. These rigid theorizings were at odds with the increasingly free transnational economy emerging at the time against a bureaucratic state order indisposed to turn “private international law” into “international private law.” Thus, a sort of “public order domain”\textsuperscript{44} was to fall like a sword of Damocles on this attempt to divorce private international law from an interstate law of nations. Indeed, the first opening in the impregnable wall of sovereignty was economic: the need to broaden commercial space by liberalizing mercantile traffic.

The treatise entitled \textit{Traité du droit international privé} (1843) by Jean Jacques Gaspard Foelix, translated into Italian and Spanish, was important for consolidating the term “private international law,”\textsuperscript{45} as were, in their own countries, the works of Francis Wharton,\textsuperscript{46} William Henry Rattigan,\textsuperscript{47} and Pasquale Fiore.\textsuperscript{48} \textit{Private International Law} was the title chosen in
1869 by William Guthrie for the English translation of Volume 8 of the 
_System der heutigen römischen Recht_ (1849) by Savigny. It was there that 
the founder of the Historical School dealt with the conflicts between 
national laws.  

One of the great treatises of the time on international law was written in 
1854 by Robert Joseph Phillimore, an English judge. It echoes the 
importance of the distinction between public and private international laws 
and equates the latter with international comity. The obligations of public 
international law are a matter of legal necessity, whereas those born of 
private international law are more about social convenience. For Phillimore 
(p. 13), it is fully within states’ competence to refuse entry permits to 
foreigners who wish to initiate trading relations with their subjects, or to 
grant such permits only if those foreigners submit to the law of the state that 
grants them entry. In any event, a _casus belli_ would never be justified, as it 
would be if a rule of public international law were breached, which would 
justify recourse to war as a last resort. 

In his 1889 commentaries and notes on the classical _Elements of 
International Law_ by the American jurist Henry Wheaton, Alexander 
Charles Boyd indicated that this distinction between public and private 
international laws was then commonly accepted in the field. Six years 
before that, in France, however, F. Heinrich Geffcken, a commentator on 
August Wilhelm Heffter's famous work, said that “private international law 
was still being formed.” 

The principle of nationhood was fully linked to this division and had 
entered the international arena accompanying nationalism, most particularly 
Italian nationalism. _Della nazionalità come fondamento del diritto delle 
genti_ was the title of the address given at Turin by Pasquale Stanislao 
Mancini in 1851. For Mancini, the law of nations was law between states – 
a law of political communities aware of their common nationhood. These 
nations can form themselves into states and function as such in the 
international community, that is, independently. Therefore, in the event of 
any conflict of laws, the principle of nationality should prevail. In other 
words, the law of the nation to which the person performing the legal act 
belongs, against his jurisdiction's principle of territoriality or of domicile, 
should decide the case. This transition to the principle of nationality is 
considered one of the greatest changes to take place in law since the Late 
Middle Ages. 

Private international law continues to be the subject of debate. In reality, 
it is more an international private law than a private international law. That
is, it is a branch of the internal law of states with heavy implications for public international law because it deals with the standards that national courts apply in cases concerning foreign laws, or a status recognized as such in another country. Yet, as Christopher Gregory Weeramantry once complained, “Private International Law is very hard to define.” He was right. In terms of its content, it is private law. To the extent that it affects states, it is public law. It is also close to procedural law because of the jurisdiction problems posed by conflicts of laws. The birth of private international law thus exposed the crisis in the conceptualization of public international law: ex privato, publicum. The public must flow from the private and not the other way around.

6. NEW ATTEMPTS AT CONCEPTUALIZATION

The international law of European states – as it grew in area (if not in theory) by colonization and as it developed pari passu with the Industrial Revolution and international treaties – gave Europe a universal hegemony and a monopoly on power and diplomatic influence; it became a truly worldwide international law, now characteristic of the twentieth century.

The Treaty of Versailles (1919) brought an end to the First World War, which devastated the fields of Europe and created an international crisis of the highest order. The League of Nations was born of the treaty to keep peace in Europe following the armed conflict. It failed to live up to the expectations of its sponsor, then U.S. President Woodrow Wilson, who could not even obtain enough votes in the U.S. Senate for his country to join the League. Between the wars, the Soviet Union, Nazi Germany, and Japan dissociated themselves from the treaty. Nonetheless, it will always have the distinction of being the first serious attempt to form a family of nations.

The Second World War – a conflict that witnessed an unprecedented death toll of 50-million-plus, the dropping of two atomic bombs on civilian populations, and the greatest number of participating nations – gravely injured the international order. The reaction, both political and institutional, was swift.

Created in 1945, the United Nations provided a forum for multilateral dialogue that helped make international law universal and set up international courts with greater or lesser jurisdiction. But the science of international law took a major step, unprecedented in human history, with the promulgation of the Universal Declaration of Human Rights on December 10, 1948. Here was a true Bill of Rights for humanity, informed
by the principles of liberty, equality, and solidarity that protect the dignity of each person.

The full, direct application of international law to all persons was recognized by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which created the now defunct European Commission for Human Rights and the European Court of Human Rights (reorganized in 1998). According to Articles 25 and 46 of the European Convention, it is lawful for individuals to invoke human rights in legal proceedings, even against the states to which they belong. As Philip C. Jessup pointed out, “One keystone was to be the adoption of the principle that international law, like national law, must be directly applicable to the individual.”

Jürgen Habermas, a partisan of legal globalism and neo-Kantian pacifism, maintains that the enforcement of human rights should not be entrusted to the national states alone but must always be under the aegis of supranational bodies that can authorize the use of armed force for humanitarian ends as needed. This has already happened, for example, in Iraq (1991), Somalia (1992), the former Yugoslavia (1994), and Rwanda (1994). “Human rights fundamentalism,” Habermas concludes, “is avoided not by renouncing the politics of human rights, but only through a cosmopolitan transformation [weltbürgerrechtliche Transformation] of the state of nature among states into a legal order.”

In the field of international organizations, great advances were made throughout the twentieth century. In 1944, the World Bank was created to reduce poverty in the world and improve the quality of life of peoples. The International Monetary Fund was founded in the same year to encourage sustainable foreign-exchange policies, facilitate trade among nations, and reduce poverty. Three years later, in 1947, the General Agreement on Tariffs and Trade (GATT) was signed, which was the precursor of the World Trade Organization (WTO), created on January 1, 1995, to supervise the international liberalization of trade. In 1998, the Rome Statute created the International Criminal Court, the first permanent criminal court for the punishment of crimes, lèse majesté, and genocide. By 2007, 104 countries had ratified the statute.

Perhaps the most relevant international event of the past few decades, however, was the birth of the European Union (EU) on November 1, 1993 with the Treaty of Maastricht, recently strengthened by the Treaty of Lisbon on December 13, 2007. The EU calls for economic, social, and political integration. Its development dates to the Schuman Declaration of May 9, 1950.
1950, which can be compared only to the formation of the United States. Out of the ashes of the two world wars, a new Europe was born with an indubitable desire for political union.

Aware that they were witnessing a time of transition, international experts tried to incorporate into the science of law new expressions to reflect changing historical realities determined by the urgent need for stable peace and the universalization of international relations. Of these new formulations, those put forward by Philip C. Jessup (1897–1986), C. Wilfred Jenks (1909–1973), John Rawls (1921–2002), and Álvaro d’Ors (1915–2004) deserve special consideration. Coming from different fields – the first two from international law and the last two from political philosophy – over time, they achieved the greatest auctoritas. The other formulations, too, seem to be on the right track.

A. Philip C. Jessup's Transnational Law

The legal scholar Philip C. Jessup, aware of the shortcomings of the world order and of the need to make changes in the concept of international law, pushed for the use of the term “transnational law” in his 1956 Storrs Lectures at Yale Law School. Jessup made his point clear from the start: the concept of international law, like the word “international” itself, is inadequate to solve the world's problems. This was so principally because states are not the only way to organize the world, and yet international law had for historical reasons become a law applicable only between nations and states.

For these reasons, Jessup preferred the expression “transnational law” to “international law.” This new concept would comprise “all law which regulates actions or events that transcend national frontiers” – private international law (conflict of laws) as much as public international law, and even other standards that might not be included in these two categories. Jessup himself acknowledges that his transnational law is similar, if not identical, to George Scelle's unified intersocial law (droit intersocial unifié), because transnational situations may involve individuals, corporations, states, organizations of states, and any other group.

A French jurist consulting for a Chinese company that wants to do business in Paris, a Russian at the U.S. border with passport problems, or the resolution of the Iraq conflict by means of an interstate agreement – all of these relate to transnational law in that they involve conflicting applicable standards, often requiring a choice of which law to apply. This
involves breaking through the artificial barrier created between the national and the international, which has at times been accomplished simply by indicating that international law is part of the national legal order (part of “our law”) and therefore applicable by national courts. In the final analysis, according to Jessup’s theory – with which I agree entirely, although it seems to have been improved upon over time – the individual would cease to be an object of international law and would be recognized and acknowledged as its subject, with standing before international tribunals.64

This transnational law would address the universality of human problems, that is, issues whose scope extends beyond one's own nation. Even though the expression “transnational law” has been so well received that it appears in the names of several institutes and scientific journals, it has not been definitively settled, perhaps because it retains the word “nation,” with all the negative implications that may follow. In effect, transnational law liberates itself from the burden of state sovereignty, but not from the political weight of the nation, which has been identified since the French Revolution with the state itself. Therefore, it only partially solves the problem, but the use of the expression “transnational law” continues to be preferable to international law, except in the case of intersovereignty relations.

B. C. Wilfred Jenks and the Common Law of Mankind

The man who served as the sixth Director General of the International Labour Organization from 1970 to 1973, C. Wilfred Jenks of Liverpool, indicates at the beginning of his 1963 book Law, Freedom and Welfare that what international law needs most today are faith and creative vision.65 He indubitably possessed both. Indeed, after the international crisis caused by the Second World War, Jenks forcefully advocated for a common law of mankind, to which he devoted a 1956 book that has since become a legal classic.66 In this eclectic work, he traces the outline of this new juridical configuration that he later develops in Space Law (1965), Law in the World Community (1967), and A New World of Law? (1969).

In The Common Law of Mankind, he unabashedly points out the error of continuing to define international law as it is traditionally defined, namely, as a law governing interstate relations by delimiting their jurisdictions. That is something, but it is grossly insufficient. Law must regulate the structures of the international community and its decision-making procedures. It must guarantee the protection of human rights on the international plane, civil
liberties and social, political, and economic rights, the legal rules that govern interdependent economic relations on a global scale, public services, state corporations, private partnerships, and conflicts of laws.\textsuperscript{67}

Jenks therefore asks internationalists to work toward a legal system broad and deep enough to lead the world with the necessary changes in power. According to Jenks, international law can no longer be seen as a system of rules for governing mutual relations between states; it should rather be considered the common law of mankind \textit{in an early phase of its development}.\textsuperscript{68} It would regulate the organization of a world community built on the basis of states, which would gradually surrender their jurisdictions to a complex of institutions and bodies, regional and international, that protect the human rights of individual citizens and uniformly order matters that come under the law (p. 7). As he points out in \textit{Law in the World Community}, such a law would not be the faithful servant of a given ideology but a code of accepted principles and procedures making it possible for people to live together in peace.\textsuperscript{69}

In his \textit{A New World of Law?} (1969), Jenks even specified the principles of this common law of mankind that have undoubtedly contributed to making international law a more effective tool in the service of the universal community. At the end of his Storrs Lectures at Yale University in 1965, he even names what he calls the eight principles of world political morality. These eight principles or propositions are requirements of international law to the extent that they share with international morality the goal of social justice (p. 291). These are the eight principles: the unity of mankind, the immorality of the arbitrary use of force, the limitation of sovereignty by law, impartial justice administered by third parties, good faith, fair dealing, mutual aid, and respect for human dignity.\textsuperscript{70}

Jenks believes that all moral principles derive from the first: unity – the foundation of the universal fraternity and equality of all people. The principles’ validity arises more from the need for an international community than from proof of its existence. That is, if one believes in the desirability of the unity of humankind, it is reasonable to constitute and organize a universal community. If one is not sure of its merits, however, the morale needed to establish it loses its \textit{raison d’être}. The same is true, Jenks would say, of the law, which finds no “better justification” than “the deepest instincts of man” (p. 293).

World events have only confirmed Jenks's great wisdom concerning the status quo of international law, the development of new areas of international law, the formulation of moral principles for the human
community, and the restoration of the concept of person to international law. I hope in these pages to pursue the road mapped out by that master, in light of the new world order shaped by globalization. I also will attempt to climb another step in the scientific development of the law.

My only criticism of Jenks relates to his trust in the concept of sovereignty, even when stripped of dogmatism and subjected to the principles of international law. Jenks fails to see the serious peril it holds for the new world order, which must move beyond the idea of the state. As long as state sovereignty exists, there can be no definitive step toward global law, which will have to coexist with international law.

C. John Rawls and The Law of Peoples

More recently, from a philosophical rather than legal perspective, John Rawls, the author of *A Theory of Justice* (1971), reflected on the law of peoples in a lecture delivered on February 12, 1993, on Abraham Lincoln's birthday. Dissatisfied with the results, in 1999 he published a revised version, which has become definitive since his death.

In this suggestive essay, Rawls offers a realistic utopia where the law and justice reign over the principles and rules of international law and practice. By the phrase “society of peoples,” he means the union of those who agree to govern themselves in accordance with the law of peoples. In this union, the peoples would be the agents, much as individuals are in domestic societies. Following Bodin, Rawls suggests that peoples would be well ordered into democratic and liberal societies, or at least “decent societies” having basic institutions founded on the criteria of justice and a certain degree of citizen participation in the decision-making process.

A typical case of a nonliberal decent society would be a nonaggressive Muslim people – given the fictitious name of Kazanistan – that recognizes the important norms of a society of peoples. The author himself says in his introduction: “The Law of Peoples hopes to say how a world society of liberal and decent peoples might be possible” (p. 6). To achieve this, he advocates fair policies under the aegis of social institutions and appropriate developments that would combat the great ills of human history. In this law of peoples, human rights fulfill an important function by restricting the reasons for justifying war, prohibiting certain behaviors, and limiting the regime of the internal autonomy of peoples.

Against the idea of the state as the protagonist of his “law of peoples,” Rawls, a philosopher of law grounded in a liberal conception of justice,
formulated eight well-known principles of this law of peoples, just as James Leslie Brierly and Terry Nardin had done before. These include freedom, equality, independence and solidarity of peoples, observance of treaties and undertaking, duty of non-intervention, the right to self-defense, and the protection of human rights.

Rawls acknowledges that his construct is not perfect. He even cautions that the eighth principle – mutual aid between peoples – is “especially controversial” (p. 37, note 43), although it does not cease to be a worthy goal. He further states: “This statement of principles is, admittedly, incomplete. Other principles need to be added, and the principles listed require much explanation and interpretation” (p. 37).

It seems to me, however, that this is the correct way to shape a legal order that addresses the needs that arise from the new world order born of the rubble of the Twin Towers. The major difference between John Rawls's theory and the global principles I propose is that Rawls's point of departure is the idea of people as a “moral person,” whereas mine is the person himself as a bearer of rights (the nomophor). His reinterpretation of Rousseauian ideas about persons (men as they are), with their application first to institutions and ultimately to peoples, is central to our differences.

This theory does not resolve the principal question of modern international law: the position of the person as the subject of law in the cosmopolitan society in which he lives. It is true that the “society of peoples” must respect human rights and basic freedoms, but this is still a minimal criterion that does not place the person at the center of the system of global law.

The concept of people, although more adequate than the concepts of state and nation, falls short, because there are more general political communities that must form part of this society of “communities,” which do not need to have the same nature. Rawls is flexible on this point, speaking of societies in the broad sense of human groups that are self-reliant enough to realize themselves institutionally. I do not, however, see a problem with societies that are somehow dependent but transnational forming part of this “society of peoples.” In other words, I do not know to what point independence (Principle 1, p. 37) should be a conditio sine qua non for the application of The Law of Peoples. Thus, dependent but decent communities, and even internally democratic societies arising within nondecent societies should be included in this framework.

D. Álvaro d'Ors and Geodierética
The original reflections of Álvaro d’Ors in his *La posesión del espacio* (1998)[76] are the fruit of a half-century of intellectual dialogue with the German jurist Carl Schmitt.[77] After examining the relationship – only apparently incongruent – between the concepts of space and possession,[78] d’Ors, a Spanish scholar of Roman law, offers a new view of the current crisis involving the division of the world into sovereign and national states.

D’Ors says that with respect to space – conceived as “the totality of the perceptible environment”[79] – and thus with respect to any specific instance of it, there is possession but not ownership. He thus retrieves the ancient Roman concept of *possessio*, applied fundamentally to the holding of the *ager publicus*. For d’Ors, property rights would be “a judicially-protected preference over certain things,”[80] like possession, in the final analysis.

Álvaro d’Ors proposes a new science, *Geodieretics*,[81] which, as part of geonomy, deals with the fair ordering of parcels of space available to people. Such distribution must not be made as if it were a matter of sovereign dominion, but rather as a “personal preference” within the purview of an administrator of something held in common.

The most important difference between *Geodieretics* and geopolitics is that the second presupposes the idea of the state. The first “encompasses all levels of adjustment of space to the objective needs of men.”[82] Facing the statist territorialism typical of geopolitics in the service of the great powers’ strategies, Álvaro d’Ors, an estimable critic of the modern state, defends a rational distribution of space. He bases it on the principle of subsidiarity in accordance with the “levels of possessive preference,” which run from the family (as the first level)[83] to the great spaces.[84] These are a kind of confederation of nations that are not themselves made into states and do not become a superstate. D’Ors gives the example of the British Commonwealth, although he would demand greater autonomy for the peoples who comprise it.[85]

These personal preferences empower their owners to demand due respect *vis-à-vis* third parties; they should be regarded as “services” to others. To d’Ors, every right, every preference is, in the final analysis, a “service.”[86]

The astute reader recognizes that many ideas proposed here, although nuanced, are steeped in the thought of d’Ors. Indeed, they could not be otherwise, unless I were to give up what is most precious in a university relationship: intellectual filiation.

7. IUS NATURALE IN THE SHADOW OF IUS GENTIUM
The author cannot end this initial, historical chapter without expressly mentioning natural law, which, like the popular Iberian River Guadiana, appears and disappears in the landscape of legal theory. In considering natural law, jurists and political theorists take sides in different ways, from unconditional defense to frontal attack and everything in between. Only indifference, that typical feature of postmodern tyranny, shrinks from it. Even so, indifference has dulled the stamp of natural law.

It should not surprise anyone that the most felicitous phrases of the most famous philosophers and jurists have been written for or against natural law. Henry S. Maine does not hesitate to say, for instance, that it is precisely natural law that makes Roman law superior to other legal systems, nor does Jeremy Bentham mince words in his harsh criticism of Blackstone. Bentham calls natural law a “formidable non-entity.” In his Principles of Morals and Legislation, he describes it as “an obscure phantom,” and in his Theory of Legislation he denounces as “fictions or metaphors” the concepts of natural law and natural rights. The fact is that the expression “natural law,” which has been tweaked many times, has ended up with different, even contradictory, meanings, many of them containing great riches. For this reason, it would be an intellectual calamity to lose this concept, which the science of law seems to rediscover quickly whenever it is suppressed.

The Roman ius naturale, as an expression of the Greek physei dikaion, goes hand-in-hand with the law of nations, because the scientia iuris Romanorum never hesitated to draw its legal standards from its “contemplation of life.” Although they differ in origins and objectives, both have traveled together down the centuries, sometimes in tandem and sometimes crisscrossing like a braid. Indeed, because Cicero first used the expression “ius gentium” in the light of natural law, they have at times even been identified as one and the same reality observed from different angles.

Supported by Cicero's doctrine and Gaius’ identification of natural law with the law of nations, Christianity gave wings to natural law. Paul of Tarsus combined gens and natura and incorporated the Stoic doctrine of lex naturae into his Epistle to the Romans, where he says that the Gentiles, although they do not comply with the Mosaic law, are a law unto themselves if they abide by the law of nature. Later, the idea of natural law was invoked profusely by the Church Fathers as a law inspired by God in the hearts of people. St. Ambrose considered natural law a path that leads to
God (duce natura credunt in Deum et Christum), and his disciple St. Augustine laid down in City of God his doctrine of lex aeterna and lex temporalis. St. Isidore of Seville returned to the Roman sources, which, through his Etymologies, hearken back to Gratian's Decretum.

Medieval canon-law scholarship would, on the basis of the Decretum, identify natural law with the content of the Decalogue and the Gospels and thus Christianize the concept of natural law: ius naturale est quod in lege et evangelio continetur. For his part, St. Thomas Aquinas some time later constructed a theory of law and natural law that has, until today, informed Catholic doctrine. The Salamanca School, led by Francisco de Vitoria, assumed the task of perfecting and applying it after the discovery of the New World. The same work has also been performed by distinguished contemporary authors of the English-speaking world, including Germain Grisez, Joseph M. Boyle, John Finnis, and Robert P. George who, inspired by this philosophia perennis of the existence of sound objective moral rules, are working out a new classical theory of natural law. There has also been no dearth of advocates in the area of civil law, with Jacques Maritain and Michel Villey in France, or Álvaro d’Ors, Juan B. Vallet de Goytisolo, and Javier Hervada in Spain.

Natural law – accepted and reinterpreted by Hugo Grotius, Thomas Hobbes, Samuel von Pufendorf, and John Locke in versions that are, respectively, modern, naturalist, rationalist, and enlightened – was held in high esteem in the process of American independence. Thomas Jefferson's Declaration of Independence of July 4, 1776, expressly mentions the laws of nature imposed by God (“the Laws of Nature and of Nature's God entitle them”) and the unalienable rights recognized as evident truths (“we hold these truths to be self-evident”). Natural reason held a place of honor in William Blackstone's famous Commentaries on the Laws of England, one of the most popular and influential works in the history of common law and a basis for the initial development of the U.S. legal system. In his clear and unadorned style, Blackstone based his definition of the ius gentium on its deducibility from natural reason and on the consent of the world's civilized citizens.

Pitiless utilitarianism and a romanticism that exalts the spirit of the people – driven by the nineteenth-century German Historical School of Law and increasingly demonstrated in the recent work of Kelsen, Hart, and Raz – have made of natural law a patchwork of ideas and intentions that have little
or nothing to do with law but much to do with morality. But the two realities, although related, must be distinguished.

The history of the relationship between the law of nations and natural law is the history of the permanent tension between voluntarism and rationalism, between being and ought, between external legal limits and self-limitation, between power and authority, between the autonomy of law and the possibility of its dependence on morality or ethics; in the final analysis, between *ius* and *lex*.115

“A law” (*lex*), one may remember, is broader than “law” (*ius*), because it is not strictly a legal creation, like a contract or a testament, but a concept used by jurists. The physical law of gravity is as much a law as the moral one not to cause unnecessary injury to oneself or the juridical one to pay the purchase price. The law (*lex*) should not be the exclusive patrimony of jurists; on the other hand, law (*ius*), which includes other sources of legal norms, such as custom, principles, judicial rulings, and agreements *inter partes*, should just be. *Ius* (*Recht, droit, derecho*) and *lex* (*Gesetz, loi, ley*) have been identified with each other – partly because of the common law tradition, which for reasons rooted in the Middle Ages, frequently employs the word *law* to refer to both. In the process, the legal system has increasingly been seen as a set of acts of human will (*Willensakt*), as Kelsen called for. This undermined the validity of norms (*Die Geltung von Normen*), which would have only a relative and subjective sense,116 as natural law would come to have for many legal thinkers.

It is thus the business of philosophers and moralists and not just of jurists to concern themselves with the natural law (*lex naturalis, loi naturelle, ley natural*). Natural law (*ius naturale, droit naturel, derecho natural*) is, however, the province of the jurists. Jurists impart legal relevance to a moral law, which, to the extent it affects relations of justice, must be protected by the law.

Natural obligations are good examples. This type of obligation, which binds in conscience the person who has contracted it but cannot be enforced in a court of justice, is recognized in many legal systems grounded in Roman law, such as those in France, Italy, and Spain. Under Roman law, natural obligations can form the object of novation and surety and, if freely satisfied, are considered truly fulfilled (*soluti retentio*). As such, the jurist’s work is facilitated by the recognition of the existence of natural law as a sort of release valve in hard legal cases.

In my opinion, the crisis of modern international law is partly a result of its total separation from natural law, begun by Grotius and completed by Bentham. This is the exact opposite of what happened with the law of
nations, which is ever respectful of *ius naturale*, however much natural law may have been oblivious of the law of nations. A good example of this is found in the regulation of slavery, permitted by the law of nations and prohibited by natural law. Neither Kant's *Staatenrecht* nor Bentham's *international law* needed a natural law to support their legal concepts. When law casts aside the idea of nature, of *natura rerum*, it meets a dead end of normativist formalism, which ultimately turns law into a group of rules in service of the most powerful. History provides several examples that we should not forget.

The incipient global law does not, of course, involve the idea of natural law, much less its acceptance, but it should be open to it, because – as we will see – global law is based on a person's dignity and not on the sovereignty of states. States, the subjects *par excellence* of international law, do not close themselves off to transcendence or ethics, which is the case with interstate law. The state by its very nature is coercive; that is to say, it generates its own enforced ethics.

Natural law, like the law of nations and international law, is a typically European concept. As such, it draws on the best of European heritage – Greek philosophy, Roman law, Christianity, and the Enlightenment – to offer the world a new idea of law acceptable to all persons and nations irrespective of culture, creed, and political persuasion. One needs only to look to the reception this idea has had in the Islamic world, as shown by Abul-Fazl Ezzati in his *Islam and Natural Law*, where he points out the similarity between the concept of *fitrah* and that of natural law.

To try to suppress in one stroke such seminal ideas as those of natural law, which are created and refined by the science and practice of law over many centuries, amounts almost to a renunciation of the essence of European identity in this new era of globalization. It is a different question whether the notion of natural law will be reviewed in light of constructive criticism and the requirements of the times in which we live. This is the challenge of today's legal science.

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1 A general overview of the different epochs of international law can be found in Wilhelm G. Grewe, *The Epochs of International Law* (translated and revised by Michael Byers, Walter de Gruyter, Berlin, New York, 2000).


*Iuris et iudicii fecialis sive iuris inter gentes, et quaestionum de eodem explicatio* (2 vols., ed. Thomas Erskine, 1650; Carnegie Institution of Washington, Washington DC, 1911). The expression is already in the title, but also in *pars prima, sectio prima*, No. 2, p. 2: “Deinde hoc ius inter gentes obtinet inter eas gentes, aut populos, penes quos est imperium, vel universalis et summa potestas de iis quae ad communionem inter gentes cum in pace, tum in bello spectant, decernendi.”

He bases his definition of *ius gentium* (Book I, Chap. 14, ed. 1913), on the thinking of Spaniard Fernando Vázquez de Menchaca, expressed in *Controversiae Illustres* II. Book 4. Overall, Grotius softens Vázquez's idea by adding the qualifier *multarum*, because the law of nations does not address itself to all men: *est ius gentium, id est quod Gentium omnium aut multarum voluntate vim obligando acceptit*.

modern Philosophy of Law.”

11 Cf. Grotius, De iure belli ac pacis, Prolegomena 11 (ed. P. C. Molhuysen, Leyden, 1919), p. 7: “Et haec quidem quae iam diximus, locum aliquem habere etiamsi daremos, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana.”


13 Hobbes, Leviathan, Chap. 30.185.


19 Samuel von Pufendorf, De systematibus civitatum, first published in 1675, in Dissertationes academicae selectiores (Lund, 1675).

20 Cornelis van Bynkershoek, Quaestiones iuris publici, in Opera omnia, vol. II (Apud Samuelem et Joannem Luchtmans, Leyden, 1767), Book I, Chap. X.


iuris, quo Gentes, sive populi inter se utuntur, et obligationum
eidem respondentium.”

23 Von Wolff, *Ius gentium* (cited in the previous note), § 2, p. 1:
“Gentes spectantur tanquam personae singulares liberae in statu
naturali viventes.” He repeats this phrase again in § 3.

24 Emer de Vattel, *Le droit des gens, ou Principes de la loi naturelle*
(1758, ed. Guillaumin et Cie Libraires, Paris, 1863),
corps politiques, des sociétés d’hommes unis ensemble pour
procurer leur salut et leur avantage, à forces réunis.” The same
identification between nation and state and a similar definition
21, § 122, vol. I, p. 330 he also (wrongly, in my view) identifies
fatherland and state: “Il signifie communément l’État dont on est
membre.”

79: “Les droits des gens et la science de droit qui a lieu entre les
nations ou l’État, et des obligations qui répondent a ce droit.”

26 On the concept of the state in Kant, *vid.* for all, Jeremy Waldron,
“Kant's Theory of the State,” in Pauline Kleingeld (ed.),
*Immanuel Kant, Toward Perpetual Peace and Other Writings on
Politics, Peace, and History* (Yale University Press, New Haven,

27 Immanuel Kant, *Grundlegung der Metaphysik der Sitten, Kants Werke*, IV (Preussische Akademie der Wissenschaften, Berlin,
zueinander [welches nicht ganz richtig im Deutschen das
Völkerrecht genannt wird, sondern vielmehr das Staatenrecht (*ius
publicum civitatum*) heißen sollte] ist nun dasjenige, was wir
unter dem Namen des Völkerrecht zu betrachten haben.”

28 Immanuel Kant, *Metaphysik der Sitten, Kants Werke*, VI
(Preussische Akademie der Wissenschaften, Berlin, 1911), III, §
62, p. 352: “Dieses Recht, so fern es auf die mögliche
Vereinigung aller Völker in Absicht auf gewisse allgemeine
Gesetze ihres möglichen Verkehrs geht, kann das weltbürgerliche
(*ius cosmopoliticum*) genannt werden.”

29 In this regard, *cf.* Adelino Braz, *Droit et étique chez Kant: l’idée


32 In this connection, cf. Otfried Höffe, Kant's Cosmopolitan Theory of Law and Peace (trans. by Alexandra Newton, Cambridge University Press, Cambridge, New York, 2006), XV: “Kant is the first thinker and to date the only great thinker to have elevated the concept of peace to the status of a foundational concept of philosophy.”

33 In a memorable phrase, Hegel (Grundlinien der Philosophie des Rechts, 4th ed., in Sämtliche Werke XII, ed. Johannes Hoffmeister, Meiner, Hamburg, 1955, § 331) considered the nation-state (Das Volk als Staat) to be the spirit in its substantial rationality and immediate actuality, and, therefore, an absolute power on earth (die absolute Macht auf Erden).


36 Of interest in this regard is his biting criticism of the Declaration of the Rights of Man and of the Citizen (of August 26, 1789) in a letter addressed to Brissot some days before it was approved by
the French Constitutional Assembly: “The best thing that can happen to the Declaration of Rights will be, that it should become a dead letter; and that is the best wish I can breathe for it”; quoted by Philip Schoefield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford University Press, Oxford, New York, 2006), p. 59.

37 Specifically, in the second volume of *The Works of Jeremy Bentham, Published Under the Superintendence of His Executor, John Bowring* (W. Tait, Edinburgh, 1843), vol. II, pp. 537–566. The titles of the four essays were: I. *Objects of International Law*; II. *Of Subjects, or of the Personal Extent of the Dominion of the Law*; III. *Of War, Considered in Respect of Its Causes and Consequences*; IV. *A Plan for an Universal and Perpetual Peace*.


39 Andrés Bello, *Principios de Derecho de Gentes* (Imprenta de la Opinión, Santiago de Chile, 1832).


41 *Cf.* the Preamble to the Declaration of Independence: “…it is the Right of the People to alter or abolish it, and to institute new Government…”


excluded from the proper province of jurisprudence. It is obvious that those rules commonly known as International Law, can have neither their source nor their sanction in common with the law embraced in the previous description. The subject is, therefore, inevitably relegated to take its place in a department of a science which would properly be called that of Positive Morality; and if language rigorously consistent were used, it would be termed, not International Law, but International Morality.”


law is now very generally accepted.” But although he speaks of private international law, this characterization had not yet appeared, e.g., in the 1866 ed. (8th American ed. by Richard Henry Dana, Little, Brown, Boston, 1866), § 10, p. 16. In the first edition of his work, Henry Wheaton, *International Law with a Sketch of the History of the Science* (Carey, Lea & Blanchard, Philadelphia, 1836), the expression “private international law” is not yet employed. On the other hand, he does identify international law with the law of nations: “The law of nations, or international law” (§ 11, pp. 46 and 47).


56 The creation of new international courts has progressively grown since the establishment of the Permanent Court of Arbitration (1899, reformed 1907); of the International Court of Justice of The Hague (1945); of the European Court of Justice (1957, 1999); of the European Court of Human Rights (1959, 1998); the International Center for Settlement of Investment Disputes (ICSID) (1966); the Inter-American Court of Human Rights (1979); of the International Criminal Tribunal for the Former


60 The Treaty of Lisbon came into force as of December 1, 2009, after the deposit of the instruments of ratification in Rome by the final signatory, the Czech Republic.


63 George Scelle, *Précis de droits de gents. Principes et


68 In p. 14 he again repeats the point: “…International law represents the common law of mankind in an early stage of its development and compromises a number of main divisions of which the law governing the relations between States is only one.”


bound up with that of sovereign power.


76 Álvaro d’Ors, *La posesión del espacio* (Civitas, Madrid, 1998). This book will be better understood in the light of his other writings: *Nueva introducción al estudio del Derecho* (Civitas, Madrid, 1999); *Derecho y sentido común* (3rd ed., Civitas, Madrid, 2001); and *Bien común y enemigo público* (Marcial Pons, Madrid, 2002). An introduction to the thought of d’Ors can be found in Rafael Domingo, Álvaro d’Ors. *Una aproximación a su obra* (The Global Law Collection, Thomson Aranzadi, Cizur Menor, 2005).

77 Cf. the correspondence between them, edited by Montserrat Herrero, *Carl Schmitt und Álvaro d’Ors. Briefwechsel* (Duncker & Humblot, Berlin, 2004).

78 Álvaro d’Ors, *La posesión del espacio*, pp. 11–16.

79 Álvaro d’Ors, *La posesión del espacio*, p. 14: “Concebido el espacio como totalidad del ámbito sensible, no se reduce a la solidez del suelo sino también a la insolidez del mar y del aire.”

80 Álvaro d’Ors, *La posesión del espacio*, p. 22: “una preferencia sobre cosas determinadas judicialmente protegida.”

81 Álvaro d’Ors, *La posesión del espacio*, pp. 18–19.

82 Álvaro d’Ors, *La posesión del espacio*, p. 28: “La Geodierética abarca todos los niveles de adecuación del espacio a las necesidades objetivas de los hombres.”

83 Although d’Ors grants each individual a preference of possession in housing, he does not consider the person (mistakenly, in my opinion) to be the first preferential level, because a person is not a social group in the strict sense of the term (cf. *La posesión del espacio*, p. 42).

84 Álvaro d’Ors, *La posesión del espacio*, pp. 45–60.

85 Álvaro d’Ors, *La posesión del espacio*, p. 56.
86 Cf. Álvaro d’Ors, *Nueva introducción al estudio del Derecho* (Civitas, Madrid, 1999), § 62.

87 Henry Sumner Maine, *Ancient Law* (3rd American ed., Henry Holt & Company, New York, 1873), Chap. IV, p. 75: “I know no reason why the law of the Romans should be superior to the laws of the Hindoos, unless the theory of natural law had given it a type of excellence different from the usual one.”


90 Jeremy Bentham, *Theory of Legislation* (ed. Charles Kay Ogden, Routledge & Kegan Paul Ltd., London, 1931), p. 82: “Natural law, natural rights, are two kinds of fictions or metaphors, which play so great a part in books of legislation that they deserve to be examined by themselves.”


93 Cf. Fritz Schulz, *Principles of Roman Law* (2nd ed., Oxford University Press, Oxford, 1936), pp. 35–36: “This is the determining cause for the peculiar manner in which legal science is presented; it does not actually prove the rules stated, but derives them direct from the contemplation of life, from the *ratio iuris*.”

94 Cicero, *De re publica* 3.22.33.

95 Gaius, *Institutiones* 1.1, *Digest* 1.1.9.
St. Paul, *Epistle to the Romans* 2.14: “cum enim gentes, quae legem non habent, naturaliter, quae leges sunt, faciunt eiusmodi legem non habentes ipsi sibi sunt lex.”


St. Augustine, *De civitate Dei* 19.5–17.


*Cf.* the new contribution to the renewed interest in natural law, edited by my colleague at the University of Navarra, Ana Marta.

114 William Blackstone, *Commentaries on the Laws of England*, vol. IV (Wayne Morrison, ed., Cavendish, London, Sydney, 2001), Chap. 5, No. 66, p. 53: “The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance frequently occur between two or more independent states, and the individuals belonging to each.”

115 Jeremy Bentham somewhat querulously mentioned this because English had lost the full significance of the fruitful Roman distinction between *lex* and *ius* that has passed to several European languages: “The English is at present destitute of this advantage” (Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd ed., edited by James H. Burns and Herbert L. A. Hart, with a new Introduction by Frederick Rosen, Oxford University Press, Oxford, New York, 1996, Chap. 17, No. 25, p. 294). The difference suggested by Thomas Hobbes in *Leviathan*, Chap. 14.64, or in *De cive*, Chap. 14.3, is a poor one: *lex* would be *vinculum*; *ius* would be *libertas*. Roscoe Pound also pronounces on this point, in his contribution titled *The Common Law* to Arthur Larson and C. Wilfred Jenks (eds.), *Sovereignty within the Law* (Oceana Publications, Dobbs Ferry, New York, Stevens & Sons, London, 1965), p. 31: “Where in Latin there are two words, *ius* and *lex*, and in the languages of Continental Europe there are three: French, *ordre juridique*, *droit*, *loi*; in German, *Rechtsordnung*, *Recht*, *Gesetz*; we have only one: *law*, or if we seek to make two by distinguishing *law* and *a law* or *law* and *laws*, yet we are easily confused by *laws* as a plural of *a law* and a tendency to take *the law* for a body of *laws.*”


117 Cf. the *Address of Benedict XVI to the General Assembly of the United Nations Organizations*, New York, 18 April 2008 speaking about the universality of human rights: “They are based
on the natural law inscribed on human hearts and present in
different cultures and civilizations. Removing human rights from
this context would mean restricting their range and yielding to a
relativistic conception, according to which the meaning and
interpretation of rights could vary and their universality would be
denied in the name of different cultural, political, social and even
religious outlooks” (www.vatican.va).

118 Abul-Fazl Ezzati, *Islam and Natural Law* (ICAS Press, London,
PART TWO Toward a Global Law
4 The Crisis of International Law

This chapter discusses the reasons for the current crisis in the traditional international law system, considering how the system developed through the centuries to respond to the needs and circumstances of past historical epochs, as well as how the system is no longer capable of meeting the unique developments and needs of life in the Third Millennium. We consider the problems of a state-based international law that, rather than focusing on the prime actor and focus of the law, the human person and his inherent dignity, concentrates on and gives enormous power to the artificial construct of the nation-state and its animating principles of sovereignty and overdependence on territoriarity. This inborn defect in the system of focusing on the nation-state was imported wholesale into the United Nations system, ultimately rendering it incapable of meeting the basic security, social, and economic needs of our world, which longs for a true global community of persons. The nation-state paradigm, as well as the United Nations system, needs to be essentially and profoundly reformed. New institutions having real global power need to be set up to meet the requirements of our globalized world, especially regarding defending human rights from the incessant assault from both state and nonstate actors.

International law is in its death throes, and with it an outdated order will become extinct, giving way to a new paradigm of globalization. That much is certain. What is also clear is the need to regulate the interactions of a concrete and ever more extended human community, which gives rise to a whole host of legal relationships and questions of justice that must respond to the new millennium's imperatives.

The efforts of internationalists and politicians to find a way out of this historic crisis, which threatens to become endemic, have been extensive. However, international law as currently conceived is insufficient; it is lacking. Its capacity for action has been compromised by global terrorism, the hegemony of a sole superpower (the United States), and the rampant imperialism of various nations – China, Russia, India – that strive to recover their lost grandeur.

We are no longer dealing with the perennial question of whether international law is closer to morality than legal science, or of whether it is more or less dependent on legal orders – which are eminently interesting theoretical questions in their own right. Rather, we are faced with a crisis
that stems from the very structure of international law, one based on political concepts that have become obsolete: sovereignty, territoriality, and the nation-state. For centuries – in which wars and conflicts persisted – these principles helped settle the framework of existing relations among certain states that had decided to exercise their power by having recourse to various counterbalances of alliances and hegemonies.

Nevertheless, however much we try to apply such principles with the same attitude through a consolidated bureaucracy (the United Nations), we accomplish little or nothing when faced with the complexity of this new global order and the great interdependence of postmodern global relations. Thus have the conceptual grounds of modern international law changed; reality does not – and never will – wait for theory. And if common sense compels us to redefine the law in light of the new phenomena that globalization gives rise to, this reformist eagerness will not always be shared by the defenders of an outdated legal system that, going against the tide of history, prefers to anchor itself in nineteenth-century concepts that have failed to bring peace to the world.

The creation of an effective and powerful United Nations was the highest goal of the international law system that was built according to the criteria of the Peace of Westphalia. That goal was realized more than sixty years ago, at the end of the Second World War. With that accomplished, the spread of the legal order was intimately linked to the process of gradual expansion of the United Nations. However, more than half a century later, we have reached a dead end, or rather a crossroads. Either we continue on the well-known, familiar road or we follow the fascinating path of the future. Notions that support international law – which, in their time, were modern – do not help us effectively respond to the issues arising from the new order. For a long time now, state-centered solutions have been inadequate. World problems have changed, giving way to the development of new and transformative trends.

The law cannot be irrelevant to the needs of our time. Twenty-first century jurists must embark on a new route, as the founders of so-called classical international law did in their day. Only in this way can we establish a global legal system capable of overcoming the defects and gaps of the current one, promoting peace and the development of nations and creating, above all, a style of “doing law” that firmly rejects any idealized, particularist or biased notion that might in any way legitimize inequality among nations. We must always, however, face this new challenge from within the bounds of democracy.
1. INTERNATIONAL LAW AND THE GLOBALIZATION OF LAW

Although the concept of international law is in crisis, an apparently irreversible process of internationalization is gathering speed thanks to globalization in its myriad facets. This may seem like a paradox, but it is not. Globalization has so transformed things around the world that some are beginning to speak of a third wave of global knowledge. It is a genuine technological revolution that has had, and will continue to have, repercussions on all aspects of civilization – and, thus, of course, on the legal and democratic system.¹

With good reason, Hans Kelsen warned of the increasing inclination to internationalize the law, with international law determining the content of the norms of various national legal orders or, more generally, gradually replacing them.² However, in fact, globalization has unleashed this process of law's internationalization, and not vice versa. Therefore, globalization's legal ordering cannot be accomplished by imposing international treaties from above, which (as Kelsen explains)³ can cover any issue, thus giving international law a potentially unlimited sphere of application.⁴

Although internationalization of the law is part of the legal globalization that directly affects states, globalization is a larger social phenomenon that cannot be ordered solely by the principles of modern international treaty law. Indeed, globalization unleashes the forceful reaction of national legal systems, which refuse to perish under a superior law that threatens to constrain or limit them.

We can say that “if states are internationalized, society is globalized.” The conceptual crisis of international law results from its pretension to deal with globalization without undergoing a change in its basic principles – principles founded upon an obsolete structure and doctrine, unacceptable for a society called to reflect true universality and solidarity. The clothes of international law have become old, tattered, and useless for a global society. They need to be exchanged for new, better-fitting garments.

What is more, because it appears impossible to continue along the path we are on, which would involve straitjacketing our international community, we should move from a definition of international law as ius inter nations – much less inclusive than Vitoria's notion of ius inter gentes – to a broader definition that looks beyond that mere portion of the law regulating international relations or the international community itself.⁵ Until the person (replacing the current centrality of the state) is recognized as the
primary subject of international law, this will remain an impossible task. When that day comes, international law will cease to be what it is and will instead become global law.

Meanwhile, it is urgent that we recover for legal thought the concept of the person. The objectification of the idea of the person over the last several decades is undeniable; it is an instrumentalization reflected in the most disparate legal systems. Personalizing the law is indispensable to the development of modern legal studies. The law's excessive technification and the arrogant technicality with which it is applied to key aspects of human life threaten to relegate the human person to the humiliating role of the eager legislator's passive and silent guest. This needs to end.

Globalization has transformed the international sphere into another dimension of each pars scientiae iuris. Thus, now we have commercial, economic, and criminal international law, for example, along with more novel branches such as international dispute resolution and arbitration, international environmental law, and international constitutional law. These make up only a dimension of each of the various areas of the law itself. Thus, international law has become the legacy of all jurists, not only the internationalists, since the onset of the process of globalization.

Of course, strictly international areas continue to exist – for example, the law of international treaties or the law of international relations – though the practical and theoretical significance of their role is diminishing. Basically, because it has been shown to be incapable of meeting the challenge for which it was created – the establishment of a perpetual peace in keeping with the Kantian ideal or the Wilsonian dream – international law loses global relevance and becomes merely a laboratory of modern ideas or progressive desires. Its branches, on the other hand, become global, for the global unites the transnational, the international, the supranational and, even the anational. The lex mercatoria, for example, is a paradigm of lex privata, but it is not less valid or binding than public law, even though no sovereign state may intervene to ensure compliance with it.

Lately, as in other golden ages of law, sovereignty has not extended its tentacles over certain legal phenomena. If globalization weakens the conceptual model of internationalism and strengthens the universalization of a series of principles, we must work to ensure that the law that arises from it does not cement asymmetrical or unbalanced relations between peoples, thus becoming a tool in the hands of a few closed oligarchies that seek temporary gain at the expense of the democratic interests of broader communities. This is one – perhaps the most important – of the pressing challenges of the emergent global law.
2. THE BASIC PRIMACY OF STATES AS SUBJECTS OF INTERNATIONAL LAW

For all the prestigious internationalists’ recent efforts to nuance the issue in standard legal texts, international law continues to be mainly a law between states – one in which the person occupies a secondary and even peripheral place. In the second edition of his Theory of Pure Law (1960), Hans Kelsen, then at the end of his life, correctly synthesized the status quaestionis of the internationalist doctrine that he himself had revolutionized: “According to the traditional definition, international law is a complex of norms regulating the mutual behavior of states, the specific subjects of international law.” This state-centric character of the ius inter nationes has so far remained untouched by efforts to downplay its importance. The state worship that characterizes international law hobbles its development and hinders proper analysis and critique of its institutions, for it places at the center of the system something that actually should take second place to the person.

The world's nearly 200 states are effectively the primary subjects of international relations because they possess plenary legal capacity. Individuals, according to the well-known and familiar traditional theory, are nothing more than “objects” of such capacity subject to their power, however much (as an aside) it used to be said that the interests of persons were the supreme end of the law, including international law. In this way, persons are instrumentalized, classified as res inter nations. Theorizing on this point, George Scelle was emphatic about the idea that the international community is a community of states. This makes such state exclusivity a paralyzing abstraction of international law: “c’est une vue fausse, une abstraction anthropomorphique, historiquement responsable du caractère fictif et de la paralysie de la science traditionnelle du droits du gens.” He was right to point out the deeply insensitive character of such a conception of international law.

What is clear is that today we witness the emergence of a new category comprising international organizations, national liberation movements, nongovernmental organizations, and transnational (or multinational) corporations, whose international legal capacities are limited. In fact, because of the state-centeredness that continues to shape the law between
nations, these new actors are not even considered subjects of international law in the strict sense. This nominal totalitarianism extends to the realm of privileges that are completely opposed to the principle of equality. In the world of international law, to be a state and to be an organization or a “mere” human being is not the same. Witness the existence of the United Nations Security Council, which legitimates the theoretical superiority of states under international law, handing over the governance of the world and the preservation of peace to an exclusive club of sovereign powers while excluding from power an entire group of global actors whom it condemns to the de facto ostracism of simple consultants.

The internationalization of human rights has changed the course of international law in a way that makes persons more central, although still in an insufficient and skewed way that permits the excessive ideological manipulation of those entities meant to come to the person's defense. The development of humanitarian law (ius in bello) – especially beginning with the Geneva Conventions (1949), which approved regulations applicable to military personnel and civilians but mainly to those wounded, sick, and captured in times of conflict – shows this renewed interest in the person, not just the state. It has also deeply influenced the extension of international private law's sphere of activities, such as liability for harmful products, the transportation of toxic materials, environmental protection efforts, the electronic transfer of funds, arms trafficking, child custody issues, and international trade matters. Clearly, these are all relevant issues that directly affect both individuals and international law itself.

International law continues to consider persons, at best, as a sort of subject matter, without taking into account that the person is both the origin and center of legal life and not just a secondary end or a benchmark to be grudgingly taken into consideration on its continuously ascendant trajectory. Nationality is the point of contact between the state and the individual. For international purposes, nationality definitively links a person to a specific state, so much so that it is only a citizen's state that determines the rules to be applied to him or her in the realm of international law and that will be recognized by the other member-states of the world community.

Like Kelsen, I think the traditional doctrine that international law imposes duties and responsibilities and confers rights only on states, not on individuals, is untenable. “The subjects of international law, too, are individuals,” the constitutionalist maintains with his characteristic firmness. Kelsen believes that the subjects of international law are states as legal persons, but for him this does not otherwise mean that individuals
cannot also be legal persons, for the same reasons and in a similar capacity. They are subjects of the law, but of course not in precisely the same way they are in a national legal system.

Nonetheless, Kelsen gets bogged down in an intermediate step as he tries to grant the person the capacity of an international subject through use of a fiction, the classification of “legal person,” which is not a reality in positive law or by nature. Thus, alleged rights and duties of states would be rights and duties that individuals enjoy in their capacity as agents or members of a community represented as a legal person.\(^{15}\) In my judgment, there should be no significant difference between being a part of a national community and being a member of an international collectivity. We must recognize the real capacity of persons to be subjects of international law without recourse to any intermediate means.

The person does not need legal fictions or empty bureaucracies to find his place under the sun. The “specific way” of being subjects of international law that Kelsen mentions in his work\(^{16}\) is only valid as a conception of international law that has now been superseded by new global circumstances. When legal reasoning takes flight from reality and creates fictions to define concrete situations, the result is a limited one-dimensional law, legal gibberish, unsuitable for analysis because its tools have been limited by its own creator. Herein lies the problem with Kelsenian positivism.

3. THE DEATH THROES OF THE STATE

Adorned with the many accoutrements that restrained its attempts to be omnipotent – its nature as liberal, federal, social, rule-of-law-based, democratic – the sovereign, territorial, and coercive legal–political unit of the state is suffering an anguished, irremediable, and prolonged agony. We are witnessing a slow death, for the decline of the world's preeminent institutions has been slow, gentle, and gradual. The death throes of the state certainly are changing the distribution of world power, yielding to new political actors all clamoring for a bigger role on the world stage. These new protagonists weaken the nineteenth-century Leviathan and give rise to a variety of parastate means of effectively ordering the complex relations forged in the crucible of civil society.\(^{17}\)

The brainchild of Machiavelli and Bodin, the state was born with the purpose of transcending the religious wars that devastated Europe, centralizing the royal power that threatened to break up under the pressures
of the eternal privileges of feudalism. Through the consolidation of sovereign monarchical absolutism, the state was imposed as the most prevalent governmental structure in the world, eventually linking its fate with the democratic model of government. However, the configuration of a new, more participatory, and direct democracy carries with it the imperative to remake and remodel the state. That is, the twenty-first-century model of democracy is no longer the same as that which Tocqueville brilliantly analyzed in the first half of the nineteenth century, and the national state of the new millennium is not a modern entity capable of effectively responding to the challenges of globalization. Circumstances have fundamentally changed. The world is not the same. Without falling into legal “Gatopardism,” if democracy is to remain faithful to its essence, it must change. Of course, so should the state if it is to manage the process of social changes proper to and necessary for postmodern civilization.

Thus, the state – which shaped the ordo orbis until the rise of globalization and the events of September 11 – by blending with modernity, has signed its own death certificate. The clear world paradigm shift requires new forms of political organization that transcend public state bureaucracy and complement it. The crisis of the state is without doubt a crisis of modernity, the demise of an outdated model that cannot solve contemporary problems. In a postmodern world where new values and principles set the intellectual discourse and guide political praxis, the state finds itself at a peculiar juncture that demands tools and implements that national law lacks.

The reality of international politics far surpasses the lumbering consensus-based modus operandi created by the United Nations system. That internationalist utopia in which the most powerful nations participate was soon shattered by the reality of power. Globalization has upset state hegemony, allowing for the development of a civil society that expands and enriches the base of the political demos. The imperialism of the state refuses to give up its influence over supranational entities, and it is reluctant and stubborn about implementing new forms of participation. This was, for example, the basic reason for the failure of the European constitution and of international tribunals, rejected time and again by hegemonic states, which have reduced the rest of the international community to a state of impotence. As bewildered as the defenders of state worship are, they refuse to accept the need to promote new institutional mechanisms to respond to the realities of our historical moment. For now, all desires for cooperation and consensus are dashed by the state's efforts to maintain its influence, aut concilio aut ense.
The state has proven too small for global issues, yet too large for local ones. The most important decisions of our day – such as global security, the elimination of poverty, defense of the environment, education of the masses, or the reduction and nonproliferation of nuclear arms – should be dealt with by structures that transcend the material and conceptual borders of the state, which is ultimately incapable of providing practical solutions. Moreover, with ever-increasing force, civil society demands a more direct form of democracy concerned with taking real action on a host of smaller issues: *de minimis non curat res publica*.

The tension between that which is global and that which is local puts the modern state in an awkward position by requiring concessions of sovereignty through international treaties (as in the case of the European Union (EU) Constitution) or by yielding decision-making powers to bodies capable of acting with greater efficiency. However, endorsements of sovereignty have often become rhetorical rather than pragmatic proposals. Treaties have ceased to be a sure means of dealing with global issues, and international legality is often damaged by the political zeal of a handful of nations that hold most of the power.

Moreover, the legal equality of states required by international law is only *de jure*, not *de facto*. Does a country the size of Andorra have as much power in the international arena as one as large as Brazil? Whether in terms of population, opportunities for development, or international relations, we cannot make the comparison work even by means of a legal fiction. Equality between the *entia moralia* is not comparable to the equality between persons, for the latter is based on their profound and essential dignity. The highly touted equality among states is effectively conditioned on a given society's economic capacity, its material power, and its importance on the world stage, as well as its soft power. Hence the so-called independence of so many states is more myth than reality. This does not imply, of course, that countries that for some reason assume regional or global leadership have *carte blanche* to do (and undo) as they please. Law is the art of balance and not the triumph of anomie.

The crisis of the state is caused by excessive bureaucratization (typical of state development), a general moving beyond the idea of borders, territorial compartmentalization, and the appearance of new players on the international relations stage that have more flexible and dynamic structures and heterogeneous interests. Bureaucratization has put a dent in the framework of the United Nations, slowing its ability to respond to the many crises that have plagued humanity throughout the twentieth and twenty-first centuries. Heir to the state – that is, to its institutions – the United Nations
has become a thick-skinned institution incapable of reducing the risk of conflict; a sort of secondary actor in the global events that shape the politics of the Third Millennium.

Bureaucracy undermines global governability, for it has failed to become an adequate instrument for nimbly negotiating the requirements of peace and balance. On the contrary, excessive state bureaucratization has created a system ever more removed from reality, slow to respond, and unrealistic in its goals. Moreover, the defects of the nation-state have been transferred to these international bodies. Those that act calmly and become pragmatic forums in which it is possible to reach some sort of agreement tolerably respected by its members are entirely indebted to the guidelines of state authorities or to an extensive and coordinated cryptocracy.

On the other hand, international bodies and tribunals that wither in the face of the laxity and inertia of nation-states cannot count on the support of established powers and are forced to merely issue often toothless pronouncements of condemnation, refusal, or solidarity, as the case may be. The decisive fact is that, despite legalist efforts, governance of the world is exploding outside the established bounds of international law – and is doing so against its theoretical assumptions. In reality, it is in active politics that we find evidence of the yawning gap between the theory brandished by international law and the policies that states actually apply in the face of concrete facts and situations. There is often an unbridgeable chasm between the two. This double standard, enshrined in international relations, has not been eliminated by the bureaucracy of the United Nations. It is not a matter of effectiveness, but rather of power. On the international plane, power has ended up bending or contorting the law. And we know well that when the law is debilitated and manipulated by the powers that be, the potestas, it becomes a simulacrum, a mere semblance of justice, and an agent of the most mundane interests imaginable.

On the other hand, border policy and old-style territorialism have been subjected to intense debate over the last several years. Territorial nationalism has clearly not perished. Quite the opposite, conflicts like the recent armed fight between Georgia and Russia confirm the ongoing vitality of national sentiments and of the virulent animosity of expansive chauvinism, which can be understood only through the lens of sovereignty. It is ultimately this variable we must isolate if we wish to eliminate warmongering or the asymmetry in positions governing international relations. Only nationalism explains such disparate phenomena as Indianism and anti-Americanism.

Besides, the appearance of new actors on the global stage changes the
rules of conduct and leads to a handful of problems beyond the reach of the state's power. These new players do not understand the language of sovereignty. They challenge and transcend it. At times, for strictly practical reasons, they agree to respect or acknowledge it. This situation gives rise to a fruitful dialogue that makes use of updated rules that are considerate of the style and sensibilities of a new age. Here, the law must serve as an effective catalyst and support for this new supranational language – interpreting it, shaping it, and drawing out its logical consequences.

Clearly, the debacle of the state is intimately linked to the crisis of sovereignty, to that of territoriality – at least on the theoretical plane – and to the reform of the concept of the nation (in its most political sense). In the following sections, I shall deal with each of these issues.

A. Sovereignty and the Sovereign People

Sovereignty is the pillar of the state. Unless we take into consideration its successes, its cruelties, and its bloody genocides, the evolution of the state would be incomprehensible.\(^{20}\) I am not referring to the so-called international sovereignty that justifies and underpins the mutual recognition of states or independent territories, nor am I referring to that domestic sovereignty that regulates internal state action. I am also not alluding to independent sovereignty, which allows the government of a country to control the flow of information and the operations carried out beyond its borders. All these meanings of sovereignty are new and flattering versions of “organized hypocrisy,” as Stephen Krasner\(^ {21}\) has called it, which revitalized and extolled modern international law beginning with the Treaty of Westphalia. It substantially altered the subjects of international law and allowed the law of peoples to become, in time, a law between states. Sovereignty in this way became an instrument of reform, of modernity, and of development. Today, however, it has become a hindrance that must be roused out of its noxious lethargy or risk disappearing altogether.\(^ {22}\)

The concept of sovereignty – which replaced the Roman concept of \textit{majestas}, a quality proper to the \textit{Populus Romanus}, the Roman people – definitively closed the doors to a harmoniously ordered international order, instead artificially standardizing a system of states having plenary powers in their respective territories, enclosed by borders. Thus, sovereignty is to the state what the will is to the person: its master and slave.

Sovereignty is thus a property inherent to any state, which gives it supreme power in its territory, control of its legal system, and the right to
recognize external bodies or entities that establish contact with it. Nowadays, its usefulness is in doubt in an era of globalization, in which communications, commerce, and daily life have been globalized, creating a dense web of human interaction and an interdependence of relations incompatible with its theoretical assumptions. The indispensable pluralism of a global society clashes with the nation-state’s pretense of exclusivity. Numerous declarations of the universality of human rights and various historical milestones such as the birth of the EU or the establishment of international tribunals call into question the reach and future of the concept of sovereignty, in spite of certain cosmopolitan efforts to reconceptualize it. Rather, an open society requires new mechanisms for articulating and meeting the needs of civil societies, needs that cannot always be met via the bureaucratic structures of sovereign power, which are ultimately based on obsolete doctrine.23

Sovereignty appeared for the first time in Jean Bodin's (1530–1596) Les six livres de la République (1576).24 This French thinker understood it as the absolute and permanent power that a republic exercises in a determinate context: “la puissance absolue et perpetuelle d’une République.”25 In the Latin version of that work, the definition appears clarified and loosely translated, inspired in part by Ulpian's phrase princeps legibus solutus.26 Bodin states that “maiestas est summa in cives ac subditos legibusque soluta potestas.” It was thus an exclusive and excluding power that lay in the hands of the prince, who was able to impose laws on his subjects without their consent and without himself being bound by them. Sovereignty so conceived implied an absolute indivisibility of power. The sovereign by definition ceased to be so as soon as another like him existed in his territory. Such power made no room for solidarity, as was the case among the Roman consuls; it was an all-encompassing, radically absolutist entitlement.

Hardly a century had passed when Thomas Hobbes also defended the sovereign nature of the monarch in his Leviathan27 (1651), as well as the indivisibility of his power.28 The essential indivisibility of sovereignty was considered by Jean Jacques Rousseau in his book Du contrat social (1762), but from a very different perspective. Effectively, the transfer of the title of sovereignty from the monarch to the “volonté générale” also required the former to be indivisible, for otherwise it would cease to be the general will of the people, becoming instead the wish of only a portion of such.29 Moreover, the British Parliament had been charged with limiting the king's
power, as reflected in the expression “King in Parliament,” which synthesizes the English constitution's principle of parliamentary sovereignty.  

Reflection on the concept of sovereignty has been a constant in the thought of all state theorists: from Kant to Hegel, Locke, Bentham, and Austin, Montesquieu, and Tocqueville. It has also occupied the political action of statesmen, such as the founding fathers of the United States of America. Clearly, the various uses of sovereignty have had immeasurable political consequences. Developed in English thought, sovereignty played a central role in the formation and consolidation of the United States of America under the banner of federalism and around the Constitution of 1787 (into which it was not ultimately effectively incorporated).

With characteristic ardor, James Madison defended the need to admit the divisibility of sovereignty with a view to the future of the Union. Thus, “the act, therefore, establishing the Constitution, will not be a national but a federal act,” and speaking of “a sovereignty over sovereigns” was, in his view, destructive. However, his was not the only opinion.

Still, the genius of the American Revolution lies in its having overcome the sovereignty conflict by appealing to the people. In the case of Martin v. Hunter's Lessee (1816), the Supreme Court, through Justice Joseph Story, focused the force of the Revolution on the issue of sovereignty and appealed to the citizenry: “The United States Constitution was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the United States.” It was, as we shall see, a notion closer to the Roman idea of majestas, for it recognizes the direct intervention of the nation without creating a legal fiction from which powers could then be appropriated.

Beginning with the gradual demise of the Ottoman Empire (starting with the recognition of Greece as a state in 1832), and in the process of Latin American independence, sovereignty came to occupy a central place in the birth of new states. In the European realm, without the issue of sovereignty we cannot understand the violent Teutonic political history of the nineteenth century: the fall of the Holy Roman Empire (1806), the German Confederation (1815), the Revolution of 1848, and finally the unification of Germany (1871) after the Proclamation of the German Empire.

Basically, the birth of the new German federal state required jurists to modernize the concept of sovereignty, substantially changing Bodin's view. Men of stature like Georg Jellinek, Hugo Preuss, Georg Meyer, Paul
Laband, and Otto Gierke focused their attention on that view, analyzing it from the fresh perspective born of new political imperatives. It has been maintained that Bodin's concept of the sovereign state could not apply generally to all peoples, as if it were built on the foundations of political science until the end of time. Hugo Preuss rightly explains that the meaning of a technical expression (eine technische Ausdruck) in a specific science must be first shaped by the science itself and cannot depend exclusively on philosophical considerations or carry with it negative consequences, for then one would have to eliminate the technicality (p. 135). Bodin's concept of sovereignty refers to an absolute state and has little to do with the modern constitutional state of law (Rechtsstaat), which the German state was (or tried to be) (p. 136). Clearly, sovereignty's legal makeover facilitated its survival in the new order of things, in the same way that other institutions have evolved through the centuries by appealing to modernity and by evidencing a willingness to yield and adapt to the historical moment. However, the reform was such that sovereignty would end up becoming a concept bound closer to political utilitarianism than to jurisprudential reflection.

On the other hand, in Georg Jellinek's view, sovereignty would be “the quality of a state in virtue of which it alone can be linked legally with its own will.” Precisely for this reason, acts in which the state exercises its will are acts of self-obligation (Selbstverpflichtung). At stake here is an exclusive power of self-determination, which can also determine or set its own limits. For Jellinek, this is not a power that lacks limits (Schrankenlosigkeit), but rather one that includes the possibility of limiting itself (die Möglichkeit der Selbstbeschränkung).

Among notable twentieth-century attempts to make sovereignty a technical legal concept is Hans Kelsen's effort, which was harshly criticized by Hermann Heller and discredited by Carl Schmitt. The father of constitutional courts believed that sovereignty was one of the focal points (Brennpunkte) of the Theory of Law and the State, which would have to be stripped of its political ties and given legal content and characteristics: more specifically, “sovereignty as a quality of a normative order.” Clearly, though, stripping sovereignty of its political dress is nearly impossible.

Rather, the history of peoples since sovereignty became salient in the modern world has been marked by the instrumentalization of sovereignty for power. The most illustrious, or rather infamous, demagogues of the modern
era have appealed to sovereignty to bolster their position in the state or to
give free rein to their megalomaniacal dreams. It has been used as the basis
to justify the most disparate events – from the independence of all imperial
colonies to the most aberrant and bloody genocidal massacres. The old
battle between cosmopolitans and champions of sovereignty seems
unaffected by the passage of years or the enormous international changes
September 11 wrought.

For Kelsen, without sovereignty there is no state, and without the state
there is no law, for the state is nothing but the legal order. Hence the
sovereignty of the state (Souveränität des Staates) is identified with the
positivity of law (Positivität des Rechts). This makes sovereignty supreme,
independent, and capable of limiting itself by means of the legal order.46
The result is a sovereignty-based determinism that distorts the legal
framework, hijacking it by tying the existence of the law to the survival of
sovereignty.

Clearly, though, the law existed prior to the political rise of sovereignty –
prior to and superior to it – and, although it is influenced by sovereignty, it
should not fall completely within its sphere of action. If that happens, if
sovereignty ends up seizing the jurisdiction of the law, then justice will be
politicized, and a whole series of actors and institutions that undermine
judicial independence and limit the autonomous development of the
judiciary will actually be incorporated into the organic legal framework.
This is a real and often-resisted danger that occurs more often than is
acknowledged by theorists who proclaim that the various powers of the
state are truly independent. In effect, because of sovereignty and in the name
of the people's interests, concrete areas are encroached upon, weakening
governability and undermining the auctoritas of certain institutions.

Although the concept of sovereignty has been redefined – from a more
political perspective in American thought and from a more legal angle in
European thought – it has clearly fulfilled its function as a theoretical
supposition. It is now difficult, if not impossible, to make it compatible with
new forms of organization in harmony with globalization, even if we recast
it again using spruced-up, more up-to-date formulations. In the end,
sovereignty and universality are irreconcilable concepts, as are universality
and totality. Globalization is universal. That is not true of the national–
international pairing, which has governed modernity and is fighting to
survive, thus accidentally reforming sovereignty in the process. Universality
reclaims the idea of the person as its centerpiece and then immediately turns
to the notion of people, once more, publicum ex privato.

If we continue to gamble on strengthening the state over all other political
entities that do not share its structure, then sovereignty, stretched to its limits, may transform the interstate system and the organization of nations into a world superstate of which the Titleholder is humanity as a whole (*domina mundi*). Thus, the old aspiration of medieval emperors would be fulfilled – dominion over the world. This will to absolute power, criticized by Vitoria, is based on a failure to acknowledge a superior entity (*superiorem non recognoscere*). Martin Shaw, for example, defends this path of evolution in his book, *Theory of the Global State*.47

For Shaw, the formation of a “global state” is an inevitable fact,48 and its culmination will shape the triumph of a global democratic revolution that must necessarily be led by the West. It began in the middle of the last century with the crisis of the national empires and continued at the end of the twentieth century with the fall of the power blocs that divided the planet between them. This leads us to a dangerous, complex, and tangled accumulation of *potestas* in the hands of a cryptocracy that dreams of perfectly consolidated command. However, the world crisis we now experience requires well-integrated global institutions that can respond to civil society’s demands for a greater role and efficacy. A global state will not necessarily meet the needs of a global demos. To the contrary, a polyarchy may well raise the specter of a Big Brother megastate and other forms of worldwide tyranny. Could democracy survive in such a state? It would be difficult – especially if the superstate is based on a model of sovereignty in which, even though factions may exist, the ability to express dissent is seriously curtailed or eliminated. Let me explain this concept more clearly.

The world needs to be ordered globally. There can be no doubt about that. Now, taking into account the perspective of sovereignty, the creation of a global state is a *contradictio in terminis*. Sovereignty entails plurality, by nature territorial and exclusive, and it acknowledges the existence of other sovereign communities susceptible of being excluded from its territorial area of application. The same can be said of the state. There cannot be a single, global state, for territorial borders necessarily demarcate one state from another. Thus, a state without borders – a state without territory – would cease to be a state, at least conceptually. A planetary state would set aside exclusion, making legal inclusion essential: one state, one law, one power and, of course, the threat of totalitarianism is more real and tangible than that of its predecessors. We would go from state totalitarianism to global absolutism without turning back.

In this respect, the state is like the term “sibling”: for either to exist, there must be at least two, one is not enough. The existence of a state entity leads
us inexorably to a law between sovereign states, and these in turn lead to international law. The idea of sovereignty is fully crystallized in international law, which is simply its most evident consequence. History shows us that national sovereignty is incompatible with international anarchy. Hermann Heller refers precisely to this aspect. There is international law, he declares, “to the extent that there are at least two universal and effective units of territorial decision.”

Legally specifying the concept of sovereignty has been successful, as was positivizing the law. Successful, too, have been the efforts to seriously question sovereignty's essential indivisibility. However, if we want to avoid falling into an absurd reductionism, we must not forget that the legal specification of a multidimensional concept is only an instrumentalization for technical or methodological purposes. To exclude the other dimensions is to close one's eyes to reality. The hegemony of the United States is a consequence of its application, albeit sui generis, of the concept of sovereignty. As a result of its American and German reformulations, this concept has been internally democratized, but not externally – that is, in the realm of international relations, in which international law continues to be its irreplaceable ally: a ius inter nationes.

We should not forget that former President George W. Bush occasionally defended the invasion of Iraq by citing his wish to return sovereignty to the Iraqi people, oppressed by Saddam Hussein's tyranny: “We restored sovereignty to the Iraqi people.” Is it possible to support armed action by invoking the restoration of sovereignty as a panacea for a country's evils? It has been done time and again, and it will continue to be done. Therefore, when the instrument becomes an end in itself, the world becomes a less secure place and laws legitimizing such actions are no better than a legal farce.

B. The Crisis of Territoriality

There is no international law without states, sovereignty, and territory. This is one of the essential dogmas of international law. In effect, a territory is the geographic stage on which a state exercises its powers and a precisely defined population develops itself fully. Thus, the principle of territoriality has had a special and to a certain extent undeserved place in political science and in international praxis since the Treaty of Westphalia (1648). With the goal of protecting states’ territorial integrity, international law has
developed a set of rules to restrain any sort of aggression that might impair sovereign territory.52 However, this was all evident up to the final decades of the twentieth century. In May 2000, when a young Filipino hacker from Manila managed to spread the “I love you” virus in cyberspace, causing serious problems for governments and companies around the world and provoking a global emergency, territoriality suffered a catastrophic blow. The Philippines at that time lacked legislation regarding computer use. More recently, we became familiar with the deficiencies of the principle of territoriality in the case of the Guantánamo Bay Naval Base, when the U.S. government cited the base's territorial status to avoid fulfilling international regulations in force regarding human rights.53 In this way, sovereignty has become a sort of carte blanche justifying many outrages in specific areas.

The territoriality principle is an organizing principle and is therefore secondary in nature. Its mission compares to that of an automobile's emergency handbrake. It provides security and solves concrete problems. Still, it impedes progress, and its abuse actually paralyzes. This auxiliary sense of the principle of territoriality can be partially understood by the practice of solving crises by, for example, separating two employees who have had a falling out (principle of territoriality) – which does not necessarily mean that they will make up with each other and be reconciled. This is a quick, easy, and carefree solution, but it is not the most adequate one from the point of view of pacific interpersonal relationships. The best outcome in our example would be for the company's personnel office to reconcile the workers (according to the principle of personhood), attempting to foster a fruitful dialogue between them, mediating forcefully and (if appropriate) separating them temporarily. Thus, the principle of territoriality complements the principle of personhood but is not an ideal replacement for it, as the modern state assumes in practice. Clearly, personhood should not be displaced from its central position in the realm of law by the principle of territoriality or any other, for that matter.

A society is postmodern when it applies the principle of territoriality as a means and not as an end. This does not imply banishing territoriality completely, for it fulfills an important auxiliary function in the global setting. However, it is unhelpful to give it an inappropriate centrality. It should only be applied when dealing with territorial issues. Territorial issues are resolved territorially, not otherwise. We should keep in mind that the great wave of migrations from underdeveloped countries is about to change the face of the earth. Territoriality constrains the free circulation of persons, and it permits us (those in the rich, developed nations) to live in a
fantasy world. On the one hand, we accept that the free market is an indispensable condition for the development of peoples. We support the free circulation of raw materials, capital, and services, as well as the elimination of customs barriers, legal freedom, and the establishment of more standardized or harmonized norms. We defend these positions tooth and nail as much as necessary when faced with violations. On the other hand, we remain wrapped in nescient ignorance of the reality that confronts us day to day – that of immigration.54

Immigration is intimately linked to an exacerbation of the principle of territoriality. Birth and nationality impose lifelong limits on a human being, and territoriality seals this condition. An overextended territorialism, protected by an exclusive sovereign law, could end up choking the healthy aspirations of hundreds of thousands of citizens – each possessing inherent dignity and certain inalienable rights – who find migration, leaving home, the only real solution to their problems. Physical walls lining borders, legally protected by concrete laws, can end up inclining masses of people to illegality. A territorialism that actively excludes provokes a chain reaction of actions falling outside the law. Only when it is too late is legal engineering employed to remedy the harmful effects of a legal system that privileges territory over actual persons. An overflow of people on a global scale is already a reality. Entire masses of people are displaced and illegally cross borders to find a better life. Territorialism runs the risk of becoming a dead letter at this point – or, what is worse, a nebulous theory disconnected from reality.

The principle of territoriality is elementary, like a person's sense of touch. Even though it is easily surpassed in importance by sight and hearing, it remains useful and sometimes indispensable. Territoriality is to the law what occupation is to property, its first link. However, it is not the only nor most important one. The problem with the state is that its survival is conditioned on territory. Thus, international law, being a law between states, was staked first on the totalitarian hegemony of the principle of territoriality, thus weakening the principle of the person. What has never been established, of course, is the minimum territory necessary to properly have a state (there are tiny ones like Malta, San Marino, Liechtenstein, Vatican City) or the necessary contiguity of such. The requirement of territory, on the other hand, has been settled: “Sovereignty comes in all shapes and sizes,” according to Crawford's conclusive phrase.55

Globalization establishes a world without borders, which does not easily accept the modern dogma of territoriality, much less of extraterritorial jurisdictions, so frequent in the nineteenth century (in China, Turkey, Japan)
and absolutely contrary to the principle of reciprocity. Humanity needs common global spaces with proper rules of play. It needs spaces that do not somehow fall between states or that alternately belong only to a few citizens who can and may wish to utilize them for their own interests, that is, certain aspects of the Internet/online trade and personal interaction. Now, with new technologies, all of this is possible.

Thus, if we want to perpetuate its mission, the principle of territoriality must be loosened in the civil law as well as in the common law, and perhaps more so in the latter because common law – especially U.S. law – forcefully deployed the principle of territoriality for a variety of historical reasons. In the realm of jurisdiction, territoriality must be made a principle of suitability or opportunity, not the decisive criterion of justice, much less a demand of state sovereignty or an impulse that leads ultimately to secession.\textsuperscript{56}

In my opinion, the key is to separate territoriality and sovereignty, to “desovereignize” territory, for the principle of territoriality came before that of sovereignty and managed to survive for centuries without it. For example, the emperor Diocletian used it on a wide scale at the end of the third century A.D. when he decided to divide the Roman Empire into twelve dioceses, a method the Catholic Church later adopted.\textsuperscript{57} The major problem with the principle of territoriality is that as it is linked to state sovereignty, it is inseparably bound to the theory that a state has dominion over a territory.

In effect, the monarch held power over the state's territory similar to that of the \textit{dominus} over the \textit{res}, that is, total power. With the American and French revolutions, that title was transferred, respectively, to the people and to the nation. So whereas the Titleholder changed, the content of the right did not, as it continued to be absolute. The same rules that Roman Law invented for the \textit{dominium} (domain) over real estate thus continued to be applied. Nowadays, that is indefensible.

As yet, international law avoids a fundamental principle imposed in our time, thanks to immigration and to new spaces: that the earth belongs to everyone. It belongs to humanity. It is not an object that can be used for spurious reasons or immediate gratification. Nor is it something co-owned by all the states, but rather by all men and women, without the mediation of artificial entities or unscrupulous bodies. In this vein, the dissemination and establishment of the term “common patrimony of humanity” – first used by the United Nations General Assembly in 1970 in its Declaration of Principles Governing the Sea-Bed and Ocean Floor – has been of interest for the science of international law.\textsuperscript{58}
In a certain sense, the earth is the common patrimony of humanity by antonomasia. It is perhaps the greatest patrimony we have. However, sometimes that which belongs to everyone ends up in reality belonging to the strongest. Thus, because of this Sword of Damocles hanging over our heads that is capable of perverting the noble ideal of solidarity, the law struggles to establish an equitable system in which the prerogatives of the inhabitants of a specific territory are respected. Now, I realize that invoking the notion of humanity's common patrimony has clear legal consequences. That which belongs to everyone can be administered by everyone or by a delegation representative of everyone. And I note that administration can be carried out in many ways. Territorialism should not necessarily intervene in all cases. Transcending borders – which are ultimately legal–political creations – is one of the challenges of a modern territorialism that allows for global spaces in which it is possible to interact without being subject to the ties of sovereignty.

C. Jurisdiction: Does It Belong to the State?

By appropriating territory, sovereignty takes over jurisdiction, which is simply the power of applying the law coercively within a determinate setting. In the modern age, it is intimately bound to the idea of state sovereignty. Jurisdiction, as conceived in enlightened laboratories of ideas, is a function of state character, owing to the importance of the legal order for the state. Moreover, the two are often confused. However, this legal power of coercion, without which the law becomes science, has not always been united to sovereignty. Jurisdiction exists prior to it. It goes back to the Roman legal temper and therefore is not identical to the state. Let us consider this point a bit more.

The word jurisdiction comes from the Latin ius dicere, which expresses the coercive declaration of the law by he who holds power, mainly the magistrate, to order or command. Adjudication, from the term ius dicare, is different. It refers to the legal declaration by he who has authority to adjudge a matter, principally by judges themselves. Dicere and dicare, from the same Greek root deik (show, indicate), are the two main activities that allow the development of law, of ius. Dicare makes reference to reasoned legal declarations (in the same vein, consider indicare, iudicare, adiudicare, abdicare), whereas dicere, on the other hand, refers to coercive acts or commands (therefore giving us ius dicere, addicere, edicere, interdicere).
The difference between *ius dicere* and *ius dicare* is at the heart of Roman classical civil procedure, and to a great extent it facilitates the prodigious legal developments following the first century B.C.\(^6\) Because of its focus on the importance of case law, this distinction is reflected more in common law (jurisdiction and adjudication) than in civil law. Especially beginning with the French Revolution, the latter preferred to make written laws themselves (*leges*) the main source of law (*ius*), leaving the judge in the secondary position of “the law's dead mouth,” as the classical saying goes.

Applying jurisdictional criteria to the realm of international law suffers from all the vices of sovereignty. Because jurisdiction is a sovereign concept, states must respect it as an integral part of their own constitution through the principle of nonintervention in the internal or domestic affairs of other states. However, the dynamics of international relations forced the state to meddle in the sovereignty of other states to carry out its own acts (executive jurisdiction), resolve cases with a foreign element (judicial jurisdiction), or apply laws affected by a foreign element (legislative jurisdiction).\(^6\) Thus, like an adopted daughter, international jurisdiction passed from the hands of sovereignty whenever the latter crossed its own boundaries. For this reason, private international law established rules applicable in cases of conflict of laws between states.

The growth of transnational commercial relations and the existence of problems common to humanity – international crime, terrorism, the regulation of cyberspace, the protection of the environment, and others – require an immediate review of jurisdiction, which in light of this new landscape must be separated from sovereignty. Sufficient advances have been made in this area with the signing of all manner of international treaties that among other things establish suitable jurisdiction, as in the International Court of Justice at the Hague; grant jurisdiction to supranational organizations, as in the case of the EU or, more recently, provide for complementary jurisdiction to that of national jurisdictions, as with the International Criminal Court. Restoring the autonomy of jurisdiction is fundamental to carve out global spaces independent of sovereignty.

Those legal tools used for global conflicts resolution that have managed to introduce a new way of doing law apart from jurisdictional organs of the state (international arbitration and mediation) deserve a chapter of their own. This is significant and yet not so, for the underlying principle remains the same: jurisdiction continues being essentially state based to the extent that greater decision-making capacity is not ceded or assigned to international bodies. Why is that? This is clearly a case of political obstacles leading to and having legal consequences. Does yielding
jurisdiction imply a weakening of state sovereignty? Not necessarily. As we have seen, jurisdiction exists before sovereignty and can recover its identity separately from it. Relativizing sovereignty in favor of increased powers in the hands of international bodies – or new global institutions – is the only viable way to maintain peace and justice. The failure of the United Nations is a concrete example of this point. The great wall of sovereignty has blocked the General Assembly's various attempts at efficaciously channeling peace efforts. Unfortunately, there is a sort of entente cordiale between the great powers that hinders consensus at the heart of the Assembly. The Security Council is the embodiment of hegemonic powers' sovereignty. This is the dialectic confrontation between sovereignty and consensus, between power and authority. Or, what is more frequent, between war and peace. The inertia to which the United Nations has been doomed is closely linked to the excessive power and deference we have given to sovereign decision making. The action area in which the United Nations can intervene is limited, with decisions always subject to the risk of rejection at the slightest hint of a potential “violation” of state sovereignty. On the other hand, the areas in which hegemonic states directly intervene in their spheres of influence have grown.

The cases of the United States and Iraq, or Russia and Georgia, are concrete examples of interventionism among the great powers. The economic union of several multistate blocs around the world has relativized certain aspects of sovereignty, but it has not relegated it to a secondary role, much less destroyed it. To the contrary, in a sovereigntist reaction compounded by nationalism, it has kept for itself various spheres of influence essential for shaping international relations. For example, national armies are kept, legislative capacity is practically untouched, policy continues to be decided in territorial terms, and bureaucracies created by new global institutions are more decorative than effective. Advisory bodies are everywhere, and although many courts with cosmopolitan ambitions have been created, global powers are slow to provide them much support. Sovereignty counteracts or obstructs the work of these courts and instead defends national forums of justice. The United Nations is incapable of remedying the situation and, over time, increasingly exhibits a worrying passivity in relation thereto. The revitalization of the United Nations or the creation of new global institutions necessarily involves redefining the limits of sovereignty and the scope of a jurisdiction free from the heavy baggage of the state.

Traditionally, and with some reluctance, universal jurisdiction was
applied to cases of piracy.\textsuperscript{63} At the end of the Second World War, the allies relied on universal jurisdiction to judge war crimes and crimes against humanity in the Nuremberg and Tokyo trials. It was also invoked in the Geneva Conventions of 1949, which impose the principle of extradition or judgment (\textit{aut dedere aut iudicare}), as well as other more recent legal instruments.\textsuperscript{64} Currently, the idea of universal justice has been revitalized thanks to the case of Chilean dictator General Augusto Pinochet, who was detained in London in 1998 by order of Spanish judge Baltasar Garzón. Garzón sought support for the application of universal jurisdiction so that political repression carried out years earlier by the government of Pinochet's military junta would not go unpunished. However, the case of Somali pirates has shown how a lack of coordination on this issue can endanger citizens not protected in a timely manner by the joint forces of the United Nations.

Universal justice makes it possible for a state to try certain crimes – usually crimes against humanity – without any of the traditional jurisdictional bases, such as the fact that they were committed in its national territory or by national citizens. Arguably in these cases, the international community is affected by such crimes, which allows any court in the world \textit{ratione materiae} to try them. It is in a certain sense an indirect application of the theory of chaos. The flapping of a butterfly's wings may well eventually give rise to a hurricane. Similarly, a legal act carried out in one place has clear repercussions throughout the global order of human rights. This by itself changes the lens through which we analyze jurisdiction.

Jurisdiction is the patrimony of the political community, sovereign or not. Thus, there are as many different levels of jurisdiction as there are distinct overlapping political communities – from the family to humanity. Crimes against humanity are universal in nature, and they should be resolved in a universal way. This is not a matter of yielding sovereignty. It is rather about organization, about the management of the global society, which functions poorly if it is artificially compartmentalized.\textsuperscript{65} Sovereignty produces this compartmentalization, which instead of integrating seeks to sever and hinder the living synthesis of cultures and civilizations.

The Spanish Constitutional Court (Second Chamber) defended universal jurisdiction in its groundbreaking decision of September 26, (STC 237/2005), in relation to indigenous peoples’ leader Rigoberta Menchú Tum's appeal in the Guatemala Generals case. The Spanish Constitutional Court ruled that Spanish Courts have jurisdiction over crimes of international importance – crimes prosecutable in any jurisdiction as
prescribed by international treaties including the Geneva Conventions –
regardless of the nationality of the victims and perpetrators. Unfortunately,
the Spanish Parliament passed by an overwhelming majority an amendment
(Ley Orgánica 1/2009, in force as of November 3, 2009) that limits the
competence of Spanish Courts to cases in which Spaniards are victims,
there is a relevant link to Spain, or the alleged perpetrators are located in
Spain. Universal jurisdiction, however, is only the first step toward a more
structured “global jurisdiction” based on permanent courts with jurisdiction
ratione materiae and coercively binding resolutions issued by executive
bodies set up for that purpose.

D. The Nation-State: A Marriage of Convenience Doomed to Divorce

Since international law became a law between states, state and nation have
been linked in international relations, forming an unum indivisibile: the
nation-state. But this was not always so. The nation is prior to the state and
even exists alongside the state, if we consider the phenomenon of
secessionism. Thanks to the French Revolution, both realities set out on
their joint political and historical adventure, a sort of politico-legal joint
venture whose decline is starting to be noticed by the most eminent political
observers. Having traced the outlines of the modern state, we must still
sketch out the conceptual development of the nation, which was duped into
marrying the state for the latter's political, economic, and ethnic gain.

*Nascio* or *Natio* (from nascor, to be born) was the name of the Roman
goddess who protected births. Cicero refers to her in his *Natura deorum* in
45 B.C.: “quia partus matronarum tueatur, a nascentibus Natio nominata
est.”66 A year later, in his tenth philippic against Marc Antony,67 the Roman
statesman again uses the term to indicate that all nations can endure slavery,
extcept Rome. Titus Livius68 also uses the word *nation* in his famous *Ab
Urbe condita* to refer to nationes Histrorum et Illyriorum; so does Aulus
Gellius a century later, in his *Attic Nights*,69 along with many other
classical authors. Bestriding the ancient world and the Middle Ages, Isidore
of Seville in his *Etymologies* regards nations as groups of people having the
same ancestral origins.70 At the end of the first millennium of Christian
history, it still had the same meaning. For example, it is used on eight
occasions by Lambert of Cremona,71 the sharp bishop and historian of the
tenth century to whom we owe much information about that relatively
unknown period. Incipient medieval universities, especially that of Paris,
were organized by nations even before the creation of departments or
faculties properly speaking. Thus, it should come as no surprise that César-Egasse Du Boulay would subtitle his *Historia Universitatis Parisiensis* (1665) with the heading: *Nationes, Facultates, Magistratus, Decreta.* Following this academic tradition, the Council of Constance (1414–1418) also organized its assembly by nations.

During the modern age, the fathers of the state continued to use the term nation in the generic sense. Jean Bodin does so in *Les six livre de la République* (1576), although in a very limited manner. Thomas Hobbes uses it more frequently in his *Leviathan* (1651), when he tackles the question of the Jewish nation, and John Locke does so in his *Second Treatise of Government* (1690). Still, the idea of nation underwent a profound metamorphosis during the French Revolution, with the aims of dethroning the royal absolutism of *l’État c’est moi* and that of democratizing society. By then, the nation became the *ipso iure* holder of constituent power – that is, the heart of the state's structure.

In the pamphlet published by Emmanuel Joseph Sieyès in January 1789 on *Qu’est-ce que le Tiers État?*, the priest was asked about the scope of the concept of nation: “*Qu’est-ce qu’une nation? Un corps d’associés vivant sous une loi commune et représentés par la même legislature.*” Months later, his reflections were recalled in article 3 of the Declaration of the Rights of Man and of the Citizen of August 26, 1789, which proclaimed national sovereignty as follows: “the principle of all sovereignty resides essentially in the Nation.” George Washington spoke of national existence in his letter of September 17, 1787, in which he sent the Constitution of the United States to the President of the Congress. The constitutional text, however, never calls the United States a nation, but a people. The nation becomes a political entity in the heat of revolution and becomes the legitimating concept of the new legal order.

The new doctrine quickly spread throughout Europe. In his eighth *Rede an die deutsche Nation*, given in the winter of 1807–1808 during the Napoleonic occupation of Berlin, Fichte transfers the revolutionary principles of freedom and justice that Bonaparte was desecrating throughout that period all along the Danube to the German nation. He, thus, overturned the concept of nation, which has since been more cultural (without ever losing entirely its political tint).

Twentieth-century constitutionalism – a child of the French Enlightenment and German idealism – made the nation a differentiated, territorially indivisible, and legally solidary entity. It was sustained by the principle of nationality – which incorporated a person into the national scheme,
something the state had not sought to do – and by the principle of self-determination of peoples, which equated the nation with the state and thereby changed it into the ratio constituendi of new sovereign territorial entities. Thus, each nation was the embryo of a state. In this way, the merger of nation and state was made concrete and legitimized by the new legal order. The words of Ernest Renan in 1882 at the Sorbonne express the thinking of the age: “the existence of a nation is – forgive the metaphor – a daily plebiscite, just as the existence of an individual is a permanent affirmation of life.”78 Renan voluntarism clearly had a legal correlate. From then on, sovereignty – based on the nation – would become the philosopher's stone of the legal framework. On it rested legislative praxis, the work of the executive branch, and judicial primacy.

This point has given rise to significant tensions between the need to maintain the status quo, as determined by state sovereignty, and the natural freedom of all peoples to govern themselves and occupy a defined portion of the earth on which their societies may develop without facing serious obstacles. Thus, international law incrementally strengthened the principle of self-determination of peoples. It conceived it as a right of nations – possessed, at least potentially, of sovereignty – to set themselves up as states, that is, to be plenary subjects of international law. The concern was clearly to give centrality to the sovereign people in the decisions that affected it: whatever affects the people should be approved by the people. The nation thus became the center of international law because it and it alone was the entity charged with bringing the state to life.

By shifting the political paradigm and enthroning the state as the subject by antonomasia, international law unintentionally favored colonies’ desire for independence and the statist longings of various communities. Sovereignty is only satisfied when it can feast on the banquet of the state. So many communities around the world that clamor for more autonomy see the state as the final utopian destination on their road to self-expression and development. Without the nation, there is no state, and without states, international law loses its raison d’être. That is why international codes never give rise to a sort of globalism that would permit unrestricted yielding of sovereignty to bodies that could escape state-based theory in order to penetrate and make tangible progress in the real world of politics. If sovereignty is given up, the state is weakened. If the state decays, international law loses its main actors. It is a vicious circle.

The right of self-determination of peoples is memorialized in golden letters in the American Declaration of Independence (1776) and has been the legal instrument through which many peoples of the earth have gained
their independence, providing support to a widespread decolonization movement that unfortunately has not yet been fully realized. On the other hand, it has also served as a legal incitement to nationalist imperialism, as well as a wave of armed separatism that has little or nothing to do with true self-determination. We must be careful: Bolivar and Lenin, Wilson and Hitler, Gandhi and Castro have all been thrilled by the possibilities offered by the principle of self-determination of peoples. It has formed political communities and created an international order, but that does not mean the concept will always be properly utilized.

Sovereignty – and with it the concept of territorial jurisdiction – has run its course and has done so well. Once an interdependent international community, states and their respective legal systems, and an interstate organization with a professionalized bureaucracy have all been established, we must take the next step, a legal leap forward of sorts. The new global order and the paradigm shift in international relations require a new legal framework built on a series of global principles that go beyond the mold and limitations of the state-based model. Once this is in place, the self-determination of peoples can no longer be considered an absolute principle that permits no exceptions or partial waivers to its application.

Rather than an exaggerated self-determination that ultimately seeks a federation of self-ruled entities, we should aim for a confederation of peoples marked by a sense of solidarity who fight and strive for real peace. Only in this way will solidarity become a tangible characteristic of a legal framework that, until now, has been propped up by (to use a metaphor) the crutch of egotistical and self-serving sovereignty. A change of this magnitude would expand the possibilities for the law in the Third Millennium, making it possible to build an energetic and determined global consensus capable of responding in a timely and efficient manner to any attack on human rights. We must not forget that irrational anxiety about or obsession with sovereignty is the argument that dictators and demagogues invoke to avoid protecting human rights in territories falling under their jurisdiction. An instrument created to serve the needs of a specific historical moment ends up becoming an insurmountable barrier that imprisons human beings, a legal device that at times leaves them at the mercy of tyrants. The Cuban regime, Chávez's Venezuela, and the Eastern despotism of Kim Jong-il are a few cases in which appeals to sovereignty have been utilized to avoid or, in the case of Chávez, reverse a society's democratization and the reign of fundamental human rights.

Once sovereignty, state, nation, and territory have been removed, there is no longer a middle way under the precepts of international law. The balance
is upset. Either something is a state or it is nothing. Thus, pursuant to this artificial imperative, a nation, any nation, is called upon, actually compelled, to become a state, whether by secession or creation, because only the nation possesses sovereignty, as a people possess a territorial state. From this perspective, a nation that becomes a state is like a frustrated, incomplete entity, a halfway house en route to the Promised Land. And the road to reach it is self-determination, for nationalism has gone completely out of focus, as so many have pointed out. Only in light of the absolute deification of the concept of nation-state can we possibly understand the desire for sovereignty held by so many peoples bound together by varying degrees of ethnic ties.

Clearly, self-determination is not necessarily equivalent to independence or to the absolute right to a sovereign territory. Rather, self-determination is self-government, the right to elect leadership without external influence or internal impositions. With self-government, it becomes feasible to establish one's own legal order and to develop a specific region culturally, socially, and economically. Self-government also consists in the right to be recognized by the international order. However, in a fully global era, we must move beyond the dependence/independence dichotomy, for its basis in sovereignty distorts its purpose, which is solidarity among a society's peoples and inhabitants. All communities making up the great family of humanity are dependent, at least interdependent, and never truly independent. No national community is, metaphorically speaking, an island. There is no pure self-rule. Not even the United States, which for now enjoys undisputed hegemony, is free of influences as if it were an isolated continent permanently wrapped in an impenetrable fog. In the new reality of the globalized world we live in, a new balance comes about in which cooperation takes the place of asymmetry.

After September 11, it was clear that all communities must be free and not susceptible to domination or colonization, which unfortunately continues to be the case in certain parts of the world. The great challenge of our time is to achieve a balance between the drive toward sovereignty and the need to attain a more just world in which cooperation among peoples takes priority. Colonization, like the violent struggle to obtain the status of a sovereign state, is a harmful deviation that weakens the framework of true civil society. The struggle against terrorism does not just redefine international relations. With the weakening of the concept of sovereignty, it also allows us to resurrect solidarity as the cardinal principle guiding the modern global community.
4. THE FUTURE OF THE UNITED NATIONS

Since it was founded in San Francisco on October 24, 1945, the United Nations has fulfilled an important mission. Surprisingly, its work has been more fruitful in matters secondary for its founding fathers than it has concerning its main priorities, both then and now. Heir to the League of Nations, it rose from the ashes of the Second World War, which had gravely upset the entire world with its massively lethal impact on humanity and with a growing focus on arms that has not changed since.

Initially consisting of 51 states, today it numbers 192 (the latest being Montenegro, on June 28, 2006). In theory – but unsuccessful in practice – U.N. members are ready to fulfill its goals of maintaining peace and security in the world, international cooperation, an increase in friendly relations among peoples, and harmonization of forces in pursuit of common goals (cf. art. 1 of the U.N. Charter). It was, of course, an international organization created to eliminate war from the face of the earth, resolving controversies between states in a peaceful way and avoiding the use of unilateral force, except in cases of legitimate defense. The international organization, in a novel move, reserved the right to intervene militarily against aggressor states that threatened the peace. However, the essentials of that foundational dream have not been realized.

However, the United Nations does boast several major successes. It is enough to consider its very foundation – a great world event – or the fact that practically all the world's recognized sovereign states are members; or the Universal Declaration of Human Rights; its promotion of democracy around the world through the provision of electoral and logistical assistance; its distinguished role in the process of decolonization, respecting the will of communities through holding plebiscites and referenda; and its promotion of international law.

However, many serious errors weigh it down, mostly those owing to the complete power held by the Security Council, its executive body. Its permanent members with a veto right (art. 27.3) are China, France, the United Kingdom, Russia, and the United States. In effect, through this body the United Nations became an incredible instrument in the hands of the Second World War's victors. They always played to win, masking their interests at the beginning with unity of intentions, though they used ten other countries from around the world (elected as temporary members for two-year intervals by the General Assembly) to gain legitimacy. The Security Council soon became an exclusive political clique in which the fate of the
world was decided.

And that is understandable, for despite the patina of legality coating the U.N. international system, politics keeps appearing as the driving force of the United Nations. If the General Assembly is itself an eminently political forum, the Council soon became the executive hand, no longer of the Assembly but of the many coexisting ideological blocs that share in and divide among them the bureaucratic spoils of the U.N. agencies. Thus, in this prosaic and illegal way, politics has dominated not only the natural jurisdiction of the United Nations but also the legal realm, instrumentalizing the legitimacy of the U.N. bodies and utilizing in the process their bureaucratic framework. The United Nations has become a hierarchical and dysfunctional organization, with more than 40 percent of its financing (based on 2006 official data) coming from the United States and Japan. It is incapable of confronting or challenging the great powers in moments of crisis – mainly Russia and the United States during the Cold War (1945–1989), and the hegemony of the North American colossus that followed, bent on instating a pax Americana, like the pax Romana that Caesar Augustus imposed in the ancient world. However, although the economic burden weighs on its decisions, in recent years its management shows evidence of becoming seriously compromised. Not only does it merely react formally (and almost not at all) when faced with serious threats to the peace – as in the case of the Georgian-Russian conflict – but it has completely lost its willpower, its will to truly take action when needed. Economic dependence has become political subjugation that damages its prestige and its capacity to coordinate effectively.

The United States ultimately does not accept an international framework that imposes rules on it or controls or limits its international scope of action – especially not after September 11, 2001. This ominous date marked the fate of international relations, accentuating the unilateralism that has defined America since its origins as a nation. With it, the United States passed judgment on the United Nations: it would lead certain ongoing peace efforts in the world without seeking multilateral support through the United Nations.

In his book Law without Nations?, Jeremy A. Rabkin is clear in his reading of September 11: “The international community offered condolences. America then had to summon its own resources to defend itself.” He goes on to present an argument that has wide support among a large portion of the American populace and even more so among Pentagon hawks: that the Declaration of Independence of the United States (1776) was not just an effective instrument for gaining independence from the
British Empire; it remains a valid defense against meddling by any earthly power that would keep the United States from taking its place of honor in the order of nations, “to assume among the powers of the earth, the separate and equal station,” as the document's text reads.\textsuperscript{87}

This means that the sovereignty of the American nation cannot be compromised internationally without violating its independence, a constitutional pillar of the United States. American unilateralism, as we see, is legally sanctioned, even before being applied in political praxis. Only from this perspective is it possible to understand the American longing for autonomy and its reticence to form alliances, even when faced with its natural allies’ demonstrated ineffectiveness. Europe's incapacity to carry out military operations – not only globally but also regionally – is a familiar tale. Whereas the Old Continent enters postmodernity, with all that entails politically, the United States applies the logic of modernity in matters of global government.

The United Nations also shares the European methodology of conflict resolution, although not as efficiently. What should be clear is that there are certain threats to peace that, because of the speed of events, cannot be resolved using a slow-moving process such as that followed by the United Nations. The United Nations often reacts slowly and poorly when it comes to dealing with \textit{faits accomplis}. There is also, of course, the other extreme, the danger of falling into an exaggerated bellicosity that indiscriminately has recourse to arms for matters in which diplomacy can and should be used as the primary approach. We are far from reaching a balanced approach on this point, and to that we owe the rhetorical inertia and lumbering impotence with which the United Nations reacts to many international crises. Stripped of its material tools (i.e., those “with teeth”) for dealing with conflicts between two or more factions – which are not always states – it only manages to issue feeble communiqués of condemnation.

To set out a position on a specific issue, a small gesture is generally more than sufficient. However, if one is trying to save human lives and intervene rapidly and effectively, mere proclamations are not the solution, much less if they are not accompanied by immediate action. It is vital to endow global institutions with enough strength to effectively and rapidly intervene in armed conflicts of all types. Otherwise, the country or body in the best position to do so will either act or abstain from doing so, predictably provoking a crisis of legitimacy concerning such institutions’ operations.

The United Nations has not been able or has not known how to meet its fundamental goal of keeping world peace. One merely needs to think of the following less than effective efforts, some of which were abject failures: the
Korean War; the Cuban missile crisis; the Vietnam War; the war in Sudan; the Soviet invasion of Afghanistan; the Gulf War; the civil wars of Nigeria, Lebanon, Angola, Algeria, Somalia, or El Salvador; the killings in Rwanda and Kosovo; the massacre in Srebrenica; Congolese genocide; the Anglo-Argentine war in the Malvinas (Falkland Islands), the Balkans, Chechnya, the conflict between Ethiopia and Eritrea, in Iraq; the recent armed conflict in the Gaza Strip. This is a partial list of the United Nations’ inertia and powerlessness when faced with conflict around the globe. It has not been an effective instrument in the struggle against international terrorism. It has not managed to contain or resolve international disputes or put an end to violent conflicts already begun, although it must be said, not for a lack of vain and desperate attempts to stop each of the previously mentioned crises. The problem is not one of good faith or preparation on the part of its professional bureaucracy. Limitations are ultimately the problem. The root of that problem is actually one of borders. The United Nations acts to the extent that it can, but it always comes up against the behemoth of sovereignty or the national interests of some specific country.

Much thought has been given to reform of the United Nations. International experts of all stripes have suggested reforms in reports presented to the Secretary-General. However, in my opinion, it is not a matter of changes or restructurings. The United Nations is an organization of states with opposing, conflicting, and selfish interests. Those who should take it seriously, especially Russia, China, and the United States, do not. Thus, a revision of the Charter will not resolve the problem. The United Nations, as the League of Nations did on April 18, 1946, should dissolve and transfer its rights and powers to a new world organization, born not of battlefields devastated by destructive weapons nor of peace treaties between conqueror and conquered – as with past attempts at similar organizations – but of the irrepressible human desire to organize a global community. And, of course, it must not have its headquarters in the United States.

This new organization must have at its disposal its own armed forces created ex professo to ensure compliance with its goals – otherwise, it will remain at the mercy of material assistance from the great powers, which will not always be generous with their resources. The time has come to found a global military academy, a universal militia, and global institutions to permit swift and effective action in the face of any threat to peace. Forming this set of auxiliary organizations is a basic requirement for the effective functioning of any organization with serious worldwide goals. Only in this way can we ensure that collective decisions taken within these
new organizations do not fall on deaf ears, but instead have real effects and consequences. This point about the validity of legal decisions is vital to strengthen the credibility and prestige of a new global system.

One of the most serious problems with the United Nations is its lack of credibility. As the United States has become more unilateral, the United Nations has been increasingly undermined in the past few decades. However, it has also been undermined by the creation of other international forums – the EU, for instance – in which a common space was created for effective action on so many fronts that have changed the lives of hundreds of millions of citizens. Any attempt globally to regulate societies in the Third Millennium must take into account this modernizing pragmatism. The legal framework exists. Of course, establishing a series of bodies capable of acting outside the political debates of a limited forum (e.g., the Security Council of the United Nations) remains to be done. To do that, we must yield sovereignty. In this way, we will make real what exists now only on paper.

These reforms must be structural. This is not a matter of sprucing up what we already have. The great mistake of the current system is its blind determinism, embodied in a professional bureaucracy incapable of acting in the face of concrete problems and challenges. Speed, swiftness, is the great characteristic of globalization – speed in communications, in commercial transactions, and in technological development. The law cannot live in a vacuum, disconnected from reality. When it does, it is phased out, and on many issues – especially world peace – we jurists have clung to the past. With the end of the cold war, the tools created by the great powers to keep a strategic balance between them became obsolete. Globalization has imposed on us a new model of armed conflict, a series of conventions for acting in the face of aggression and threats that before were only part of certain peripheral preserves. Almost everything has been globalized, and quickly so. This fact is as undeniable as it is pressing. If we immerse ourselves in a legal determinism that eliminates variables as important as politics, economics, or sociology from the equation, the responses we propose will be mere palliatives for the global crisis, not effective remedies.

As jurists, it is our job to analyze and interpret globalization and identify the legal institutions that allow humanity to enter a new era. Still, as men and women of learning, we must recognize that our discipline is concerned only with one concrete aspect of knowledge – a fundamental one, to be sure, but no more so than one of the other fundamental disciplines in a universal education. When we fall into a rigorous positivism that approaches reality
without leaving room for other types of interpretation or sources of inspiration, the law disappears, giving way instead to a straightjacket full of norms and regulations but lacking a real connection to the needs of society.

It is necessary therefore to recognize the importance of other disciplines in addressing the problems of our times. Close multidisciplinary collaboration will allow the law to address the problems presented by postmodernity through a wider and clearer lens. The case of the United Nations is an example. Despite pressures from the great powers, we have built a perfectly well-oiled system, at least on the legal plane. It consists of an impressive framework of norms and unblemished regulations that function to resolve long-term problems. Still, the speed of the new millennium produces, more frequently than in the past century, conflicts that require a new resolution framework and greater urgency of response. This is all thanks to the enormous destructive capabilities that weapons technology brings with it.

Blitzkrieg has been effectively globalized. Tens of thousands of human lives can be annihilated in a matter of days, even in a focused (limited in geographical scope) and conventional conflict. It is here, faced with threats of this magnitude, that we end up losing ourselves in a thicket of norms, wading through Byzantine discussions of whether a certain action or reaction is appropriate. The impossibility of collectively negotiating a response to a rapidly developing crisis means we might leave hundreds of thousands of innocents subject to violence. Thus, although the legal norms may be clear, we jurists should not forget that the law often goes hand-in-hand with politics, and politics, as befits the science of power, tries to absorb everything. It devours independence. This all-encompassing zeal clearly has concrete repercussions. An important one is that the expansion of political motives often shapes legal thought and practice.

Political deception has consequences in the legal world. It is deplorable how power, potestas, tries to impose itself – frequently with success – on authority, overpowering it. To ignore this fact is to walk in a pitch dark night along the edge of very high cliffs. Meddling by power slows down the capacity of the law to respond. The United Nations can be legally prepared for a crisis, but without real capacity to act it is overwhelmed by dejection and reacts slowly and poorly to it.89 There is, moreover, a sort of inscrutability surrounding the decisions of the Security Council, a precarious balance of powerful wills that try to impose themselves independently of whether they have a majority in the General Assembly. If this is the case, it is largely due to the ineffectiveness of the Assembly itself, which is frequently divided on the most important issues or neutralized
when it actually reaches a majority view by a Council that remains clearly in control.

The great American democracy – the most advanced in the world – has just given us a historic lesson in equality of opportunity. Barack Hussein Obama is the new president of the global superpower. His electoral triumph bolsters the idea that each and every one of us, absolutely each and every one, is capable of developing our talents to the fullest. What is important, ultimately, is the person, and around the person an institutional framework must be developed, one that fully respects and does not rob him of his central social role. Considering this objective truth, the extent to which the United Nations does not comply with the principle of reality is clear. By systematically giving preeminence to states, it is a significant roadblock to a legally organized global community.

In effect, a globalized democratic system is possible only within a legal regime that recognizes and promotes the primacy of the person. Thus, the United States, that standard-bearer for the struggle for democracy that recognizes the importance of the individual in the structuring of its freedoms, should also lead the refounding of the United Nations into a new body that better represents the indissoluble union between the law and the person, not between the state and its regulations. The empowerment of individuals is tied to the effective functioning of global institutions. If the United States has broken long-standing taboos by raising to the oval office the first Afro-American president in its history, it can also demonstrate enough maturity to drive a serious process of reforms at the heart of the international community. The success of this process will require the United States to suppress – as it has done before, to everyone's benefit – its inclination toward unilateralism. The presidency of Barack Obama is, in this sense, a unique opportunity. We must not waste it.

Faced with several types of totalitarianism that equal or surpass the threats of the twentieth century, the peoples of the world should reconsider the mechanisms of control established throughout the twentieth century. Some of these are now manifestly obsolete and must give way to strikingly new institutions. However, this is not about throwing overboard hundreds of years of experience and collective know-how, of numerous attempts and failures. Rather, we have a wonderful opportunity to establish new parameters, new bounds, for global cooperation between peoples, carefully identifying what deserves to remain part of our tradition of peace and solidarity. Refounding the United Nations and making it into a new entity will entail doing away with the significant liabilities that have accumulated over the decades since its founding.
In a world in which the main powers have begun to reform capitalism to better guarantee global financial stability, we might ask ourselves why this process of profound economic introspection is not occurring within the framework of the United Nations. Although American unilateralism has hindered effective responses to the challenges of the new order, it is also clear that this zeal for a central international role is not only the purview of American leaders. The G-20 is seeking to rejuvenate the economic system in light of a crisis that is powerfully shaking the foundations of the global economy. Still, however, not all of the nations currently suffering the ravages of our economic excesses were invited to this reformist conclave, nor were those countries drowning in misery due to certain faults of globalization.

Only the great powers are considered rightfully competent to remedy the ills their own governments have to a great extent created over time by numerous sins of commission and omission. For this reason, they prefer to create a petit comité in which to strike up a discussion, distancing themselves from a global majoritarian consensus that would give ultimate legitimacy to any reform program. The crisis of capitalism has shown that global government is carried out in limited forums, cryptocratic clubs, and single-class alliances. To a certain point, this is understandable, given the endless discussions (and prickly arguments) that a debate with too many parties would entail. There is clearly a need to solve problems as quickly as possible. Nonetheless, even within the United Nations – or its Security Council – in the face of the threat of global bankruptcy, a special committee could be commissioned to study possible solutions to ensure that all affected nations’ recommendations are not completely ignored.

Now, the reformation of capitalism – mentioned often recently and especially since Barack Obama's election – cannot be carried out overnight, neither by a summit of powers nor after a high-level and diplomatic debate in which the entire world's countries participate. Redefining the scope of the debacle of the financial system may be a long-term process. For matters such as these, the relevant mechanisms of the United Nations have been put aside and left unused. And they are because beyond the speeches, the pompous rhetoric, and the stringent analysis, the conclusions and recommendations originating from it are incapable of being, or becoming, effective, for they are unable to unite force and law. The United Nations has not managed to deal effectively with humanity's demands in the economic realm – because of its Byzantine slowness, among other things.

The global crisis threatens to worsen and to weaken already weak polygarchies in developing countries. Fruitless attempts (to date) at
mitigating its negative consequences have not been held in the spacious New York offices of the United Nations. The United States welcomed the G-20 to Washington and showed that leadership and the ability to respond to difficult situations are to be found in other forums. APEC, the G-20, and even the summit organized for this purpose by the EU have greater convocational capacities and more effective real-world potestas than the United Nations. Moreover, on a symbolic level, the meeting of those international clubs focusing on the economy is more palatable than any forum organized in the United Nations on the same issue.

Why has the United Nations yielded the central role? Despite representing the international community more fully than any other body, some of its loss of primacy as a forum for major international issues results from more than just the post–cold war paradigm shift. It is also (unfortunately) the case that its own errors and defects have contributed to staining its image. There is not just a great and dangerous ambivalence on the eminently delicate theme of human rights – as we saw in relation to the Council on Human Rights – which diminishes even more its already paltry authority. We are also witnessing an increase in the bourgeois passivity of its elites, who have not managed to put together an effective pressure group to act as a counterbalance to those other forums having authentic power.

If we want to change the situation, we must refound the United Nations. Its original sins and defects have become unmanageable. Our current international situation makes this possible. The election of Barack Obama will not only redefine the internal dynamics of American politics, it will also change the country's international goals and American policy at the beginning of the century. It is urgent that we democratize decisions that affect us all, and this will be possible only if the new president pursues open policies, not only on commercial or trade issues. Restoring the person as the fundamental actor in international actions is an indispensable condition for any renewal efforts. Democratizing international relations means granting enough power to the global citizen to change structures and to cease being limited by them. This quality, overlooked and even objected to by some today, is fundamental to the reform and reconstruction of a global order that sadly, until now, has brought war, hunger, crisis, and destruction – the horsemen of an apocalypse whose end is uncertain.

1 Telling analysis on this score is provided by David Held, “Democracy and Globalization,” in Daniele Archibugi, David Held and Martin Köhler (eds.), Re-imagining Political Community. Studies in Cosmopolitan Democracy (Polity Press,
2 Hans Kelsen, *Principles of International Law* (2nd ed., revisited and edited by Robert W. Tucker; Holt, Rinehart and Winston Inc., New York, Chicago, San Francisco, London, 1966), p. 301: “We may characterize this phenomenon as the increasing inclination to internationalize the law, to determine the content of the norms of national law by international law, or to replace national by international law created by treaties.”

3 Hans Kelsen, *Principles of International Law* (2nd ed., revisited and edited by Robert W. Tucker; Holt, Rinehart and Winston Inc., New York, Chicago, San Francisco, London, 1966), p. 300: “There are no matters which cannot be regulated by international law, but there are matters which can be regulated only by international law, and not by national law, that is, the law of one state, the validity of which is limited to a certain territory and its population.”


7 In an interesting tome entitled “The Global Democracy Deficit: An Essay in International Law and Its Limits,” James Crawford and
Susan Marks express their skepticism about the role that international law can play in the process of consolidating democracies or even of the possibility of establishing a cosmopolitan democracy. *Vid.* James Crawford and Susan Marks, in “The Global Democracy Deficit: an Essay in International Law and Its Limits,” in Daniele Archibugi, David Held and Martin Köhler (eds.), *Re-imagining Political Community. Studies in Cosmopolitan Democracy* (Polity Press, Cambridge, UK), p. 85: “On the other hand, in so far as it has such a commitment, international law operates – we have noted – with a set of ideas about democracy that offers little support for efforts either to deepen democracy within nation-states or to extend democracy to transnational and global decision-making.”


17 Sandra Braman defends the idea of a “change of State,” the process by which the welfare state, characterized by its bureaucratic structure, gives way to the informational state, in which control of information (of its creation and its use) becomes a more effective means of exercising power. But information – in all its forms –
has always been a fundamental element of the state's operations, so we could speak of the permanent existence of an “informational state.” Vid. Sandra Braman, Change of State. Information, Policy, and Power (The MIT Press, Cambridge, Massachusetts, 2006).


19 The analogy of states and persons is a constant feature of international law. In this vein, see Charles R. Beitz, Political Theory and International Relations (2nd ed., Princeton University Press, Princeton, New Jersey, Oxford, 1999), p. 69: “The conception of international relations as a state of nature could be viewed as an application of this analogy. Another application is the idea that states, like persons, have a right to be respected like autonomous entities. This idea, which dates from the writings of Wolff, Pufendorf, and Vattel, is a main element of the morality of states and is appealed to in a variety of controversies concerning international politics.”


22 Cf. the critical view of Charles R. Beitz, Political Theory and International Relations (2nd ed., Princeton University Press, Princeton, New Jersey, Oxford, 1999), p. 69: “While the idea of state autonomy is widely held to be a fundamental constitutive element of international relations, I shall argue that it brings a spurious order to complex and conflicting moral considerations.”

logically. The least that can be demanded is that it must not be adopted without careful consideration of other possibilities.”

24 The medieval antecedents, above all beginning with the formula *rex superiorem non recognocens in regno suo est imperator*, can be found in Francesco Calasso, *I glossatori e la teoria della sovranaità* (3rd ed., Giuffrè, Milan, 1957). The theory, however, needs revision.

25 Jean Bodin, *Les six livres de la République* I (Librairie Arthème Fayard, Paris, 1986) p. 179. Bodin uses the Latin term *majestas* as a synonym of sovereignty. Thus, for example, in Chap. 10 of Book I, which deals with “Des vrayes marques de souveraineté” (pp. 245–341), he speaks of “la première marque de la souveraineté” (p. 306), but of “la seconde marque de majesté” (p. 310).

26 Ulpian, *Digest* 1.3.31, apropos of his commentary on the expired legislation of Augustus.


28 At the beginning of chapter 19 of his masterpiece, Hobbes notes that this indivisibility is predicable of the three forms of government: monarchy, democracy, and aristocracy: “Other kind of commonwealth there can be none: for either one, or more, or all, must have the sovereign power, which I have shown to be indivisible, entire.”


31 A history of the concept up until the fall of the Holy Roman Empire can be found in Helmut Quaritsch, *Souveränität, Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland vom 13. Jahrhundert bis 1806* (Duncker & Humblot, Berlin, 1986).


34 *Cf.* James Madison, “The Conformity of the Plan to the Republican Principles,” in *The Federalist Papers*, no. 39 in the online version at *The Avalon Project at Yale Law School* ([www.yale.edu/lawweb/avalon](http://www.yale.edu/lawweb/avalon)).

35 James Madison and Alexander Hamilton, “The Insufficiency of the Present Confederation to Preserve the Union,” in *The Federalist Papers*, no. 20, in the online version at *The Avalon Project at Yale Law School* ([www.yale.edu/lawweb/avalon](http://www.yale.edu/lawweb/avalon)).


Interesting in this regard is the work of Hymen Ezra Cohen, *Recent Theories of Sovereignty* (The University of Chicago Press, Chicago, 1937) on the important conceptual discussion in Europe at the turn of the twentieth century.

Cf. his well-known *Das Problem der Souveranität und die Theorie des Völkerrechts* (J. C. B. Mohr, Tubingen, 1920).


52 For example, articles 2(4) and 2(7) of the United Nations Charter, but also of the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States, adopted by the General Assembly of the United Nations pursuant to Resolution 2625 (XXV) on 24 October 1970, or article 1 of the Consensus on the definition of aggression adopted by the General Assembly of the United Nations in Resolution 3314 (XXIX) on 14 December 1974: “The use of armed force by a State against the
sovereignty, territorial integrity or political independence of another State.”

53 A history of the issue can be found in Jana K. Lipman, Guantánamo. A Working-class History between Empire and Revolution (University of California Press, Berkeley, 2009).

54 I do not at all share the groundless fears of Samuel P. Huntington, as outlined in his book Who We Are? The Challenges to America's National Identity (Simon & Schuster, New York, 2004). I especially reject his reductionist policy expressed on p. 256: “There is no Americano dream. There is only the American dream created by the Anglo-Protestant society. Mexican-Americans will share in that dream and in that society only if they dream in English.” Immigration will transform societies, reshaping the “dreams” and aspirations of the receptive community. To oppose a tangible fact is not “scientist.”


56 In this vein, Allen Buchanan, Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law (Oxford University Press, Oxford, New York, 2004), p. 378, resists the electoral argument of a postmodern secessionism: “It is a mistake to think that the commitment to democracy requires recognition of a plebiscitary unilateral right to secede, because the chief justifications for democratic governance within given political boundaries do not support the thesis that boundaries may be redrawn by majority vote.”

57 On this topic, see my article: Rafael Domingo, “Los principios de territorialidad y personalidad en el concepto de diócesis,” in Actas del IX Simposio Internacional de Teología (Servicio de Publicaciones de la Universidad de Navarra, Pamplona, 1989), pp. 273–278.

58 Resolution 2749 (XXV), of 17 December 1970. Afterward, it was repeated in article 11 of Agreement 34/68, of 5 December 1979, which governs states’ activities on the moon, and in articles 136 and 139 of the United Nations Convention on the Law of the Sea of 10 December 1982, which declare the Zone, that is, the seabed and ocean floor, including their subsoils, beyond the limits of
national jurisdiction (cf. art. 1.1), as well as their resources, the common patrimony of humanity.


60 The classical formulary procedure consists of two phases: one *in iure*, before the praetor, who could perform acts proper to his jurisdiction – that is, make coercive declarations to make the process develop according to *ius* – and a phase of adjudication or *apud iudicem*, in which the judge, a Roman citizen, pronounces his judgment (*sententia*) on the case, namely either the plaintiff is dismissed or the defendant condemned (*ius dicare*). Cf. the overview of the Roman formulary system offer by Max Kaser and Karl Hackl, *Das römische Zivilprozeßrecht* (2nd. ed., Beck, Munich, 1996).


62 Cf. in this vein Charles R. Beitz, *Political Theory and International Relations* (2nd ed., Princeton University Press, Princeton, New Jersey, Oxford, 1999), p. 69: “While the idea of state autonomy is widely held to be a fundamental constitutive element of international relations, I shall argue that it brings a spurious order to complex and conflicting moral considerations.”


64 Cf. for example the Convention on the Prevention and Punishment of the Crime of Genocide, contributed by the General Assembly for
Resolution 260 A (III) of 9 December 1948; or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly Resolution 39/46 of 10 December 1984.


66 Cicero, *De natura deorum* 3.47.


68 Titus Livius, *Ab Urbe condita* 43.1.

69 Aulus Gellius, *Noctes Atticae* 6.16, with respect to Rhodesians: “sed non Rhodienses modo id noluere, sed multos populos atque multas nationes idem noluisse arbitror.”

70 Isidore of Seville, *Etymologiae* 9.9.4: “a definitione certorum prognatorum, ut nationes….”

71 In his *antapodosis* (1.5), he refers, for example, to “ceterae vero, quae sunt sub eodem climate nationes, Armeni scilicet, Perses, Chaldei, Avasgi,” and later in book VI (no. 2) “ad graecas nationes.” In his famous *Relatio*, he deals with the Italians, Saxons, Franks, Bavarians, and Sueves: “indignos vos omnesque Italos, Saxones, Francos, Bagoarios, Suevos, immo cunctas nationes.”

72 Nations were a very natural and primitive way of organizing persons, one that paid no attention to sciences (*omnes artes*
indiscriminatim). Cfr. César Egasse Du Boulay (Bulaeus),
*Historia Universitatis Parisiensis*, vol. I (1665; repr. Minerva,
Frankfurt, 1966, p. 250), which gradually gave way to division by
departments, based on areas of knowledge: “a longe facilius est
homines dividere per nationes, quam per facultates” (vol. I, p.
251). In the famous bull *Parens scientiarum* of Gregorio IX (13
April 1231), Heinrich Rüthing (ed.) *Historische Texte.
Mittelalter XVI* (Vanderhoeck & Ruprecht, Gottingen, 1963, no.
10), the Constitution of the University of Paris, the admission of
unworthy teachers is prohibited but without reference to persons
or origins: “nec admittet indignos, personarum et nationum
acceptione summota.”

At first, there were four nations (Italic, Gallic, Germanic, and
Anglo), but later the Hispanic nation was added. In the council
minutes, one can follow the *congregationes nationum* (cfr.
Joannes Dominicus Mansi, *Sacrorum Conciliorum nova et
amplissima collectio*, Akademische Druck- und Verlagsanstalt,
Graz, 1961, l. XXVII). Thus, for example on p. 809: “Die Jovis
19. mensis Decembris [1415] praedicti fuerunt concretat
deputati omnium Nationum in loco Natione Germanicae.”

*Cf.* article 3 of the Declaration of the Rights of Man and of the
Citizen of 26 August 1789: “Le principe de toute Souveraineté
réside essentiellement dans la Nation. Nul corps, nul individu ne
peut exercer d’autorité qui n’en émane expressément.”

*Cf.* the document in The Avalon Project at the Yale Law School.
Documents in Law, History and Diplomacy
(www.yale.edu/lawwebavalon).

*Cf.* the well-known preamble: “We, the People of the United
States.” The word “nation” is used on two occasions (art. 1, § 8),
once to make reference to trade with other nations (“foreign
Nations”) and another time to refer to the Law of Nations.

Fichte asked himself in his eighth speech (*Reden an die deutsche
Nation*, Insel-Verlag, Leipzig, 1919, no. 8) what a people is, and
he concluded that this question led inevitably to another question,
about what an individual’s love for his nation is: “was ist ein
Volk? welche letztere Frage gleich ist einer andern und zugleich
mitbeantwortet diese andere, oft aufgeworfene und auf sehr
verschiedene Weisen beantwortete Frage, diese: was ist
Vaterlandsliebe, oder, wie man sich richtiger ausdrücken würde, was ist Liebe des Einzelnen zu seiner Nation?"

78 Ernest Renan, *Qu’est-ce qu’une nation?* lecture at the Sorbonne University on 11 March 1882 (supplement, Paris, 1882), Chap. 3, § 3: “L’existence d’une nation est -pardonnez-moi cette métaphore- un plébiscite de tous les jours, comme l’existence de l’individu est une affirmation perpétuelle de vie.”

79 On the one hand, I share Allen Buchanan's sense of the need to morally evaluate the institutions and principles of international law. On the other, if international law's attempts at progress have fallen on deaf ears for the past several decades, it is precisely because of the dangerous instrumentalization of morality on the part of political operatives. The morality of the majority has frequently ended up crashing head on with the pragmatism of minorities. For a deeper analysis of the moral foundations of international law, cf. Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford University Press, Oxford, New York, 2004).

80 Very telling is the expulsion of the two directors of Human Rights Watch by the Chávez government. The Bolivarian regime's attitude reveals increasing intolerance of any criticism. On 18 September 2008, hours after a press conference in Caracas that released the report “A Decade of Chávez: Political Intolerance and Lost Opportunities for the Progress of Human Rights in Venezuela,” the Chávez government expelled José Miguel Vivanco, director of the Americas division of Human Rights Watch, and Daniel Wilkinson, subdirector of the division. The note from the Venezuelan chancellery invoked, of course, the concept of sovereignty: “It is the policy of the Venezuelan state, fond of the values of the most advanced and democratic constitution that our country has had in its history, to make national sovereignty respected and to guarantee institutions and the people its defense in the face of aggressions from international factors...It is for this reason that, in the full exercise of sovereignty and in the name of the Venezuelan people, we notify the referenced citizens of the obligation to leave immediately the fatherland of the liberator, Simon Bolivar.” *Vide* The Chancellery's complete communiqué, dated 18 September 2008: [http://www.mre.gob.ve/Noticias/A2008/comunic-262.htm](http://www.mre.gob.ve/Noticias/A2008/comunic-262.htm).


85 The Council of Human Rights is a good example. That China, Saudi Arabia, and Cuba are part of the Council shows how it is possible to comply with bureaucratic rules and at the same time achieve political objectives. To be both judge and interested party in the delicate arena of human rights issues does not help to establish the rule of the law. On the contrary, it perverts it.


87 Cf. Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, Princeton, New Jersey, Oxford, 2005) p. 233. In effect, the Declaration explains the causes of independence out of “a decent respect to the opinion of mankind,” but this deference in no way implies submission to, nor any duty to take into account humanity's opinion on subjects that affect the United States. However, as I understand it, independence – properly speaking – no longer exists, so we must interpret the Declaration of 1776, and the American Constitution of 1787, in light of new developments,
which does not of course mean interpreting it frivolously. Originalism is at odds with the changing character of every people, who cannot be constrained by decisions taken by legislators centuries earlier.


Of course, the two conditions intelligently outlined by Fernando R. Tesón should also be met. He describes these conditions in his book *A Philosophy of International Law* (Westview Press, Boulder, Colorado, Oxford, 1998), pp. 59–65: “Two conditions apply to the potential intervenor: its cause has to be just and its government has to be legitimate” (p. 59). Although he is referring to a state, it is possible to extrapolate these requirements to an effective global body’s use of force.

As Henry Kissinger rightly observes, America’s global leadership has not kept its own population from accepting this role with certain indifference. However, this deeply harmful tendency has slowly changed over the last several years, thanks in part to the implosion of the old order and to the direct attacks that the United States suffered at the hands of radical Islamists. In Kissinger’s words, this leadership is indisputable: “At the dawn of the new millennium, the United States is enjoying a preeminence unrivaled by even the greatest empires of the past. From weaponry to entrepreneurship, from science to technology, from higher education to popular culture, America exercises an unparalleled ascendancy around the globe.” Vide Henry Kissinger, *Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century* (Simon & Schuster Paperbacks. New York, 2001), p. 17.

Cf. *President Obama’s Inaugural Address* of 21 January 2009 (www.whitehouse.org): “What is required of us now is a new era of responsibility – a recognition on the part of every American
that we have duties to ourselves, our nation and the world; duties that we do not grudgingly accept, but rather seize gladly, firm in the knowledge that there is nothing so satisfying to the spirit, so defining of our character than giving our all to a difficult task.”
5 Global Law, a Challenge for Our Time

1. THE NEED FOR GLOBAL LAW

Thanks to technology and mass media, the world's inhabitants now make up a larger community, united around new common interests and problems. Thus, we must recognize a global community and a global space – which transcends the land-sea-air distinction – and, of course, the need for a global law to order social relations according to justice. This is not a law for or about globalization, as sometimes thought. Rather, it is strictly speaking a global law, which flows from the need to order human relations on a global scale – the scale of the human person's sphere of action today.

Whether global law is called the common law of humanity, cosmopolitan law, or world law is secondary but not trivial, for it is always helpful to fit terms to concepts as precisely as possible. But it is paramount that the new global law be founded on solid principles different from those that have shaped international law, which is grounded firmly on the notions of state, sovereignty and territoriality, legacy and diplomacy, just war and international treaties.

Just as the law of peoples became international law, international law must give way to a particular sort of global law. All three sought to order legal relations beyond their realm. But the law of peoples, which overlooked the principle of equality among peoples, was too hierarchical. International law, for its part, enshrined the principle of equality among states (Staatenrecht) but overlooked the citizens that made up those states. It was thus an artificial law – more institutional than personal.

It comes as no surprise that in his book Globalization and International Law (2008), David J. Bederman suggests permeability as one of the great challenges international law faces in its evolution toward a true world law, as he frequently calls global law (following Harold J. Berman's terminology). To increase permeability, Bederman suggests, among other means, “design[ing] institutional mechanisms by which domestic and international legal authorities can efficiently interact.” In other words, sovereignty has declined and interstate boundaries have been blurred by the free movement of wealth, high levels of immigration, and a crisis in the idea
of borders, but international actors have not properly responded. The extraterritorial application of domestic laws is too complex and gives rise to too many conflicts to be an adequate solution to the phenomenon of globalization.

International law has produced a new hierarchy in international relations by creating and defending a United Nations in which states – in theory, sovereign and equal – are in practice subordinated to the decisions of a Security Council led by the victors of the Second World War. Against this exaltation of sovereignty – especially that of some states – that has characterized international law, global law offers a radical defense of the dignity of the person. Sovereignty is to international law what dignity is to global law: its foundation. Sovereignty, as we have seen, is the heart of the problem. Philip C. Jessup warned as much: “I agree that national sovereignty is the root of the evil.”

In effect, either we make a law of persons or we make a law of sovereign states. And in this interregnum of globalization, the global dimension of the person cannot be ignored. So this is not a question of creating two completely separate orders: one fully legal and the other responsible for ordering international relations but distant from the daily lives of ordinary people who could coexist without major conflicts. No, there is a single global order, compatible with the family and other smaller communities, that situates the human person at the center of its structure. Thus, when international law does not recognize the state as its main subject and gives primacy instead to the person, then it will have become global law. That is the transformation we seek.

The science of the law thus needs a radical change that, without abandoning tradition, can redefine the course of the law for the Third Millennium. It must recover its self-consciousness if it is to free itself from a recent history marked by conflicts and divisions, wars and grudges that burden it like the sword of Damocles.

Globalization has changed the face of the earth; changes in the paradigms of modernity have outpaced intellectuals’ and jurists’ capacity for reflection. The law cannot remain immune to these new facts. We must take up the challenge history presents us and begin at the starting point, with principles. Without underestimating the difficulties of reshaping an outmoded order, we cannot resign ourselves to simply watching that imposing and lethargic beast – the state – control the lives of nations and individuals by overregulation.

Its Byzantine structure, as we have seen, makes the nation-state a giant with clay feet. The international community needs the principles of global law to escape the mire in which sovereignty’s excesses have left us. A
dismantled and soulless sovereignty has consolidated a world order in which the power of a few states prevails on the authority of international bodies, which have been deprived of the tools necessary to exercise real power. International law has not known how to make space for new international agents, especially nongovernmental organizations (NGOs) and transnational companies, which would diversify forms of participation and decision making in international governance.

Global law promotes new institutions to transform the way global actors operate in the international arena. A new mentality must prevail to limit the excesses of sovereignty and create a world in which inequalities among peoples and nations are mitigated by the law, which in turn is strengthened by new tools and actors.

But this change should happen gradually, taking advantage of the progress already made in international law since the Second World War. International law must make way for global law to be introduced little by little—not as a decisive break but in institutional continuity. We must take steps toward that new global legal order, formulating the principles and laying the groundwork for a law of persons and communities, not states. The elimination of the nation-state is not yet a reality, but it remains a long-term goal to create flexible, permeable, and open societies.

The experience of Rome, which overcame an intractable and formalist ius civile with a lively praetorian law adapted to the circumstances of daily life and controlled by the praetor with the advice of jurists, can be of enormous help and encouragement in the creation of global law. The growing tension between the tradition of ius civile and the innovation of ius honorarium, which was so fruitful for the evolution of Roman law toward a ius novum, must serve as a model for the relationship between the international law now in force and the new global law society needs in the Third Millennium. The ius civile protected the tradition, experience, customs, and idiosyncrasies of that great political community that was Rome. Praetorian law, really the work of jurists, updated this tradition, tirelessly reconciling the permanent and the unstable, the current and what belonged to the past. Civil and praetorian law were sometimes intertwined, making it hard to distinguish them. Civil law linked yesterday with today; praetorian law, today with tomorrow.

All the necessary tools should be used to make the international order a global one. This is the same evolution that legal thought has undergone in recent decades, beginning with the Universal Declaration of Human Rights (1948). The transition will be effected from within international law, through international treaties renouncing sovereignty, creating global
institutions *ratione materiae*, giving a central international role to nonstate entities, globalizing justice with structures of transnational jurisdiction that actively and passively recognize individuals, and fostering international arbitration. Article 38 of the Statute of the International Court of Justice, a constitution of the international community, is an apt guide for the progressive transformation into global law because it incorporates the “general principles of law recognized by civilized nations” (art. 38, 1c) as a source of international law. But there are many others.

As Richard Falk affirms, “there exists in the *corpus* of interstate law latent recognition of important ingredients of the law of humanity,” which can act as catalysts for this necessary change. He mentions (among others) articles 25 and 28 of the Universal Declaration of Human Rights, the Preamble and articles 1 and 2 of the United Nations Charter, and – in my opinion, with serious caveats – the Nuremberg principles, inasmuch as they shape an international law that recognizes international personal responsibility. He also mentions article 6 of the Nuclear Non-Proliferation Treaty of 1968, in which nuclear states – the five permanent members of the U.N. Security Council – commit to reducing and eliminating their reserves.

These are supporting norms – useful, but insufficient. I reiterate: the human person is the starting point, not norms. If global law avoids anything it should be the emphasis on norms that have made international law a bundle of shared good intentions controlled by the great powers.

2. INTERNATIONAL SOCIETY VERSUS GLOBAL COMMUNITY

Like international law, international society – composed basically of states – should give way to a more complex global community that fosters unity while avoiding homogeneity. This would be a community of persons and groups, political organizations, municipalities and metropolises, peoples and nations, corporations, civil associations, churches and other religious organizations, and of course, supranational institutions. These organizations would be integrated and harmonized, sometimes overlapping but never compartmentalized by sovereignty. They would be marked by openness, interdependence, and a global solidarity over all of humanity's common stock.

I use the term “global human community” or “global community” to avoid confusing it with “global civil society.” The latter is composed of all those agents who, sharing common interests and universal values, contribute apart
from state action to humanity's development by resolving problems that have acquired a global dimension.\(^{10}\) Without the establishment of a formally constituted government, global civil society rules by means of a so-called global governance, the fruit of consensus among its social and economic actors based on an implicit social contract.\(^{11}\)

Global civil society, which lies on the opposite side of the spectrum from an international society of states, is simply another manifestation of the need to consolidate a global human community. That community, ordered by global law, integrates both societies, civil and international, to form an *unum corpus*. In it, the distinction between public and private will be secondary, as it should be. Private issues can have a public dimension, and management of the *res publica* can be effectively entrusted to private agents. The increasing politicization of the public realm has been responsible for the excessive separation of these two aspects of social life.

The global human community will not be able to reach perfection unless states progressively renounce their sovereignty. This does not entail their rash elimination as politically distinct communities.\(^{12}\) It is simply a matter of recognizing that the nation – in the more revolutionary sense, as the soul of the body of the state – would no longer be the only sovereign entity and that humanity would be characterized by a certain global majesty (*maiestas universalis*). We would recover that inclusive Roman notion\(^{13}\) describing great open living spaces, which are clearly the most appropriate environment for today.\(^{14}\) Membership in this community will no longer depend on one's family name (*nomen Romanum*), language, place of birth, or skin color, but on being a member of the human species.

The global community's tendency would be to include all of humanity. But until all of the world's institutions and persons are voluntarily incorporated into it, it will have to maintain relations with individuals and communities outside itself, applying norms of international law then in effect. Hence the global community could coexist with international society while the latter survives. They are not incompatible but complementary and inclined to integrate. The establishment of global law, although it represents an authentic legal change, does not imply a rupture with the *status quo*. It is rather a gradual and peaceful transformation, a transition from one era to another.

This global community still has to be contextualized, clarified, and organized, although that does not mean it does not exist. It is in its embryonic stage, but like the *nasciturus*, it already lives and breathes. Its heart beats to the rhythm of global civil and international society. The law of
international organizations is beginning to be more global law in the strict sense than interstate law. The global community has been forming little by little through humanity's interactions. It is becoming a reality that the world's governments can no longer easily escape. If we do not legally organize this already existing political community, we run the risk of letting decisions fall into the hands of a hidden few who could control the planet's economy. We will speak later on the legal principles that should govern the organization of humanity.

3. COSMOPOLITANISM AND GLOBAL LAW

A direct consequence of the birth of a global community from wide-scale human interactions is the rise of a new cosmopolitanism, which has its roots in Stoic philosophy. Diogenes Laertius in his *Vitae Philosophorum* tells us that when the cynic Diogenes of Sinope (ca. 412–323) was asked about his origin, he answered that he was a citizen of the world (*cosmopolites*).

The cosmopolitanism of the extravagant Diogenes was a healthy moral and intellectual sentiment; that of modern man, on the other hand, is a capitulation to the modern human condition. For better or worse, humanity is cosmopolitan; thus, cosmopolitanism has ceased to be an ideology, a doctrine, or a good idea, becoming a reality that affects everyone. It is a different question whether this new cosmopolitan factor should be accepted or whether it is susceptible to different interpretations given its important practical consequences.

Global law aims to order this fact of cosmopolitanism, which is legally relevant insofar as it affects the attainment of justice in the world. But the global order need not determine which type of cosmopolitanism from the wide variety available should prevail. It may, however, rule out the anodyne, insubstantial, and insignificant sort that, at this stage in human history, continues to think everyone is good and that the law is pure bureaucracy. Global law also opposes a nationalist narcissism that attempts to dominate a part of the earth as its own. It rejects the idea of making a single nation of humanity, uniting cultures as if the earth were a whole without parts. Finally, it opposes governing the earth without being mindful of the next generation, thus treating our own century, a mere part, as if it were the whole, the *tempus totum* of human history. Pressing issues like global warming and protection of the environment make the gravity of the
problem clear.

Naturally, this is not about opposing the national or local to the cosmopolitan, but rather about knowing how to bring together these three dimensions to create a common universal project (what the ancients called a *bonum commune universale*) greater than the sum of the various communities’ goods. This common human project has become more relevant in our time because of interdependence. Today, any society that does not include humanity as a whole is incomplete insofar as it cannot fully meet its citizens’ needs.\textsuperscript{19} Thus, the old Aristotelian theory expressed at the beginning of his *Politics*\textsuperscript{20} that the *polis* was the paradigm of fullness and self-sufficiency (*autarkeia*) no longer applies to intermediate communities like nations or states, or to bigger supranational entities like the European community. It is valid only for humanity – hence the need for humanity to be organized.

\section*{4. CRISIS OF NATIONALITY, GLOBAL CITIZENSHIP, AND PATRIOTISM}

At this moment in history, the three concepts are tightly intertwined. The crisis of nationality, a consequence of the collapse of the nation-state, has paved the way for a new global citizenry bolstered by a new patriotism rooted in the idea of the family more than territory.

Nationality sets limits on our life, especially in a global society like ours. By establishing a link between citizens and their state of origin, nationality also links them indirectly to the international community of states.\textsuperscript{21} The position of people in the world is determined by their nationality, ultimately by their passport. Nationality affects a citizen's international development, and questions of nationality fall within the domestic jurisdiction of each state. Thus, each person's position in the international community varies, depending on each country's complex legislation on this controversial issue. In international law, it is states, not persons, that are equal.

Considered primitive today, the idea that a citizen can remain so strongly and permanently linked to a sovereign state – and so closed to others – by the fact of his or her family's origin (*ius sanguinis*), place of birth (*ius soli*), or any other nonvoluntary basis for nationality is making less and less sense. One of the most basic human rights is the freedom to determine one's place of residence with a view to personal, family, and professional development. Naturally, exercise of this right can be limited by the principle of universal
solidarity, but not to the extent witnessed in recent centuries. Think, for example, of the issue of immigration, which generates on the part of so many states around the world an endless stream of legislation totally opposed to human rights.

The concept of nationality has also replaced the ancient concept of homeland, which has recently been reappearing in different shades. When the earth was divided into national states, the nation stopped reflecting an authentic sense of homeland. Unlike a nation, one's homeland does not establish its territorial parameters too strictly. A homeland is a place, a home, yes, but not an owned, demarcated territory. It admits of different shades and dimensions, combining the local, the national, and the global. Patriotic feeling leads one to love the environment from which one comes and in which one has developed as a person, but not with a brute, possessive zeal. Thus, the concept of homeland is essentially inclusive; each person's homeland can be made up of various communities to the point of including the world. People can regard humanity as family and the earth as homeland, be a true cosmopolitan, and love deeply the soil of their ancestors, which may not be the land that they or their children tread. The same is not true of a nation. There is no nation without other nations, just as there is no state without other states. Ultimately, the nation, like the state, requires borders that separate “one's own” from others, and citizens from foreigners.

International law is a law of nations; global law, on the other hand, is a law of homelands. It fosters a free, open, and cosmopolitan patriotism as deep as each citizen sees fit to make it. This patriotic feeling, inherent in human nature, bears a smaller political burden than the nation. Thus, patriotism is compatible with cosmopolitanism to the extent that all people value and love their own – determining for themselves who those are – without being forced or limited by the law in this respect. If a woman is born in London to a French father and a Colombian mother, marries a Chinese man, and works for ten years in Nigeria, twenty in Bolivia, eight in Australia, and five in Turkey, she will probably have a broader patriotism than that defined by her British nationality.

Global law, inasmuch as it centers on the person, should stimulate voluntary ways of acquiring nationality for those citizens who have accepted the charter of globality and fight against any political and undemocratic imperative regarding the distribution of people around the earth. The principle is clear: people have the right to determine their place of residence in any corner of the world as long as they fulfill the responsibilities that the community imposes on them. In this way,
immigration would cease to be an issue between states and would become a matter of human rights inherent to all persons.\textsuperscript{24}

Immigration should be analyzed from a perspective that goes beyond the still sovereignty-tinged Universal Declaration of Human Rights.\textsuperscript{25} States are not the ones that have the right to admit a citizen into their community. It is up to persons to choose the community in which they want to live and grow, which need not be the community in which they were born. That is, citizens have the right to determine their place of residence as long as this does not entail a burden for the community. For this reason, the state will have to justify before the competent independent global institution of United Humanity its reasons for not granting citizens admission to its territory. Residents who pay taxes in turn would have the same rights as nationals, beginning with the right to vote, social provisions, etc.

The regulation of immigration must stop being the exclusive prerogative of states. As an inalienable human right, immigration falls clearly within the global domain. It requires an authentic liberalization of the barriers of the state to facilitate mobility. This will not be easy, for there are still many obstacles, including public opinion.\textsuperscript{26} Borderless migration is still seen as a utopian if not irrational dream. But it is not. Free immigration may take more or less time to be accepted, but it will happen eventually.\textsuperscript{27} Just as with email, where what was a possibility decades ago and an accepted reality more recently is now the ordinary means of communication of more than 1 billion.

With time, a sort of global citizenry will be developed for all the members of United Humanity. It will be made concrete in, among other things, a global passport that will allow global citizens to move and establish themselves freely in any part of the world with great ease and without needing to take steps beyond those required for the security of the relevant communities. This global citizenry will facilitate a much more agile and dynamic way of life, in keeping with the era of globalization in which we live. Nationality for its part will give way to broader criteria (place of residence, work, income) for the exercise of rights and assumption of responsibilities.

5. GLOBAL LAW AND NONSTATE LAW

In the last few years, the concept of nonstate law\textsuperscript{28} has been gaining relevance, in part owing to the work and thought of, among others,
sociologist Philip Selznick, who considers it an emergent type of law. He calls “nonstate law” that set of agreements, regulations, and arrangements of general interest that do not have as their main source the state (although sometimes it intervenes) but rather other social agents: business organizations, companies, NGOs. It is a much more flexible and efficient law that allows its operators to work (subject to certain legal constraints) at the pace imposed by modern society, overcoming the sometimes artificial barriers between common law and civil law. Little by little, this law enhances the power and effectiveness of parliaments, tied in their legislative process to a slow and bureaucratized rhythm at odds with the speed that characterizes our time.

The name “nonstate law” is attributed to the Czernowitz (present-day Ukraine) jurist Eugen Ehrlich (1862–1922). He used the expression *aussenstaatliches Recht*, based on Roman law’s famous distinction between *ius publicum* and *ius civile*, to refer to real but nonstate law, without which it was difficult to understand the evolution and character of classical Roman law. The father of legal sociology was harshly criticized by Kelsen – the great defender of the idea that without the state there is no law – in one of the most fruitful debates of the twentieth century, comparable to those that have happened more recently between Hart, Fuller, and Dworkin, or Rawls and Habermas.

For a Romanist like me, it is easy to embrace the idea of a nonstate law, for that is precisely what Roman law was – at least at its moment of greatest republican splendor, when it was a jurist’s law founded more on the *auctoritas* of jurisprudentialists than on the *potestas* of public powers. It was a case of *ex privato iure publicum*, not vice versa. And that is what I defend in this book. In no other way can we build a legal order on the person, who fully integrates both dimensions – public and private. The relationship between public and private is harmonious when it springs forth from the human being. It is not so when built artificially on the state, which suffocates (sometimes unintentionally) what is private, especially since modern constitutionalism took the reins of the legal order. Only from the perspective of a state-based international society can we understand the birth of nonstate law as a law that tries to free itself of unnecessary ties. I do not think, however, that nonstate law is a good companion to global law, for the latter seeks balance, harmony, and integration, not confrontation. Still, as we shall see, it is logical that, given the existing sovereignty-based obstacles, global law will emerge from nonstate law, especially from arbitration and other means of alternative conflict resolution.
6. ARBITRATION AND GLOBALIZATION

The crisis of the modern territorial state is inseparably tied to the crisis of the judiciary, the state's third power. The *vis attractiva* of the modern state has treated justice and law as its patrimony alone, setting justice itself up as a power alongside the executive and legislative powers. Fundamentally different from these two branches, the judiciary has been constrained by its state structure even as bodies of government have been democratized. With that power, any form of resolution of legal conflicts has been constrained, too. This explains why in strongly statist countries, arbitration has been until recently a residual *instrumentum iuris*. It has, however, had a greater role in the United Kingdom and in the realm of common law generally.

Something similar happened in Rome's history.\textsuperscript{35} The bureaucratization of the administration of justice in the late empire checked the development of Roman arbitration proceedings, based on a simple agreement between parties (*compromissum*) and an assumption of responsibility by the arbiter (*receptum arbitri*). The parties could even be towns, and the judgment could be entrusted to a third neighboring municipality, as we know, for example, from the A.D. 87 bronze of Contrebia, found in Botorrita (Zaragoza) in the Celtiberian city of Contrebia Belaisca, which takes up a dispute about waters.\textsuperscript{36}

International commerce and globalization have obliterated the jurisdictional structures of the states. The principle of the jurisdictional unity of the judiciary – recognized, for example, in article 117.5 of the Spanish Constitution – is in clear decline. The modern state has given trials a pyramidal and hierarchical structure in which the state judge is the protagonist. It overlooks the fact that only the parties – especially the plaintiff – are the true actors in judicial actions. This also explains the difficult position of the prosecutor in a criminal trial, where the distinction between judge and party is sometimes obscured by both belonging to the state.

As state jurisdictional unity is broken, global law needs arbitration as a tool for dealing legally with globalization. Thus, arbitration is tied to the modern tendency toward globalization, especially in the commercial realm, where the main milestone was the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on June 10, 1958. This was the opening shot in a race that has only begun.\textsuperscript{37}

The reasons are obvious: the consensual nature of arbitration is much
closer to global law than state impositions supported by international law. Arbitration, as the effective instrument of legal globalization, knows no territorial or state limits, unlike international law, which only after the Second World War began to concern itself seriously with the internationalization of justice.

Moreover, the proliferation of arbitral decisions is accompanied and followed by a development of the relevant doctrine, which needs less support in national orders. Little by little, we are forming a jurisprudence of arbitration that will be the basis for the unification and coordination of different legal systems, but not only that. The importance of jurisprudence for arbitral decisions will be decisive when it is time to interpret globally the jurisprudence of civil law and common law, both removed from the French Revolution. Exalting the law as the will of the people, the Revolution gave jurisprudence a secondary role and eliminated it as a source of law.

Through commercial arbitration, a new *lex mercatoria* has been shaped – one applicable to international commerce. Successor to the medieval *lex mercatoria*, its legality was defended to the death in 1964 by Berthold Goldman in a memorable and pioneering article on the borders of the law. In that piece, the internationalist pointed out that “the *lex mercatoria*, formally and substantially, places itself fully within the province of the law.”\(^{38}\) Although still questioned by some authors as a way to get around the determination of the law applicable to concrete cases,\(^{39}\) this body of principles, arbitral decisions, uses, and contracts is making its way. It knows no borders or national legal orders but offers transnational, cosmopolitan solutions.\(^{40}\)

Moreover, at the same time as arbitration, other means of alternative dispute resolution are developing: negotiation, mediation, and conciliation, among others. These embody the authentic meaning of justice: to attain peace through effective dispute resolution. Because of their flexibility and speed in decision making, confidentiality, the parties’ freedom to choose who will settle their dispute, and often the money saved by avoiding ordinary trials, these new methods of alternative dispute resolution have developed at an unexpected pace over the last few years. They will occupy a place of honor in the era of globalization.\(^{41}\)

7. **THE USUS OF THE EARTH**\(^{42}\)

153
Although global law is founded on the idea of the person and not on the notion of territory, we cannot fail to conceptualize the latter, as well as the idea of space overall. To whom does space belong? To whom does a continent belong? Who owns the earth we all inhabit? Who owns the sea if not the seabed and air that surround it? These are some of the questions that have been formulated over the centuries by jurists and philosophers. The shape of our legal orders and configuration of the new global society depend on their answer.

Modern international law – born, as we have said, of the ashes of the Thirty Years’ War and embodied, erroneously I think, in Grotius – applied to the earth the Roman doctrine of ownership and ways of acquiring property, thus equating plenary sovereign civil power with private property (dominium). Within its territory, each state would have absolute and exclusive power, which it could take up arms to defend. The planet would thus be partitioned; it would belong to a multitude of owners (i.e., states) blind to the possibility of establishing a solidarity-based system of land appropriation.

The only exclusive owner of the world would be God, its creator, but the need to build a law “as if God did not exist” – etsi Deus non daretur – ruled out this transcendent perspective. The known but still unconquered world – especially the New World – was considered space that states could occupy in virtue of different titles, more or less accepted internationally.

Thus, for the first executors of international law, the modern European states, the world was like a sumptuous dinner dessert. The pie arrived on the table already cut into slices so that each state could take its part. But because the Old Continent itself imposed the rules of distribution, European states had the right to seconds – to take not only their share, their sovereign territory, but also land conquered in the New World, which was susceptible to appropriation and colonial domination.

The same did not happen with the seas. These represented a common condiment at the banquet. They were, and are – pace John Selden\(^{43}\) – free, not susceptible to appropriation or distribution, except for the so-called territorial sea. Along with airspace, the “territorial” sea was claimed by the state and subjected to the despotic power of sovereignty, in keeping with the doctrine of the jurist Cornelis van Bynkershoek\(^{44}\).

This dualism between land occupied by sovereign entities and a sea common to all men marked the course of international law from the beginning of the Peace of Westphalia to the end of the Second World War. Conflicts were ultimately a legal instrument for resolving territorial disputes – the continuation of politics by other means following the decline
of diplomacy and protocol.

In our time, the legal theorem applied by modern international law is in crisis because of its decisive preference for the principle of territoriality over that of personhood, and states over persons – the latter remaining unrecognized for centuries as subjects of international law. Although Carl Schmitt – the last cultivator of the *ius publicum europaeum* – followed the bard in proclaiming it, the earth is not in fact the mother of the law (*die Mutter des Rechts*). It is a different question whether the law, always personal, needs a determinate space to develop. Whether it be land, maritime, or air, space is temporally prior to the person. And what is more important: the earth is prior to man.

The attempt to build a theory of the law on the idea of territory has been one of the great errors of modern legal science, resulting mainly from the concept of state sovereignty. That is the precise cause of all radical nationalism – the real cancer of the modern state, which claims an independent territory for itself as absolute property. Treating sovereignty as the peak of scientific reflection has contributed to the dehumanization of the person, leaving the earth in the grip of a Hobbesian leviathan and of an unscrupulous capitalist cryptocracy.

Global law defends the idea that on earth there is no “property” in a full sense, for the earth has no owner, so that neither it nor space itself can be disposed of. And the reason for this essential unavailability is that humanity is made up of all the human beings who have lived or ever will. So there is no room for otherness.

Unlike interstate law, men's actions on earth in conformity with global law are unilateral – never contractual – for lack of other parties. Thus, these acts can never count as disposals in a strict sense. The destruction of the world could never be considered an act of a legal nature. Thus, legal susceptibility to being disposed of on earth makes no sense from this new global perspective.

In my opinion, therefore, on earth there is room only for use, *usus*, which includes also enjoyment (*frui*), but never for the power of disposal (*habere*), which is the quality most suited to the proprietor. The use of the earth is based on solidarity, for that use is indivisible. Solidarity allows citizens of all times to avail themselves of what the earth provides, but without any power to dispose of it. Humanity is not the proprietor of the land, sea, or air. Strictly speaking, there cannot be ownership of space in any of its dimensions. Nor can there be full sovereignty. Humanity cannot sell the earth, because we are all part of humanity and law is between humans. There would be no customer. This theory, nowadays perfectly
acceptable, could only be modified if we were to discover the existence of rational beings on other planets, which at least for the moment belongs more to the realm of science fiction, to Spielberg's fantastical world.

The “use of space” connects the law with a transcendent view of man that many of us share. This doctrine can be harmlessly internalized as much by believers as by agnostics or atheists. A metalegal principle, it need not be reflected in laws, nor should it be expressly excluded by them. Believers will be able to give more content to the concept of the use of the land and the seas, recognizing God as the creator of the world. But everyone can accept the solidarity-based meaning that flows from this word, *usu*s, a cornerstone of any legal order and of our incipient global law.

8. HUMANITY AS ANTHROPARCHY

Because land will have no proprietor (*terra nullius*), strictly speaking, it seems obvious that someone will have to be concerned with its care, development, and administration. That someone cannot be the state, nor even an international community *lato sensu* that encompasses all international agents. If each one administers one part of the earth, the earth will not be governed as a richer and more complex whole. The issue of global warming is a good example of this. In my opinion, the earth's only administrator is humanity, organized as a *corpus unum* capable of taking decisions that bind posterity.

This organization of humanity as a *communitas* is incompatible with the classical conception of sovereign independence developed by modern international law. Moreover, the inescapable interrelations between the most diverse social groups prevent them from being able honestly to claim independence. The truest thing about men is their freedom, and about peoples their self-governance. Not independence or sovereignty. Thus, there is an urgent need to redefine the notion of “independence,” often used in a strict sense for political purposes. In this respect, the model of the American Revolution has over the past two centuries been superseded.

Independence guarantees freedom and self-governance more completely than interdependence. However, it serves us little if our goal is to achieve material progress or security. In a globalized society, or one in the process of globalizing, interdependence is an undeniable fact, a *condicio sine qua non*. It is also a sign of maturity and modernity. A man alone on an island is free and independent; he governs himself, but he cannot easily develop himself at the same pace as a harmoniously structured society.
These media-related, economic, and social interconnections must be ordered by the law, for they affect relationships of justice. Thus, humanity, no longer a metalegal concept, has acquired clear legal relevance. We can rightly say that if international law is a law between independent states, global law is the system called to order a complex and interdependent communitas – humanity. Thus, it would be a serious mistake to force humanity into a legal category extracted from political doctrine. Humanity requires its own conceptual status, distinct from any other, that makes manifest its natural uniqueness. The risk of applying to humanity the categories of political theory or reductionist economic notions is as certain as it is dangerous. If the modern concept of the state is in crisis, why should we make humanity into a superstate? Moreover, humanity can exist only as a unity. Humanity is inclusive insofar as it includes every person in the world without exception, and without requiring an explicit act of incorporation. The state, on the other hand, requires otherness and free choice (one can renounce one's nationality). The same is not true of humanity. Even if we want to exclude ourselves, we are always a part of it. The human condition is inalienable.

There is no state without other states. An entity like the state is intelligible only in a world of other states that together constitute a precarious order of sovereignties. This artificial and elaborate otherness cannot exist in humanity, which encompasses all human beings. So, humanity is universal by being personal; the state is not so because of its territorial nature, which makes it exclusive. Thus, in practice, the transformation of the world into a state carries serious risks of homogenization, concentration of power, and tyranny. Humanity could also risk becoming an empire, the dream of so many thinkers, politicians, and nations. An empire does not require otherness for its existence, of course, and it tends toward totalitarianism. It longs to govern the unum corpus of humanity. In our time, the only country with enough capacity for influence of this scope is the United States, because of its military might, its economic power, and, as Stephen M. Walt notes, a margin of institutional power hitherto unknown among states. Moreover, the attacks of September 11 opened a wound in the heart of the American power that will take decades to heal. Its extreme vulnerability, its desire for security, and its leadership in the world justify in part its imperialist position, already apparent at its genesis as a nation.

Like a family, humanity is a natural entity, not just cultural. It is a separate issue whether humanity has required great cultural maturity to try to organize itself politically and legally. But that moment seems to have arrived. We are
witnesses to the transition from an alleged world government of democratic and sovereign states to a sort of global democracy that we might call anthroparchy or “government of humanity.” Anthroparchy is a form of government that must be developed gradually, in step with the formation of a universal political will – the expression of all of humanity, not only of a portion of mankind. I say “anthroparchy” and not “anthropocracy” because we are dealing with a system of government based more on legitimacy (-archy) than on mere legality (-cracy). Thus, the natural need to constitute ourselves as a community of persons building a better world is in tension with autocratic attempts to found an order on the basis of a consensus of present desires, ethereal interests, and the opportunistic policies of a concrete time and place.

Anthroparchy opts for the English rule of law and not for the German state of law (Rechtsstaat), for the latter requires, as is obvious, that the law come from the state. On the contrary, in the rule of law, the law (lex) has a precise limit, and other sources of law (ius) do not lose their centrality. Moreover, the government of a complex world cannot be subject to the logic of direct democracy. We need new methods of governing that transcend current procedures, which are easily controlled with impunity by rampant cryptocracies and financial plutocracies.

In his essay on The Problem of Global Justice, Thomas Nagel raises the question of the legitimacy of institutions that pursue global justice. Giving his argumentation a heavy practical bent, Nagel expresses support for a legitimacy of exercise that little by little democratizes the new (and often democratically deficient) global institutions created by the world's most powerful countries. For Nagel, the authentic road to legitimacy takes us first through illegitimacy: “Unjust and illegitimate regimes are the necessary precursors of the progress toward legitimacy and democracy, because they create the centralized power that can then be contested, and perhaps turned in other directions without being destroyed. For this reason, I believe the most likely path toward some version of global justice is through the creation of patently unjust and illegitimate global structures of power that are tolerable to the interests of the most powerful current nation-states. Only in that way will institutions come into being that are worth taking over in the service of more democratic purposes, and only in that way will there be something concrete for the demand for legitimacy to go to work on.”

Nagel's bold claims here are right. History has often confirmed as much for us. It seems to me, however, that the road to legitimacy must be otherwise, at least in anthroparchy, given its transcendental goal. It is clear that in some cases what is legitimate can be arrived at from what is
illegitimate, just as one can go from sickness to health or war to peace. But this does not mean that legitimacy can be reached only from illegitimacy, nor that one can be healthy only by first being ill or live in peace only after war.

I think, rather, that the anthroparchy's fully legitimate origin allows us to grant it the force and power necessary to fulfill its important mission. Its legitimacy lies in the fact that every organized community needs a just government and that humanity as such has become a supreme community, but not governed (at least formally) by anyone. It has become a community because globalization has allowed it to become conscious of itself, its mission to protect the earth, and the urgent need to solve together the problems that affect us all. It seems to me that these reasons justify the legitimacy of its existence. In an advanced society like ours, legitimacy of exercise can come only through democratic means. Because parliament is the democratic institution par excellence and the cradle of true democracies, only a Global Parliament, the heart of a new “United Humanity” institution to which we shall refer, could legitimize the anthroparchy. It would be composed of a network of global institutions that, distributed throughout the world and given jurisdiction based on subject matter, concern themselves with those issues that affect humanity as a whole, especially in whatever concerns human rights.

The formalization of the anthroparchy and its network of institutions revolving around the Global Parliament will facilitate the just distribution of burdens among the earth's communities, as well as the realization of long-term projects that guarantee the security, inhabitability, and normal development of our planet. The establishment of anthroparchy will demand a thorough revision of functioning international institutions to adapt them to the criteria of democratization, solidarity, and personalization, making room for many other new global institutions. The first important step will be to transform the United Nations into the new institution that we have agreed to call United Humanity, the core of the anthroparchy.

Anthroparchy is currently more utopia than reality. Let us lay the groundwork for this new form of government, developing global law and, with it, the enormous advantages of a globalizing life together. Let us be firm about the democratization of global institutions and the necessary transformation of the United Nations. Let us foster, finally, a culture of cosmopolitan solidarity that can make this human dream, this utopia indicative of peace and harmony on earth, a reality.
1 To which we refer in Chap. 7.


6 *Cf.* in this vein, Fritz Schulz, *History of Roman Legal Science* (Oxford University Press, Oxford, 1953), p. 83. “The line between them cannot be sharply drawn: for example, while the *actio de dolo* is pure *ius praetorium*, *rei vindicatio* belongs to both departments.”


9 Article 25 establishes that “everyone has the right to a standard of living,” and article 28 declares that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”


160


12 Cf. in this vein, David J. Bederman, Globalization and International Law (Palgrave Macmillan, New York, 2008), p. 147: “I think the purported demise of the nation-State system is rather premature.”

13 Maiestas (derived from the comparative maior) is the attribute typical of supremacy or greatness. It corresponds above all to the Roman people, considered immortal because their office of prince would be so, beginning with Augustus. In Partitiones oratoriae 30.105, Cicero defines maiestas Populis Romani as magnitudo quaedam populi Romani in eius potestate ac iure retinendo; in De oratore 2.39.164, as amplitudo ac dignitas civitatis. It was Jean Bodin who identified majesty with sovereignty, without noticing that majesty (unlike sovereignty) is inclusive. Cf. p. 66 nt. 25.

14 An opposing view can be found in a work by Jeremy A. Rabkin, Law without Nations?, p. 270, in defense of the United States
against European criticisms of its lack of involvement in important projects of global government, like the International Criminal court or the Kyoto Protocol. According to Rabkin, only a sovereign state – he is referring mainly to the United States – is capable of fully defending its citizens’ rights. He thus concludes, “What preserves the Constitution is American independence. They cannot be reconciled with boundless schemes of global governance.”


16 Perhaps before Stoicism. Indeed, Socrates could have been a cosmopolitan. Cf. Epictetus (Discourses 1.9.1, edited by Robert Dobbin, Discourses and Selected Writings, London, Penguin, 2008): “If what philosophers say about the kinship of God and
man is true, then the only logical step is to do as Socrates did, never replying to the question of where he was from with, ‘I am Athenian,’ or ‘I am from Corinth,’ but always, ‘I am a citizen of the world.’” About Epictetus’ cosmopolitanism, cf. G. R. Stanton, “The Cosmopolitan Ideas of Epictetus and Marcus Aurelius,” in *Phronesis. A Journal of Ancient Philosophy* 13 (1968), pp. 184–195.


19 Cf. in this vein, John Finnis, *Natural Law and Natural Rights* (Oxford University Press, Oxford, New York, 1982), p. 150: “If it now appears that the good of individuals can only be fully secured and realized in the context of international community, we must conclude that the claim of the national state to be a complete community is unwarranted and the postulate of the national legal order, that it is supreme and comprehensive and an exclusive source of legal obligation, is increasingly what lawyers would call a ‘legal fiction.’” Vid. also Robert P. George, “Natural Law and International Order,” in *In Defense of Natural Law* (Oxford University Press, London, New York, 1999), § 12, pp. 234–236.

20 Cfr. Aristotle, *Politics* 1.1252b27–31 (ed. Carnes Lord, The University of Chicago Press, Chicago, London, 1984, pp. 36–37): “The partnership arising from [the union of] several villages that is complete is the city. It reaches a level of full self-sufficiency, so to speak; and while coming into being for the sake of living, it exists for the sake of living well. Every city, therefore, exists by nature, if such also are the first partnerships.”


22 On the concept of nation, see pp. 82–84.

23 On the charter of globality, vid. p. 146.

24 It is always surprising to compare the ease with which the state

25 In effect, the 1948 Declaration of Human Rights recognizes in article 13–2 the right to emigration, but not to immigration: “Everyone has the right to leave any country, including his own, and to return to his country.” In the Universal Declaration of Human Rights, the alleged right to choose a place of residence in any part of the world is limited to the territory of his state; cf. article 13–1: “Everyone has the right to freedom of movement and residence within the borders of each state.”

26 Cf. in this vein, Jonathon W. Moses, *International Migration, Globalization's Last Frontier* (Zed Books, London, New York, 2006), p. 138: “The biggest single deterrent to free international migration is the perceptions and attitudes of citizens in the developed world. The world's richest countries have shown a willingness to employ force along national borders to protect what they have from those who don't have it.” Cf. especially Figure 7.1 (p. 140) about public opinion on levels of immigration.


29 Above all, beginning with his work, Philip Selznick, with the collaboration of Philippe Nonet and Howard M. Vollmer, *Law, Society and Industrial Justice* (Russell Sage Foundation, New York, 1969). Cf. especially pp. 244–250, in which he rightly defends the idea that “as the status of citizenship evolves, the
scope of public law is also altered” (p. 249). In effect, “[a] vast number of ordinary transactions involve government and the individual at some point, yet this does not bring them within the scope of public law” (p. 250).

30 *Vid.* mainly Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (4th ed., executed by Manfred Rehbinder, Duncker & Humblot, 1989). There is an English translation executed by Walker L. Moll, under the title of *Fundamental Principles of the Sociology of Law*, with a new Introduction by Klaus A. Ziegert (Transaction Publishers, New Brunswick, London, 2002). In the brief prologue, Ehrlich masterfully explains that the law is the product of society, not the state. This is the key for understanding non-state law: “At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, by in society itself.” The sentence above should have been clarified by its author with “not only…but also and above all.”


33 For more information, Rafael Domingo, *Auctoritas* (Ariel, Barcelona, 1999).

34 *Cf.* pp. 187–188.

35 A historical view of arbitration can be found in Álvaro d’Ors, “El arbitraje jurídico” (1991), in *Parerga Historica* (Eunsa, Pamplona, 1997), pp. 271–291.

36 *Vid.*, Guillermo Fatás, *Contrebia Belaisca II. Tabula Contrebiensis* (Universidad de Zaragoza, Zaragoza, 1980).

37 On this issue and on the influence of American law on international


43 *Cf.* his well-known work, in response to Grotius’ *Mare liberum:* John Selden, *Mare clausum seu de dominio maris* (Joan. & Theod. Draise, Leiden, 1636).

44 Cornelis van Bynkershoek, *De dominio maris dissertatio* (repr. 2nd ed. of 1774; Oxford University Press, Oxford, 1923).


46 To the extent that enjoyment does not alter the thing itself but only what it produces, it can be considered a part of *usus* (usus
fruendi). In fact, usus must be opposed in this sense more to dominium than to fructus or possession. Although in Roman law, usus was in principle sine fructu (cf. Gaius, Digest 7.8.1: “constituitur etiam nudus usus, id est sine fructu”; Ulpian, Digest 7.8.2 pr.: “cui usus relictus est, uti potest, frui non potest,” and Ulpian, Digest 7.8.14.1: “usus sine fructu potest”), casuistry admitted the possibility that the user had a right to the fruits, for example, of firewood, fruits and vegetables, flowers and water, ad usum cottidianum and to the extent that it served the sustenance of his own (ad victum sibi suisque sufficiat) (cf. Ulpian, Digest 7.8.12.1). On usufruct and related rights, the observations of Giuseppe Grosso remain relevant: Ussufruto e figure afini nel diritto romano (2nd ed., G. Giappichelli, Turin, 1958), esp. pp. 85–87 and 430–436; cf. also Max Kaser, Das römische Privatrecht I (2nd ed., Beck, Munich, 1971), § 106, pp. 447–454, with a large bibliography; Antonio Guarino, Diritto privato romano (12th ed., Jovene, Naples, 2001), § 63.7.1.

This tyranny would, by the scope of its power and cruelty, be much more terrible than the tyrannies that humanity has known until now and that sparked interesting debates on the legitimacy of tyrannicide. Moreover, the risk of tyranny is clear. If we call tyranny any government by one, several, or many that pursues particular goals and interests to the benefit of those governing and at the cost of the other citizens and the common good, it is not hard to show how close we are to a world economic tyranny that seeks to control the world's financial system. Allen Buchanan in Justice, Legitimacy, and Self-determination. Moral Foundations for International Law (Oxford University Press, Oxford, New York, 2004), p. 289, rightly affirms: “The most serious ‘democratic deficit’ is not that states are unequal, but that a technocratic elite, lacking in democratic accountability to individuals and non state groups, is playing an increasingly powerful role in a system of regional and global governance.”


52 Which does not validate the ethical principle that “the end justifies the means.”

53 Cf. pp. 145–147, The global parliament is the central body of United Humanity, the institution called to govern the anthroparchy.

54 In a similar sense, Allen Buchanan discusses the need to ensure the existence of global institutions with direct personal access that guarantee basic human rights: Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford University Press, 2007), p. 427: “[T]he limited obligation each of us has to help ensure that every person has access to institutions that protect his or her basis human rights. This obligation is more robust than the Rawlsian obligation ‘to support just institutions that apply to us’” (*A Theory of Justice*, p. 15). And on the next page (p. 428) he adds: “Helping to ensure that all persons have access to just institutions requires modifying existing institutions, both domestic and international, and building new ones.”

6 The Global Legal Order

Global law, or the Law of Humanity, does not yet constitute a legal order in the strictest sense, but it is called to become one. It is not yet a legal order because a handful of globally applicable norms without internal coherence or a clear system of elaboration, modification, and voluntary or coercive compliance cannot constitute an *ordo iuris*. But today there is an inescapable social imperative for just such an order. It is the task of jurists to bring us to the point where we can accurately speak of a new global legal order.

We would be making a serious mistake if we applied the current standards of national orders to a global legal order, for this could easily become an attempt to create a world state. It would also be a mistake to create something *ex novo*, as if no existing legal traditions were useful, or as if the constructs of international law born of the Peace of Westphalia were merely a set of useless ruminations. After all, in the twentieth century, especially after World War II, the science of international law has been adequate, securing such important milestones as the Declaration of Human Rights, the European Union (EU), and the World Trade Organization. But this is no longer enough.

As David Held (among others) believes, global law need not be inimical to the idea of the state, which it should incorporate in some form as it builds a new global community. The state, which is in the process of decomposing and disappearing, deserves our respect, as do the elderly, but we must not rely on it too heavily. It has played its role in the international order, but the time has come to move beyond it.

The excessive concentration of power accumulated by a hypothetical State of Humanity would turn this conjecture into a dangerous and undesirable reality. On the other hand, it is possible to transfer some key principles of federalism, as well as of the EU, a supranational *sui generis* institution that has been able to combine various existing jurisdictional levels well.

The global order does not attempt to eliminate local, national, or supranational orders; rather, it seeks to harmonize them, without appealing to sovereignty. Thus, it must first and foremost inform and illuminate the other orders because, without some common principles it is difficult to
carry out a coordinated supracommunitarian effort. Apart from this important function, the global order must play a complementary and auxiliary role with respect to local systems, regulating certain issues (with exclusive or overlapping jurisdiction) by means of provisions binding on those local orders.

The global order will be an ordo iuris totius orbis, a coherent and necessarily open global legal system, incipient and incomplete in virtue of its complementary nature. This new order must inform the legal systems of other people that compose the global human community. It will serve as a link with local orders, completing them. In Hart's terms, we could say that the global order, unlike international law, should be formed by primary rules or rules of conduct and by secondary rules – that is, rules for the recognition, change, and adjudication of primary rules.

The global order will end up forming an unum corpus, a true pyramid, which we will explain together with the domestic orders (even with supranational ones, as in the case of the EU). If they accept global law, these orders must integrate it in their own ordo iuris. Unlike international law, without global law, local law would be incomplete. There is thus a fundamental distinction between global law and international law. The latter connects the closed and complete orders proper to sovereign, hermetic structures; the global order, on the other hand, creates a legal structure of interrelation and complementarity.

In this way, each order would be represented figuratively by a communicating vessel; it would be perfectly identifiable, having its own existence. These orders would all be connected by global law. Control of the valve that communicates the various vessels – that is, the various national orders – does not belong to the states but to the global order, unlike the arrangement of international law. Incorporating local orders into the global order implies giving up control of the valve to the latter, which will have to assume the task of determining, in accordance with a norm of adjudication, which issues will be regulated or controlled by global law and to what extent. Thus, for example, security, arms, energy, and protection of the environment could be four overlapping areas of global law over which states should cede sovereignty, not just through international treaties.

Moreover, a global legal construct that transcends the idea of sovereignty would allow for the recognition of smaller legal orders, not necessarily national. In reality, after all, self-governance by a great variety of communities according to the principle of subsidiarity is compatible with a complex and flexible framework, equipped with the coercive power necessary to make established norms of the community effective for the
fulfillment of its goals.

1. THE PERSON, CENTER OF THE GLOBAL LEGAL ORDER

The human being should constitute the center of the law in general and of global law. We must recover the notion of person for the law, a notion from which analytical jurisprudence has distanced itself since its beginnings with John Austin. Jeremy Bentham, father of international law, greatly influenced Austin in his utilitarian approach to law, and especially in the twentieth century with Hans Kelsen.

For this great jurist, the physical person, from the perspective of the law, should not be considered in his or her totality – that is, as a biological and physical unity with all his or her functions – but rather insofar as human behaviors are regulated by a set of constitutive norms of rights and duties. Thus, the person is not properly a natural reality (natürliche Realität) but a legal construct created by the science of the law. In this vein, Kelsen concludes, “the so-called physical person is a legal person,” as is the state. The genus would thus be the legal person and the species would be the state or physical person. In this way, the state was personalized, normativized, and reduced to a norm.

Every science, including the law, contemplates a partial vision of reality but not necessarily a reductionist one if it knows how to be integrated with the other sciences. One plus one is two, but “Kelsen plus Kelsen” does not make two “Kelsens.” Kelsen is unrepeatable as a person so that no summation of Kelsen is possible. Does math fail here? No, as long as we do not insist on applying it incorrectly, claiming that because one and one is two, Kelsen plus Kelsen should add up to two Kelsens.

The same happens with law: it cannot be reduced to a set of norms that regulate human behavior, making the person the mere subject of a legal relation. The person is more, much more, even for the law, which focuses specifically on the human being insofar as he or she is affected by matters of justice. The science of the law can never lose sight of the fact that it has been created – established by persons and for persons – so that the person is anterior to it. It is another thing to turn the person into an object or instrument of the science (instrumentum scientiae). Something similar occurs with medicine. A doctor should regard a sick person as a person, not a mere victim of illness. And if he or she wants to be a good doctor, he or she will have to deploy knowledge in a way that helps him or her cure the
ill person, for there is no illness without a person, and the one who dies in the end is the person.

Therefore, the fundamental norm or rule of recognition that validates the other norms cannot be alien to the person as a human being; we cannot prescind from the person in search of a fundamental norm that justifies the legal order. To the same extent Kelsen identifies the state with the legal order, we should identify the person with the legal order. I mean here any order, be it national, international, or global; for the person, and not some norm, is the origin of the law. Not the person as a subject of the law, but the person as such, as a human being – for it is not the law that forms persons but persons who order the law. A reductionist conception of the person, rather than enriching the scientific character of the law, threatens to annihilate it.

Being rational and free, with all this entails, the human person is the protagonist of the law – not only its subject *par excellence* but also its cause and final end. “All law has been constituted for the sake of men,” said Diocletian's *magister libellum*, the jurist Hermogenian, taking up the tradition of classical Roman law.¹¹ Therefore, we can say without a doubt that the law proceeds from the person. This is the golden rule of global law: *ex persona ius oritur*. Not from the state, a theoretical construction created to serve man that has, on occasion, instrumentalized him. Persons are thus authentic “nomophors” – that is, bearers of rights, always and everywhere.¹² People bear these rights not by attribution, concession, or conquest – although sometimes rights have to be fought for¹³ – but by virtue of their nature, essence, substance, or however one calls this intrinsic condition innate to persons.

Thus, it is not necessary to search for a basic norm for the survival of the global order distinct from the person, which is, as we see, its origin. Naturally, this does not mean that there exists within the legal order no *ordo normarum*; it does mean that the fundamental norm of the whole well-constituted order should be that “the law proceeds from the person” and that a law that does not serve the person is not properly a right (*Recht, droit, derecho, dret, diritto*) but something “twisted” (tort), as was the terrible positivism of the Nazi era.

Moreover, if we recover the centrality of the person for global law, abandoned as it was in international law, we should indicate what we mean by *person*. In my opinion, every living human being is a person. Scientists must determine the notion of living human being, because human life is a *factum*, an ascertainable fact. It falls to the scientists and not to the jurist –
much less to the legislator – to determine the moment when human life begins. It is, on the other hand, the duty of men of the law to defend that life whenever possible.\textsuperscript{14} Personhood is recognized, not granted. And it must be recognized wherever a living human being is identified.

Moving personhood to birth in the European civil codes of the nineteenth century, extending \textit{pro beneficio} the unborn human being the status of postnatal human beings,\textsuperscript{15} was a technical, ultimately practical legislative matter attributed to a period of ignorance about human embryonic development, during which human beings at the embryonic stage could not yet be identified as such and thus lacked a name. Today, on the other hand, there is ample consensus that human life begins with fertilization.\textsuperscript{16} To grant the status of person only from the moment of birth is as comfortable for legislators as it is unjust for humanity. Global law considers reality; it eschews fantasy. There are few realities more certain than the life of the human being in the mother’s uterus.

**A. Are Persons Legal Persons?**

This crisis in the notion of person – a crisis specific to the postmodern ethos – is also reflected in the widespread confusion of legal vocabulary. It is apparent in the complex and obscure distinction between a physical person and a legal person – a distinction developed in the Middle Ages\textsuperscript{17} by the canonist Sinibaldo dei Fieschi\textsuperscript{18} (later Pope Innocent IV) and promoted by Hobbes\textsuperscript{19} and by Friedrich Carl von Savigny and Otto von Gierke.\textsuperscript{20} Called originally \textit{corpus fictum}, or \textit{persona ficta et repraesentata}, and later moral person, the similarity of the legal person to physical persons has produced more problems than answers, for the two are completely different in nature. It is especially problematic to try, as Kelsen did, to make physical persons merely a species of the genus of persons.\textsuperscript{21}

A legal person can – and in fact does – have an owner, so it is feasible to apply to it the legal regulations that correspond to slavery and even to ordinary objects. Man, on the other hand, is born free by nature. Moreover, the physical person is also a legal person, in a broad sense, a nomophor. But one cannot treat him as if one were treating a legal person \textit{stricto sensu}, for this would amount to instrumentalizing him, as occurs in Kelsen’s theory. Faced with this terminological confusion, it would be helpful to eliminate from global legislation the expression “legal person” and replace it with other concepts more in keeping with social exchanges, such as institutions,
corporations, and other entities that manifest the existence of a genus completely different from that of persons.\textsuperscript{22} We have even more reason to eliminate the concept of so-called legal quasi-persons (\textit{Quasi-juristischen-Personen}), that is, those societies that do not have legal personhood in the strict sense but are subjects of rights and duties in virtue of enjoying partial legal capacity (\textit{Teilrechtsfähigkeit}).

Well aware that many other solutions exist, I propose replacing the expression “legal person” with the general Latin \textit{corpus iuridicum}, a legal body or corporation, to restore a tradition from Roman law.\textsuperscript{23} These corporations, like legal persons, can be of many types – foundations, colleges, societies – according to their goal and structure. Corporations that enjoy greater stability and importance could be called legal institutions.

It is helpful to distinguish a legal construction properly speaking from what makes the law possible in the first place and should thus be respected and protected by the law as anterior to it: the person. There is moreover a practical criterion for distinguishing these cases: the reality of the human person is perfectly identifiable as such, whereas the legal person depends on the particular attribution of each legal order, which grants personhood according to customs that vary from age to age and from country to country. This practice would generate serious problems for global law. For if anything is asked of global institutions, it is that they enjoy a high degree of acceptance and recognition by humanity and that they not be identified legally, not even by analogy, with the human person.

The great Italian jurist Santi Romano (1875–1947) was right when he affirmed that law, prior to norms or legal relations, requires a unity of structure and organization, an institution.\textsuperscript{24} But it should always be at the service of persons, who should never be confused with the legal structure created by the law. Therefore, \textit{subject of rights} and \textit{subject of legal capacity} are concepts attributable to corporations, but not the concept of the person, which should be reserved exclusively for living human beings.

B. Are Animals Persons?

Finally, human persons are different from other animals. The latter merit compassion, respect, and special protection on the part of human beings and public powers, but strictly speaking they are not nomophors. Therefore, as John Rawls affirms, there is no reason for them to form part of a theory of justice, especially if it focuses on the idea of “contract.”\textsuperscript{25} They can and
should be considered, even legally, a distinct category of things. In this vein, §90a of the German civil code (BGB) affirms expressly that animals are not things: “Tiere sind keine Sache.” Still, to the extent they are not free or responsible, they cannot be legally compared to persons. The animal liberation movement, supported by the utilitarianism of Jeremy Bentham and led by Peter Singer under the slogan “all animals are equal,” should not lead us to the error of comparing ourselves to other animals, reducing the human condition to that of beings that are not responsible. All human beings are animals, of course, but they are also persons, which other animals are not.

Gary L. Francione, who dedicated his book Animals as Persons “to the two hamsters and twelve dogs who taught me the meaning of personhood,” has recently provided a provocative extension of the concept of person to animals (as moral persons). Francione, known for many other publications, defends the principle of equal consideration between human beings and animals, at least with respect to their interest in not suffering. He considers the principle “a necessary component of every moral theory” (p. 45). In effect, he thinks, although the differences between human beings and other animals are many, what is certain is that we share this interest. Therefore, only in cases of conflict of sufferings should the interests of the human prevail over an animal's interests.

But Francione goes a step further: if animals are not things, as they were thought to be for centuries, and they should not be property, then they should be considered moral persons: “if we extend the right not to be property to animals, then animals will become moral persons” (p. 61). This moral personhood would not be similar to human personhood properly speaking, nor does it mean that animals have the same rights as human persons. It does demand, however, that “we accept that we have a moral obligation to stop using animals for food, biomedical experiments, entertainment, or clothing, or any other uses that assume that animals are merely resources, and that we prohibit the ownership of animals” (p. 62).

I agree that we should prohibit certain abusive practices with animals that Francione admirably describes, but it seems to me that his legal argument is unsound. In effect, the fact that animals should not be property in the strict sense (itself a disputed matter) does not necessarily mean that they are persons. This exclusive dichotomy between person and thing takes Francione down the wrong path, to the same dead end to which those who settled the legal status of animals as things were led for centuries. Animals are not, in my opinion, either persons or things. They are simply animals.
They deserve adequate legal status that protects them from abuses and inhumane cruelties.

The legal construct that should be developed to secure the due protection of animals – already supported by Ulpian in the first book of his *Institutiones* – as an extension of natural law,\(^{32}\) far exceeds the scope of this book. But, as I say, it seems to me that recognizing the rights of animals in a strict sense is not the right path, nor is equating them to persons. The solution is found in creating a third way, a *ius tertium*, independent of things and persons alike, which obligates us to treat animals as they deserve, avoiding their suffering as much as possible. In this vein, one can speak of an animal law as a concrete branch of the law, but not of animal rights. The reason is the same given against the concept of legal person – to avoid weakening protection for the essential protagonist of the law: the living human being, the person.

2. PERSONAL DIGNITY, LIBERTY, AND EQUALITY

Persons are distinguished by their genuine dignity, their natural freedom, and their radical equality. These three principles should be scrupulously protected by global law as it shapes and complements other legal orders. Dignity and freedom do not require otherness, but equality does because it includes an element of comparison. Equality highlights man's essential sociability. Persons should be equal before the law because they are equal among themselves in virtue of their natural dignity. So-called legal persons, on the other hand, are equal before the law by legal fiat, and “when the law does not distinguish, neither should we distinguish.”\(^{33}\)

A. Human Dignity

*Dignitas* is the quality of the *dignus* and proceeds from the root *dec-*, which is also the root of the verb *deceit* and the noun *decoration*; it means “what someone deserves.”\(^{34}\) Dignity was a relative concept, not an absolute one,\(^{35}\) for things were thought to be dignified with respect to something. Thus, for example, Plautus (254–184 B.C.), perhaps the first author to use the term in his comedy *Bacchides*, demands the search for such a cook as food deserves.\(^{36}\) Especially since Cicero, who uses the term profusely,\(^{37}\) it referred mainly (although not exclusively) to the republican magistracy which, as public position, deserved greater respect than other offices.\(^{38}\)
this way *dignitas* and *honores* remained linked for centuries – so long that the two terms became synonymous.\(^3^9\)

Some fathers of the church criticized the Roman concept of *dignitas* for being too centered on honor and royalty.\(^4^0\) They based a new notion of Christian dignity on the vocation of divine filiation and on the fact that every man has been created in the image of God. Among them, Leo the Great stands out for having discerned in the fifth century the absolute character of human dignity in virtue of man’s nature.\(^4^1\)

This absolute idea of dignity, no longer theocentric but anthropocentric, would characterize the history of the concept in modernity, beginning with Pico della Mirandola (1463–1494),\(^4^2\) and especially with Kant.\(^4^3\) In his *Metaphysics of Morals*, Kant considers humanity itself (*Die Menschheit selbst*) a thing of dignity (*eine Würde*), inseparably uniting it with personhood (*Persönlichkeit*) and his categorical imperative; as Kant argues, no man may be instrumentalized by another but only regarded as an end in himself.\(^4^4\)

The effective legal absolutization of the concept of dignity was one of the great contributions of the twentieth century to the science of the law. It marks the transition from international law to global law. In effect, dignity attained, after the Nazi genocide, unprecedented support, as reflected in documents like the Universal Declaration of Human Rights (1948),\(^4^5\) the *Grundgesetz* of the German Federal Republic (1949),\(^4^6\) the International Covenant on Civil and Political Rights (1966),\(^4^7\) and the International Covenant on Economic, Social, and Cultural Rights (1966).\(^4^8\) Over the same years, it was also definitively enshrined in such important documents on the social doctrine of the Catholic Church as the Constitution *Gaudium et Spes* (1965)\(^4^9\) and the Declaration *Dignitatis Humanae* (1965), both of the Second Vatican Council.\(^5^0\)

Dignity is thus a metalegal but not legally irrelevant concept, much less a paralegal or antilegal one, for it plays a dispositive role in the law. Person and dignity are two inseparable realities. From this legal perspective, personal dignity is specified as the right of every person to be treated in accordance with justice, especially in accordance with those rights that are inherent: human rights.

Because the human person is the origin, subject, and end of all law, every legal order should recognize and protect the dignity of the person, *fons omnis iuris*. In a hypothetical society in which persons lived as brute animals, there would be no law. Thus, law and dignity go hand-in-hand, like
person and dignity. Without the person, there is no dignity, and without dignity, there is no law. Dignity is to the person what the nucleus is to the cell, what the heart is to the human body. The person, from the law's perspective, acts with dignity – that is, as a person – when he or she acts justly, in accordance with justice. And people live with dignity when they do not lack the food, shelter, education, security, sanitation, work, respect, or freedom necessary to develop themselves as people.\(^5\) Thus, it is the obligation of every society to ensure that everyone within it can live and act with dignity.

Humankind's social nature implies, therefore, that the development of the person is inseparably united to the development of society. Hence, we can speak by extension of a dignified society\(^5\) to refer to those communities in which the inviolable rights of the human person are respected and protected from the first moment of existence until death. Moreover, the fact that social life is not merely incidental for human beings implies that the law must support those natural institutions in which each person should be integrated to flourish as a human being – especially the family, in which the person is formed as a citizen, and the political community itself, in which the person develops as such.

The other organizations and corporations that proceed from man's free will should support and protect, and never diminish, the nature of these two primary social institutions, which are required by human nature. It is appropriate for all men to be born to a determinate family, to develop in a concrete political community in which they carry out their profession, and to contribute to the common good of humanity. These three dimensions – personal, social, and global – as we shall see, should be protected and supported by global law.

Dignity offers the law a window onto transcendence,\(^5\) especially with respect to religious liberty, the first requirement of human dignity.\(^5\) Through that dignity, the law makes contact with ethics, morality, anthropology, and the other sciences of man, retrieving these from the ivory tower in which Kelsen tried to keep them isolated.\(^5\) The remote cause of dignity, which so many of us locate in knowing ourselves to be creatures and children of God, opens the doors of the law to the transcendent, allowing believers of various religions to coexist peacefully under the same legal order with agnostics and atheists. Thus, international law, founded on sovereignty and constructed _etsi Deus non daretur_, would give way to global law, based on dignity and built on _veluti si Deus daretur_.

Because of human dignity, global law opposes the objectification of
human beings in all manifestations (slavery, sexual and commercial exploitation, etc.). It is also opposed to the objectification of the body, which, inasmuch as it is a part of the self, is not a thing but a constitutive part of the human being (pars personae). Individualist decisionism, carried to its logical conclusions and sheltered by the law, leads to the objectification of the human being by treating people as mere “deciding machines” with the freedom to destroy or sell themselves.

In Life's Dominion, Ronald Dworkin does not consider that the expression he uses for his famous book's title is contradictory because dominion requires otherness: a someone (subject) and a something (object). Because human life (object) and the human being (subject) cannot be separated, we must conclude that such putative dominion does not exist. To elevate the will as the subject over the body is to objectify the body, treating it, and the person, as a res. Life is sacred because no one can lord over it as its owner: a decision to destroy the dignity of the person is not a dignified one, much less the source of man's dignity, as Dworkin thinks.

B. Personal Liberty

By nature, people are free, they have no owner. They are born and die without one. In defense of this thought – so simple, clear, luminous, and true – rivers of blood have been poured. And they shall continue to be, for slavery – the exploitation of women and men in its diverse forms – continues to be a reality.

Only animals and things, not persons, can be appropriated. This was the original meaning of Roman libertas, defined at first as a negation rather than an affirmation. But it was not, unfortunately, extended to all men. At the start of his first book of the Institutes, the jurist Gaius says so expressly: the most important division in the rights of persons is that which separates free men from slaves.

In Roman law, sons (liberi) were free and slaves (servi) were not. By extension, cities that did not live in submission to a dominating power were considered free, as the Roman people were in their republican period freed from the ancient monarchy in which the rex acted as dominus. Thus, Octavius Augustus presented himself at the beginning of his reign as pater and not as dominus, as a protector of the republic and not a rex whose dominating voluntas would eliminate citizens’ liberty.

In his Second Treatise on Government, Locke elaborates a notion of freedom founded on the Roman concept but extended to all people: natural
freedom consists in not being tied to any superior power on earth, and radical freedom in society consists in being subjected only to a legislative power established by consensus, not to domination by any other will.\textsuperscript{61}

This negative conception of freedom, focused on the absence of an owner, is significant but secures little. It ensures the minimum vital for the exercise of freedom – the air necessary for people to breathe in their own environment – but it is a prerequisite, not an end in itself. In this negative sense, liberty is absolute, like dignity. No one, although he or she may dominate us, can truly be our owner: he or she would never become more than a tyrant or despot, for there would always remain the stronghold of our interior freedom not to recognize his or her domination. So we could say that, just as by definition a person cannot rob him or herself, neither can one person own another.

Animals that do not have an owner are also free, in this postulated negative sense, but their liberty is neither radical nor absolute, for it is not personal (i.e., corresponding to personal dignity). Genuine personal freedom is a consequence of human dignity, and not vice versa. Because we have dignity, we are free; it is not that we have dignity because we are free. Thus, the fact that a man cannot enjoy his natural freedom (because of illness, immaturity, violence, slavery, etc.) does not imply a loss of dignity, for that enslaved person will continue to be equally valuable.

Because of his absolute and inalienable freedom, each man to his fellows is neither servant nor owner, but person: “\textit{homo homini persona}.”\textsuperscript{62} But this lack of an owner,\textsuperscript{63} which is absolute, should be supplemented with a positive conception of freedom referring to its exercise, which should be robust. It is a demand of human dignity itself that people act freely and according to conscience – in accordance, that is, with personal conviction, protected from any form of external coercion or enslavement to their passions. Thus, people search for happiness and tend to their end by pursuing good and avoiding evil, which for the law is tantamount to acting justly. The expression \textit{bonum et aequum} that appears in the jurist Celsus's definition of law\textsuperscript{64} could be considered a hendiadys, inasmuch as these two words express the same reality: justice, which is nothing but the goodness of what is right.

Because persons are free, they should be responsible. The response of the proper act before another becomes law. That is the fullness of the law: freely promulgating a binding declaration and freely accepting the coercive power derived from a legitimate and responsible rational act. In this way, laws bind people, and people are in turn bound by their own declarations.
and pacts. Freedom without law destroys itself and becomes irrational. The right to freedom is a right par excellence. It is therefore not surprising that Kant – within the framework of an enlightened individualism – inseparably joined freedom and law, defining the latter as the “whole of the conditions under which one's will can coexist with another's according to the universal law of freedom.”

Freedom is the Agora in which we find the law and the person. Without freedom, the person is lost, and the law is silenced. The law requires freedom as much as freedom requires the law. As Locke perspicaciously observes, “where there is not law, there is not freedom.” Law and freedom complement each other, like the elements. Freedom is presupposed by the law (Voraussetzung des Rechts), and the law is the guardian of freedom (der Hüter der Freiheit). Freedom without law degenerates into license, anarchy, and confusion – and into violence. Order and freedom are, for the law, prerequisites for coexistence, solidarity, and understanding. When the law attempts to constrict freedom, as it did in the laws of Nuremberg, it besmirches its name with injustice (Gesetzliches Unrecht). Gustav Radbruch's article, written just after the end of the Second World War, is in this sense emblematic: Gesetzliches Unrecht und übergesetzliches Recht.

Global law should foment and protect the exercise of freedom by autonomous agents, aiming to avoid unnecessary coercion by global structures and institutions. One way to protect this freedom would be to give diverse political communities as well as groups intermediate between the family and humanity the power to make appointments.

C. Equality among Persons

Equality – what Dworkin calls a “sovereign virtue” – should prevail in society with the help of global law. With the same intensity that global law serves universal justice, it should serve equality. Without equality, there is no justice. One could call equality the sister of justice. They are two sides of the same coin. Hence their conceptual proximity: aequus, in Latin, is justice according to equality (cf. the English word fairness).

In effect, if the law is born of the person, as we have defended (ius ex persona oritur), every person, being the origin and source of the law, must be equal before it. This reality makes us bearers of the same human rights – those that emanate from our condition and nature – for we have all been
created equal\textsuperscript{70} and are of equal dignity. Therefore, any discrimination in the fundamental rights of the person on the basis of sex, age, religion, race, or social condition should be eschewed as contrary to law. However, together with our radical equality in dignity, there is a clear differentiation among human beings that makes us unique and unrepeatable – persons. We do not all have the same intellectual, moral, or physical capacities. Nor do we have the same virtues, defend the same values, or pursue the same interests. This fact makes us radically different in our abilities and has direct effects on our wealth, quality of life, and development. But equality is before the law, not with respect to development, merit, or personal virtue. To think that everyone has the pen of a Shakespeare, Cervantes, or Goethe in virtue of being legally equal would be as absurd as thinking that being named Marilyn Monroe, Frank Sinatra, or Robert Redford could improve one's legal position.

Global law must act in three directions: (a) promoting the defense and exercise of human rights in all corners of the world; (b) mitigating the cultural, social, and economic differences that exist among human beings so that they do not produce social divisions; (c) fostering the professional development of people with exceptional abilities (scientists, poets, athletes, musicians, businessmen, inventors) to put their skills at the service of humanity.

Today, the struggle against growing inequalities, and especially the eradication of poverty as totally contrary to the dignity of the person and to the principles of global justice,\textsuperscript{71} is fundamental.\textsuperscript{72} Despite valiant antipoverty efforts by the United Nations, among others,\textsuperscript{73} figures released by the World Bank\textsuperscript{74} are alarming. Data collected in \textit{The Millennium Development Goals Report} of August 2008 show significant accomplishments by the international community in recent years: “The overarching goal of reducing absolute poverty by half is within reach for the world as a whole; in all but two regions, primary school enrollment is at least 90 percent; some 1.6 billion people have gained access to safe drinking water since 1990; the gender parity index in primary education is 95 percent or higher in six of the 10 regions, including the most populous ones; the use of ozone-depleting substances has been almost eliminated and this has contributed to the effort to reduce global warming, etc.”\textsuperscript{75} It is not surprising that the Nobel Prize-winning economist Joseph Stiglitz, in his last press conference at the White House as chairman of the President's Council of Economic Advisers, bluntly observed that “the greatest challenges for an economist now lay in the growing problems of World poverty.”\textsuperscript{76} We must
address not only poverty but also the lack of primary education, shelter, medical attention, and gender equality in many areas of our world – as well as the lack of quality of life necessary for harmonious development according to the principle of equality of opportunity.\textsuperscript{77}

A process of globalization removed from the law that does not scrupulously guard equality can increase the gap between rich and poor. Bound up with this problem is the concentration of global decision-making power, which has remained in the hands of a few people and groups. Equality is contrary to this antidemocratic distribution because, as we shall soon explain, “what affects everyone should be approved by everyone” (cf. part 4). This democratic principle cannot be undermined in society today by the fact that the complexity of decisions requires their adoption by minorities. The current economic crisis is an example of how the concentration of power can become asphyxiating for humanity.

Equality intervenes in the principle of justice of “giving to each his due,” giving “to all the same, which is each person's due” – that is, demanding that the distribution of goods and rights be socially equitable, in accordance with the difference and equality principles, to use Rawls's terms.\textsuperscript{78} I agree with the two rules that Robert Alexy proposes for resolving possible tensions between equality and freedom: (a) if there is no justified reason to require differential treatment, it is necessary to seek undifferentiated treatment; and (b) if there is a justified reason to seek differential treatment, then such special treatment can be demanded.\textsuperscript{79} Ultimately, Alexy is appealing to the Roman concept of \textit{ius singulare} as opposed to privilege, which permitted differential treatment when there was a singular \textit{ratio iuris} or \textit{utilitas} to justify it.\textsuperscript{80}

Against the tendency of international law – which depended on a formal and fictitious concept of equality among states, based on sovereignty and not on dignity – global law rests on a radical defense of the equality of all people, which serves as a real limit on the exercise of personal liberty. It is precisely solidarity among persons and peoples that should set the standard in the relationship between freedom and equality.

\textbf{3. HUMAN RIGHTS, AT THE HEART OF GLOBAL LAW}

Human rights in their current configuration constitute the great victory of modern international law, its highest aspiration fulfilled. This achievement, after centuries of wars and conflicts, is the great contribution of a legal
movement that sprang up from the blood of revolutions and culminated in 1948, just after the Second World War, in the declaration of December 10, 1948. Nonetheless, human rights – the fullness of international law – are for global law only a point of departure, a unique milestone, the beginning of a new course.

In effect, the process of globalization, besides extending the market economy to an unprecedented global scale, directly affects all who inhabit our planet and, therefore, their inherent human rights. The deep knowledge of what happens around the world that comes with new information technology and new means of communication imposes on the global community a duty, not only ethical but also legal, to address injustices around the world and to protect human rights everywhere. Knowledge of injustice on the part of people and institutions capable of eradicating it is, legally speaking, a legitimate title of action based on the principle of solidarity in the framework of global legality. There is no room for excuses appealing to states’ sovereignty and territoriality: silence implies consent. Moreover, as Coke warns, whoever does not impede what he can is considered an accomplice.

Therefore, when a determinate political community for whatever reason becomes incapable of protecting its citizens’ human rights, the international community, conscious of this, becomes ultimately responsible and must act through global institutions. This is clear from article 28 of the Universal Declaration of Human Rights: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

This is ultimately the foundation of global law, which protects people before the political communities and social groups to which they belong, appealing to the equal dignity of all human beings. The Universal Declaration of Human Rights is a witness to the fact that international law, now obsolete, yielded to global law in this universal race for freedom and justice. To the so-called three generations of human rights based respectively on freedom, equality, and solidarity, global law now adds a fourth. This one depends less on additions to some catalogue of rights than on a reformulation of them all, and of the same Declaration, with the hope of realizing global excellence, a condition inherent to the innate dignity of persons.

This reformulation should be based on the indivisible unity of the person as a rights-bearing global citizen and not only (although of course also) on a consensus among peoples. On the other hand, if the international framework
reduces human rights to a matter of mere legality, coexistence inter nationes will become so fragile it will collapse under the first wave of nonconformist fanaticism or unilateral imperialism.

The fact is, it is ultimately impossible to distinguish what is just from what is unjust without distinguishing good from evil: the good insofar as it refers to justice is called the just; and the bad, unjust. Thus, human rights are rooted in the universal ethic that saturates the law. This ethic enables us to speak of a global law that answers to humanity's innate common sense of justice, and to the idea of some human rights as expressions of justice, not mere rules of play approved by consensus for humanity's development. Human rights, like personhood, are not granted but recognized. Thus, additions of human rights should be considered victories for all humanity in the sense that humanity is exalted by becoming more conscious of the inestimable value of the human condition and of the transcendence of the dignity of each person.

4. QUOD OMNES TANGIT AB OMNIBUS APPROBETUR

Human rights are an integral part of global law, but they do not by any means constitute the whole of it – that is, of the legal order of humanity. To harmonize and integrate the distinct orders existing in the world, global law, a sort of order of orders, requires (to use Hart's terms) a rule of recognition or principle of jurisdiction that identifies what should be regulated by this ius universale as a legitimate part of its purview.

If ius ex persona oritur is the golden rule of global law, the rule of recognition would be the silver rule. Its formulation is not new. History, that magistra vitae, has already given it to us: "Quod omnes tangit, ab omnibus approbetur"; what affects everyone should be approved by everyone. Here we find the heart of the democratic system and of Western legal systems more generally. The proof is that it has been used frequently by civil law since the sixth century as well as by common law, especially since the Middle Ages. It is moreover a basic principle of the organization of communities. Decision-making powers should rest with whoever has the ability to solve conflicts. Thus, problems that affect humanity should be resolved by humanity. There is no room for partial solutions or now-obsolete justifications based on sovereignty.

The protection of human rights; the maintenance of peace in the world; the trial of international criminals; the regulation of arms, the environment, and international commerce; the eradication of poverty are issues that affect
everyone and should be addressed by humanity as a whole.

In effect, the *quod omnes tangit* principle justifies what we could call a “global legal domain,” essential to the development of global law. A global parliament (cf. part 6) would take up regulation, in whole or in part, of those issues that affect humanity and only to the extent that they do, thus limiting the sovereign power of states and even transforming it entirely. The principle of subsidiarity – which we will analyze in the next chapter and which plays a determining role in the global legal order, as it has in the consolidation of Europe – would limit the power of this domain, which would bring about overlapping provinces.

5. UNITED HUMANITY

United Humanity would be the most appropriate name for the global institution that should soon succeed the United Nations. The United Nations, that last holdout of modern international law, has failed to escape the straitjacket of the state or the rigid borders of sovereignty. Now, almost seven decades later, we must replace the old conception of a society of states with the new concept of *universitas personarum* – an authentic global community open to all of humanity and structured in different ways, as an expression of the richness and complexity of daily life. On the robust foundation of this new United Humanity, we must build a *novum ius totius orbis*, global law. A simple Magna Carta of United Humanity – the Global Carta or the Global Magna Carta – would regulate the organization of this worldwide institution.

United Humanity must recognize in the foreground the *status quo*. Therefore, current nations and states that wish to form part of it would. These will have to join with communities of other sorts proper to the new global paradigm – public and private entities that, as plenary members, should have a voice and a vote in this capital institution.

The spine of United Humanity will be the Global Parliament, whose provisions will be controlled legally by a Global Tribunal. The Global Parliament would decide which issues fall under the “global legal domain” and to what extent – which issues, that is, would (at least in part) fall under the purview of the global legal order.

Once its jurisdiction is determined – with the ceding of sovereignty that this requires for some subjects, as long as sovereign entities exist in the strict sense – the Global Parliament will create the organizations needed for dealing with the issues under its control: an international disarmament
organization, one for controlling climate change, another for migration, etc. Each institution created by the Global Parliament will have to be located in a different country and will be financed by an independent tribunal with competency over that issue. This tribunal would concern itself with maintaining the proper exercise of the international body's power and with resolving conflicts of jurisdiction between that organization and the other subjects of global law.

In the new Global Parliament, each state would have a vote in its capacity as a member, plus one vote for every 20 million inhabitants it represents – a debatable figure, of course – with a maximum of 25 seats. This limit seems necessary any way the question is considered; without it, the Parliament would be tipped in favor of China and India, which together comprise 2.3 billion inhabitants. But with the established limit, these two countries would thus have a maximum of twenty-five representatives each.

In turn each global citizen – each person who accepts the Magna Carta of United Humanity – would have the right to vote for a global institution so that it can be represented if it reaches 20 million votes. Thus, an institution for the protection of the environment would have 2 representatives if it wins 40 million votes throughout the world, and another for eradicating hunger would have 40 delegates if it received 800 million votes, and so on. Each global citizen will thus be represented by his own state and also by that institution to which he gives his vote. This way, the same global citizens will indirectly end up deciding the real problems that affect humanity, prioritizing their objectives by their votes and the specialized institutions on which they decide.

Clearly, we could go into the practical questions of the organization and functioning of this future global institution, United Humanity. However, I believe that excessive details in the construction phases of global law would obscure a proper understanding of the concept. The basics are clear: we need a global citizenry, represented in an institution called United Humanity, and organized around a Global Parliament, whose decisions, rooted in the rule of recognition and limited according to subject matter, should be legally binding and judicially controllable.

That is, we should take all the good that lies in various national orders without making the whole world a global superstate: global rule of law, yes; a global state, no. Let us aim, then, at a legal regime that is possible, not one that runs merely on a utopian vision – one that seeks above all to achieve justice.

6. CULMINATION: THE NEW PYRAMID OF LAW
The existence and nature of a global legal order imply that all the legal orders of the world should ultimately be interconnected, and not merely through interstate treaties as in international law. This presupposes a change in the conception of legal orders, which would have to be no longer closed and independent but open and dependent, according to the theory of the communicating vessels elaborated at the beginning of this chapter. Global law is not something superimposed on legal orders, nor a sort of swelling in the law. It is the opposite. To speak of global law is to speak of harmony, of equilibrium, of synthesis. So we must approach global law from the law itself because the former is nothing but a further determination of law insofar as it refers to relationships of justice that affect humanity as a whole.

A. Structure of the Pyramid

The famous normative pyramid of Hans Kelsen has already passed into the annals of legal history. Although he himself never referred to it, what is certain is that the Austrian-American jurist conceived laws as forming a hierarchical structure (Stufenbau der Rechtsordnung), in which each inferior norm finds its justification in a superior one, until the vertex is reached, the fundamental norm (Grundnorm), which gives validity and unity to the whole legal order.

It should come as no surprise, then, that this pyramidal image pervaded the Vienna School that he founded and has been used to explain his complex, ever-evolving thought. It is enough to consider the first (1934) and second (1960) German editions of his Reine Rechtslehre, or to contrast these with his English version General Theory of Law and State (1945), or his posthumous work Allgemeine Theorie der Normen (1979). Because if anything can be affirmed of Hans Kelsen, it is that he was a deep and original thinker, one who submitted all his own ideas to constant revision in part because of his nonconformist character, but also in the hope of opening his thought up to common law jurists, who were not originally the audience for his works, as he himself averred.

We, too, shall take up this polyhedral structure, so deeply rooted in the science of law, to explain our position, all from a different perspective than Kelsen's. For if Kelsen's point of departure was the norm, ours will be the person, the true source of all law (fons omnis iuris). In effect, Kelsen's error was to place the state – for him, a personification of the legal order – and not the human person as such at the center of his whole normative
system. Hence his inability to find a firm anchor in his theory, elaborate but weak, for the Grundnorm. Kelsen erred in identifying the legal order with the state and in excessively normalizing the person.93

The pyramid I propose does not need to be inverted, as has been frequently done with Kelsen's. It is, in a certain sense, more stable, firmer, more normal (also in the sense of norms, because these do not become decontextualized, as in Kelsen's theory). The pyramid represents each and every legal relationship, fact, act, transaction, and regulation. Everything fits in it, figuratively speaking. The pyramid's wide base is composed of humanity in its entirety, for although humanity exists, there will be law. This base is elastic and flexible, like humanity itself; it can grow or diminish in size as there come to be more or fewer people in the world, and therefore more or fewer legal relationships.

Each side of the pyramid represents a principle of the law in general, including global law. I have proposed seven because, as I explain in the next chapter, I think there are seven shaping principles of global law. At the pyramid's peak is the human person, the origin and center of all law. Between the base and the peak would fit a great variety of institutions created for society's development and peaceful coexistence: marriage and the family, companies, parliaments, tribunals, and political, scientific, religious, and sports communities, etc.

Therefore our pyramid, unlike Kelsen's, would not comprise superimposed normative layers, each dependent on another up through the fundamental norm (Grundnorm), but rather a wide base in which each point – that is, each person – would be projected in the apex. Our pyramid, then, is not normative, like Kelsen's, but ultimately personal, social, and human. Its defining characteristic is its uniqueness – unlike Kelsen's, whose distinctiveness needed to be imposed by regulation, that is, by the state, or equivalently, by the constitution. It integrates the local and the global across all existing and developing branches of law – from sports law to the laws of the EU from private equity and intellectual property laws to environmental laws – for what defines our pyramid is its personal character.

B. Legal Three-Dimensionality

Like all polyhedrons, our legal pyramid is also three-dimensional; that is, each of its points can be specified in terms of three numbers within a certain range (longitude, latitude, and depth). Its being three-dimensional lends the law a certain realism, for this is the ordinary way to understand real
objects. This legal three-dimensionality was absent, for example, in the proper structure of legal norms proposed by Kelsen. For normativism, even if it is dressed up as a polyhedron, is essentially two-dimensional, polygonal. It distorts reality and betrays a sort of reductionism, although this was never precisely what Kelsen sought.

To this spatial three-dimensionality we should add, as Albert Einstein\textsuperscript{94} did in his theory of relativity, the dimension of time, which so affects the law that we could say each epoch has its own law (\textit{cuius tempora eius ius}).

If we take as our point of departure the jurist Ulpian's centuries-long definition of justice as “the constant and perpetual will to give each his due,”\textsuperscript{95} the law would not be anything but what is due (\textit{ius suum}) to each (\textit{cuique}), that is, what corresponds to each person. The three dimensions of the law to which we refer affect the \textit{cuique}, the law's subject as such. In effect, the law, always personal, corresponds to a determinate person (individual dimension) or to a group of persons (social dimension), or to the totality of persons – humanity as such (universal dimension). This three-dimensionality has legal relevance in itself, in the sense that it is not the same to apply the law individually, socially, or universally. When the law is applied three-dimensionally, it is applied fully, and one can speak in a strong sense of a complete legal order. So long as states do not take up global law, the legal order of the state will continue to be incomplete insofar as it does not take into account the person as a member of humanity.

Thus, the “I” (\textit{ego}) of the individual dimension, the “we” (\textit{nos}) of the social dimension, and the “all” (\textit{omnes}) of the universal dimension have different legal effects, for they affect the law in different ways. The three dimensions are interrelated by being essentially personal, but they are qualitatively distinct. When the individual legal dimension takes leave of the social, it falls into legal individualism, and the law closes itself to solidarity. When the social dimension does not take into account universal dimension, it falls easily into imperialism, which seeks to impose the criterion proper to some political community onto the global community. If the universal dimension does not take into account the other two, personal rights and self-governance of various institutions are threatened as the world becomes a jungle governed beyond the law's reach.

To the individual dimension corresponds individual human rights (the right to life, to reputation, etc.), but also any private interpersonal legal relationship born of an agreement – in general, every law that does not require for its existence more than two persons, that is, a bilateral relationship, because without such a relationship the law would not exist because there would be no other. To put it concretely, the law began with
Eve, not with Adam. When Adam lived alone, like Robinson Crusoe, he did not need the law. In other words, although the ego is what characterizes this dimension, given the intrinsic otherness of the law, it always requires, unlike morality, a thou. Hence, to this individual dimension belong also agreements *inter personas*; contracts, but not every agreement *inter partes*, because agreements between institutions, by requiring more than two people, would be part of the next dimension.

The second dimension of the law is the social, which corresponds with the person acting in the bosom of the community or communities of which he or she is a part, as the social being he or she is. This dimension allows humankind to develop its social nature under the law's protection. It is, then, the dimension of the *we*, reflected historically in famous expressions like *Senatus Populusque Romanus*, which shaped the Roman Republic, or *We, the People*, the unbeatable beginning of the U.S. Constitution. The social dimension operates with at least three persons.

In effect, what is specific to this social dimension is institutionalization (parliaments, tribunals, companies, and groups) before agreements made in the individual dimension. This dimension makes it possible for legal relationships to be effective with third parties and for the law to be applied coercively, going beyond mere voluntary agreements. Between two people there can be the use of force but not legal action. That is why legal procedure has a triangular structure, requiring the existence of at least three persons: two parties and a judge. In this dimension we also find the law, an imperative expression of the will of a group in defense of the general interest and the common good. Thus, so-called legal persons, whom we shall call corporations (or institutions, in the case of more stable corporations), also belong in this category.

Many areas of public law operate in this dimension (constitutional law, criminal law, civil procedure, tax law). Private law also operates, for example, in the law of clubs or companies. What is public and what is private, for our purposes, is differentiated only by the goal of the relationship: in the realm of objectives that benefit the community, the law is public; if the goal is only a personal benefit, the relevant law is private. In our pyramid, this social dimension corresponds with the pyramid's height, whose magnitude depends on the number and variety of legal–social relationships.

The third dimension, which generates the global law of the twenty-first century, is the universal dimension. This one allows us legally to treat all humanity as the totality of members of the human species. It deals with a particular *we* inasmuch as it includes every person without exception. This
makes global law, which operates in this dimension and is attended also by the other two dimensions, essentially a law *ad intra* and not *ad extra*, as is international law; it thus differentiates the nature of the two kinds of law.

As a law preferably among states – that is, among institutions – international law has been developed from the dimension of the *we*, under the *Diktat* of international treaty, without finding support in the universal dimension. Thus, the image international law offers is polygonal and two-dimensional, not polyhedral. Humanity's first serious attempt to reach this universal dimension was the 1948 Declaration on Human Rights. Unfortunately, that only went half the distance.

The law is slow to take the universal dimension into account because of the sovereign character of states. Sovereignty in its most genuine sense – an exclusive and exclusionary power – keeps the *we* of the various states from turning into the universal *all* whenever humanity's welfare requires it. The universal dimension will make it possible to overcome the idea of war among states, creating a world order that guarantees peace and security of all people and regulating relations among political communities and states.

This universal dimension is related in a very particular way to the fourth dimension, time, inasmuch as humanity is composed not only of those who live now but of those who did and will. The law is intimately linked to the past of those who were and the future of those who will be. Thus, the duty to create a more just world than the one we have known is intrinsic to humanity, to this universal dimension, which gives depth to universal relationships of justice.

I will appeal to numbers to explain what I am saying. The number one, to which is attributed the unity and principle of things, represents the individual dimension, which, given otherness, would incorporate also the number two, the first and only even prime number, corresponding to the first human couple. The law began with that couple, not before. The number three represents the social dimension because it is required to create corporations and institutions that establish their will by majority vote. Three also represents the existence of the modern legal order in the current sense of the term.

The universal dimension, in which global law is developed, is represented by the number nine. This is a composite number, whose factors include one and three, which correspond precisely with the individual and social dimensions. Global law, in the universal dimension, projects onto humanity these two dimensions, finding a harmony that international law, represented by the number six, never could. International law dethroned the person from his original position with the goal of personifying the state and,
instead of being founded in the social dimension, applied to international relations the individual relation.

Therefore, for international law to exist, only two political communities are necessary (six people organized in two sovereign states). For global law to exist, nine persons are needed in at least three institutions. And this is the case because the application of law by tribunal, as we have said, requires a triangular structure (two parties and a judge), which international law does not require because of the sovereignty of states. Sovereignty keeps international law from turning into a global legal order, which passes from six to nine. This is our number.

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2 For Held, globalization does not entail the disappearance of the idea of the nation-state but a change of the forms of political power, as well as a reconfiguration of the very concept of the state; *cf.* David Held, *Global Covenant. The Social Democratic Alternative to the Washington Consensus* (Polity Press, Cambridge, Malden, Massachusetts, 2004), p. 6: “Globalization is not associated with the end of the nation-state.” A bit later he concludes: “This leads to a much more complex political picture than the view that globalization engenders the death of the modern
state.”


4 On this, see Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton, New Jersey, Oxford, 2004), p. 134. Despite everything, the author warns with good reason that a system of those characteristics alone can be implemented only if certain conditions of homogeneity and trust are present, as is the case with the European Union. On the other hand, this is not true in the world as a whole: “Global networks, by contrast, must often operate with much lower levels of trust and homogeneity among their members” (p. 134).


The concept of physical (natural) person means nothing but the personification of a complex of legal norms. Man, an individually determined man, is only the element which constitutes the unity in the plurality of these norms.


Hermogenian, *Digest* 1.5.2: “cum igitur hominum causa omne ius constitutum sit….” In his *Institutiones*, Justinian refers to this same sense of person as *causa iuris* (1.2.12), affirming that little can be known about the law if the person is ignored: “nam parum est ius nosse si personae quarem causa statutum est ignorantur.”

Nationality, therefore, should not be a ground for exclusion.


Cf. by Natalia López Moratalla and María J. Iraburu Elizalde, *Los

17 Roman jurists did not use the concept of person in this sense. An antecedent can be found in the eighth book of the institutiones of Florentinus, a jurist of the era of the emperor Marcus Aurelius, taken up in Digest 46.1.22. With regard to aditio hereditatis, the expression “persona vice fungi” is used; it is then taken up by the Medievals: quia hereditas personae vice fungitur, sicuti municipium et decuria et societas. On the development of the concept of the legal person the studies of Riccardo Orestano continue to be valuable, Il problema delle persone giuridiche in Diritto romano (G. Giappichelli, Turin, 1968) and Azione, diritti soggettivi, persone giuridiche. Scienza del diritto e storia (Il Mulino, Bologna, 1978).

18 Paradigmatic is Sinibaldo dei Fieschi's phrase in his commentary on the Decretals, Apparatus in Quinque libros Decretalium (Johannes Herbort de Selgenstat; impens. Johannis de Colonia, Nicolai Jenson sociorumque, Venice, 15 June 1481), c. 57. X. II.20: “Cum collegium in causa universitatis fingatur una persona.”

19 Fundamental to this history of the concept, it seems to me, is the passage in De cive, cap. 14.4, in which Hobbes compares institutions with men: “quia civitates semel instituta invenunt proprietates hominum personales.”

persons.


[22] In fact, Kelsen rightly uses the model of the corporation (*Körperschaft*) to explain his concept of legal person; *cf.* Kelsen, *Reine Rechtslehre* (2nd ed., Verlag Franz Deuticke, Leipzig and Vienna, 1960; repr. 1967), § 33, p. 178: “Das Wesen der von der traditionellen Jurisprudenz der sogenannten physischen Person gegenübergestellten juristischen Person lässt sich am anschaulichsten durch eine Analyse des typischen Falles einer solchen juristische Person, der juristische Personalität besitzenden Körperschaft, aufzeigen” [The essence of the so-called juristic person, juxtaposed by traditional jurisprudence to the physical person, is most clearly illustrated by an analysis of the typical case of such a juristic person, namely of the corporation, *Pure Theory of Law*, p. 174].

[23] The names *corpus* and *universitas* were used generally, the first being older than the second and of obscure etymology. The parallelism between *corpus* and the human body is clear insofar as the latter is also a set of harmonized members. As Riccardo Orestano observes in *Il problema delle persone giuridiche in diritto romano* (Giappichelli, Turin, 1968), p. 170, these terms acquire “un valore particolare, nella misura in cui sono stati idonei a riassumere come parametri concettuali i caratteri delle situazioni unificate.”


[25] *Cf.* John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, Massachusetts, 1971; 2nd ed., 1999), p. 448: “Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include
them in a natural way.”


32 Cf. the already mentioned text of Ulpian, *Digest* 1.1.1.3, which extends natural law to animals because the law is not peculiar to the human species, but to all animals: “nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est.” On this text, see Tony Honoré, *Ulpian, Pioneer of Human Rights* (2nd ed., Oxford University Press, Oxford, New York, 2002), p. 80.


34 The Greek term *axioma*, that is, “what is deserved,” is different inasmuch as it emphasizes more valor (*axia*) than honor, proper to Roman dignity. On the concept of dignity in ancient Rome and its corresponding Greek “*axioma*,” as well as its later development, see Viktor Pöschl, *Der Begriff der Würde im Antiken Rom und später* (Carl Winter Universitätsverlag, Heidelberg, 1989).


36 Plautus, *Bacchides* 1.131: “pro dignitate opsoni haec concuret cocus.”

37 Consider book IV of his *Epistulae ad familiares*, in which Cicero uses the term on eighteen occasions, especially in *Ad familiares* 4.14, where he expresses the ambiguity of the term: “Ego autem, si dignitas est bene de re publica sentire et bonis viris probare, quod sentias, obtineo dignitatem meam; sin autem in eo dignitas est, si, quod sentias, aut re efficere possis aut denique libera oratione defendere, ne vestigium quidem ullum est reliquum nobis
dignitatis.”

38 See Wolfgang Kunkel and Roland Wittmann, Staatsordnung und Staatspraxis der römischen Republik II. Die Magistratur (Beck, Munich, 1995).

39 See title 1 of book 12 of the Codex Justinianus completed De dignitatibus, as well as, among other things, the imperial constitutions of Constantine: Codex Justinianus 12.1.2, A.D. 313–315: “Neque famosis et notatis et quos scelus aut vitae turpitudo inquinat et quos infamia ab honestorum coetu segregat, dignitatis portae patebunt”; and Codex Justinianus 12.1.3, A.D. 319: “Maior dignitatis nulli debet circa prioris dignitatis seu militiae privilegia praeiudicium facere.”

40 For example, Minucius Felix, Octavius 37.10 (Jacques Paul Migne, Patrologia Latina III, col. 0354 A), is very critical of human vanity because all of us are born equal and only virtue distinguishes us: “Fascilius et purpuris gloriaris? Vanus error hominis et inanis cultus dignitatis, fulgere purpura, mente sordescere. Nobilitate generosus es? Parentes tuos laudas? Omnes tamen pari sorte nascimur, sola virtute distinguimus.”


42 See the famous work by Giovanni Pico della Mirandola, De hominis dignitate (edited by Eugene Garin, Vallechi Editore, Florence, 1942), pp. 101–165. Pico della Mirandola defends the idea that the foundation of human dignity is rooted in God's creating man of indeterminate form (indiscretae opus imaginis), in such a way that man is the maker of his own nature and, as a free being, can become what he wishes to and can make himself become whatever he wants to be: “Definita ceteris natura intra praescriptas a nobis leges coercetur. Tu, nullis angustiiis coercitus, pro tuo arbitrio, in cui manu te posui, tibi illam praefinies” (131r at end, p. 106).”

43 Cf. on the history of this concept Gregorio Peces-Barba, La dignidad de la persona desde la filosofía del Derecho (Dykinson, Madrid, 2003) and Ralf Stoecker (ed.),


Preamble: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”; and art. 1: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” ([www.un.org](http://www.un.org)).

Cf. art. 1.1 Grundgesetz für die Bundesrepublik Deutschland (23.V.1949): “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.”

Preamble of the International Covenant on Civil and Political Rights, adopted and opened for ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976: “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person...” ([cf. http://www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm)).

In the same terms as the previous document: Preamble of the International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.
entry into force 3 January 1976.


50 Cf. *Declaratio de libertate religiosa “Dignitatis Humanae”* (7.XII.1965), no. 1 (www.vatican.va), which grounds the right of religious liberty; that is, immunity from coercion in religious matters, on the dignity of the person (cf. no. 2).


53 In this vein, Benedict XVI, *Encyclical Letter Caritas in veritate*, 29 of June of 2009, no. 42 (www.vatican.va): “The truth of globalization as a process and its fundamental ethical criterion are given by the unity of the human family and its development towards what is good. Hence a sustained commitment is needed so as to promote a person-based and community-oriented cultural process of worldwide integration that is open to transcendence.”

54 The fact that religious liberty is found at the very heart of the origins of the United States has favored enormously the cohesion and development of this great American power. Cf. the first amendment to the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…” An antecedent appears in *The Virginia Statute for Religious Freedom*, redacted in 1779 by Thomas Jefferson: “[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or
belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities” (cf. The Avalon Project, Yale Law School, New Haven, Connecticut, http://www.yale.edu/lawweb/avalon/avalon.htm).


56 Ulpian, *Digest* 9.2.13 pr., speaking of the *lex Aquilia*, observes in book 18 of his edict commentary that no one is the master of his own members: “Dominus membrorum suorum nemo videtur.” Ronald Dworkin has a different view, on which taking seriously individual responsibility in politics entails a recognition of the rights to abortion and euthanasia. *Vid.* Ronald Dworkin, *Life's Dominion. An Argument about Abortion, Euthanasia, and Individual Freedom* (2nd ed., Vintage Books, New York, 1994) p. X: “If my arguments are right, we must learn new lessons about how to take individual responsibility seriously in politics, beginning with abortion and euthanasia, and ending we have no idea where.”

57 Ronald Dworkin, *Life's Dominion. An Argument about Abortion, Euthanasia, and Individual Freedom* (2nd ed., Vintage Books, New York, 1994), p. 239: “Because we cherish dignity, we insist on freedom, and we place the right of conscience at its center, so that a government that denies that right is totalitarian no matter how free it leaves us in choices that matter less.” In effect, a government that denies the right to freedom of conscience is totalitarian, but only a poorly conceived freedom of conscience could justify euthanasia and abortion because they are totally contrary to the dignity of the person. Freedom of conscience has a clear limit, which is the destruction or annihilation of one's own or another's conscience. And in the case of abortion or euthanasia, this is precisely what happens.


59 Cf. Gaius, Institutes 1.9: “Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.”

60 Cf. Álvaro d’Ors, Derecho privado romano (10th ed., executed by Xavier d’Ors, Eunsa, Pamplona, 2004), § 8, p. 43.

61 John Locke, Two Treatises of Government (1690), The Second Treatise, Chap. 4, § 22 (Cambridge University Press, Cambridge, New York, 1999), p. 283: “The natural liberty of man is to be free from any superior power on earth (…). The liberty of man in society is to be under no other legislative power, but that established by consent.”

62 Cf. the aphorism homo homini persona, in Álvaro d’Ors, Derecho y sentido común (3rd ed., Civitas, Madrid 2001), p. 118, and in Nueva introducción al estudio del Derecho (Civitas, Madrid, 1999) p. 23. Man is to other men a person. Cf. Seneca, Epistulae morales 15.95.33: homo sacra res homini. This maxim proceeds from the ancient idea of homo homini lupus, which is found in Plautus, Asinaria 4.88: lupus est homo homini, non homo, even if it was Thomas Hobbes who made it famous in De cive (praefatio, 1.12; and 5.12).

63 For Christians, not even God is the owner of men, but rather their creator and loving father, cf. Paul of Tarsus, Epistle to the Romans 8.14: “Quicumque enim Spiritu Dei aguntur, hi filii Dei sunt,” and Epistle to the Galatians 4.7: “Quoniam autem estis filii, misit Deus Spiritum Filii sui in corda nostra clamantem: Abba, Pater!”

64 Celsus-Ulpian, Digest 1.1.1.


vereinigt werden kann.”


70 *Cf.* on this, the American Declaration of Independence (1776): “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” Nonetheless, these precious words were compatible, sadly, with the legal recognition of slavery.


74 Recent data published in August 2008 by the World Bank shows that 1.4 billion people in developing countries lived, in 2005, on less than $1.25 per day (i.e., one in every four), whereas twenty-five years ago, in 1981, there were 1.9 billion (one in every four). The figures are chilling but also encouraging because they show that, thanks to international support, important advances have been made in the reduction of poverty. It has been decreasing slowly, going from 52% of the world's developing population in 1981 to
26% in 2005, which means that in those twenty-five years, the number of poor people diminished by 500 million. Cf. the work of Shaohua Chen and Martin Ravallion, *The Developing World Is Poorer Than We Thought, But No Less Successful in the Fight against Poverty* (1 August 2008), published on [www.worldbank.org](http://www.worldbank.org).


**78** Cf. John Rawls, *A Theory of Justice* (2nd ed., Harvard University Press, Cambridge, Massachusetts, 1999) § 11, pp. 52–56, *Political Liberalism* (expanded edition Columbia University Press, New York, 2005), pp. 5–6; and *Justice as Fairness. A Restatement* (Harvard University Press, Cambridge, Massachusetts, 2001) § 13, pp. 42–50. His two postulates appear on p. 42 of the final version. “(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).”

80 Cf. Paulus, *Digest* 1.3.16: “Ius singulare est, quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est.” Cf. also Iulianus, *Digest* 1.3.15: “In his, quae contra rationem iuris constituta sunt, non possimus sequi regulam iuris.” The two jurists are comparing the *ratio iuris generalis* proper to the *ius commune* with the *ratio iuris singularis*, constitutive of the *ius singulare*. Distinct from singular right, composed basically of benefits, is privilege – whether favorable or not – completely contrary to the principle of equality because it has its origin not in a *ratio iuris* but in the *voluntas legislatoris*. Cf. its prohibition in the Law of the Twelve Tables 9.1 (of the fifth century B.C.): “Privilegia ne inroganto” (Cicero, *De legibus* 3.4.11).


84 Cf. on this Antonio-Enrique Pérez Luño, *La tercera generación de Derechos humanos* (Thomson Aranzadi, Cizur Menor, 2006), p. 34.

85 This is how Benedict XVI described it before the General Assembly of the United Nations, in his speech on 18 April 2008, on the occasion of the sixtieth anniversary of the Universal Declaration of Human Rights: “Today, though, efforts need to be redoubled in the face of pressure to reinterpret the foundations of
the Declaration and to compromise its inner unity so as to facilitate a move away from the protection of human dignity towards the satisfaction of simple interests, often particular interests. The Declaration was adopted as a ‘common standard of achievement’ (Preamble) and cannot be applied piecemeal, according to trends or selective choices that merely run the risk of contradicting the unity of the human person and thus the indivisibility of human rights” (www.vatican.va).


87 After China and India, which would have twenty-five seats each, the next best represented country would be the United States, with sixteen seats (fifteen for its 300 million inhabitants plus the one given each state); Indonesia would have thirteen; Brazil, ten; Pakistan would have nine; Russia and Bangladesh, eight; Japan, seven; Germany, Vietnam, and the Philippines would each have five; four seats would go to France, the United Kingdom, and the Democratic Republic of Congo; Spain, Sudan, Argentina, and Columbia would have three; Venezuela, North Korea, Romania, Yemen, two; and Guatemala, Ecuador, Angola, Senegal, the Vatican, one. And so on with the other 200 states. If the European Union acted as such, setting itself up as a global institution, it would have twenty-four seats (for its 490 million inhabitants) and twenty-seven for being the union of twenty-seven states – fifty-one, but it would be reduced to the maximum permitted each state, twenty-five. This same scheme would apply to various alliances among states that could arise in the future.


95 Ulpian, *Digest* 1.1.10 pr: “Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.”

96 *Cf.* On this Ulpian, *Digest* 1.1.1.2: “Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem.”
7 Legal Principles of Global Law

1. RULES-BASED PRINCIPLES AND PRINCIPLED RULES

Global law is configured as a legal order of principles. Whether the principles that I propose are accepted to either a greater or lesser degree will significantly depend on their incorporation into the Magna Charta of Humanity, once global law fully functions as a cohesive legal order. Until that time, the mission of principles will be to illuminate and inspire the new global law as requirements of justice in light of the reality of globalization.

I use the concept of *principle* here broadly in keeping with the etymology of the Latin *principium*, which means beginning, initiation, or origin. It is a compound of the adjective *primus* and the verb *capere*, and it means “the first thing it takes to realize a project.”¹ Thus, the principles I propose are the first tools needed to shape a new legal global order. Articulated in brief statements, they appear here as rules, but that is not exactly what they are. Here I suggest a taxonomic distinction.

A rule – *canon* in Greek, *kanun* in Arabic – is a *brevis rerum enarratio*.² Laws are not derived from rules (*non ex regula ius sumatur*) but rather rules from laws. Thus, the flow of any jurisprudential system ultimately leaves a deposit of legal rules. So it was with Roman law – a jurists’ law (*Juristenrecht*) in which rules proliferated.³ The same is true for common law, which even incorporated the expression *rule of law* as a guarantee of rights, as opposed to civil law systems, which opted for the German concept of a state of law (*Rechtsstaat*).

This is not the place to take sides in the philosophical debate over the importance of principles and rules. That discussion gained international prominence with Ronald Dworkin's⁴ critique of Herbert Hart's “unprincipled” positivism⁵ and the latter's subsequent reply accentuated their differences. Hart acknowledged that he had effectively neglected principles: “I now agree that it is a defect of this book that principles are touched upon only in passing.”⁶ I agree with Dworkin that principles form an essential part of the law and that because they shape the whole of the legal order they help resolve what he calls hard cases. Another important
debate took place between Ronald Dworkin and Robert Alexy over the
German legal philosopher's splendid book on the theory of fundamental
rights.\(^7\)

My own position is closer to Alexy's than to Dworkin's. Unlike Alexy, I
do not (at least with respect to global law) consider the distinction between
principle and rule to be “the basis for a theory of constitutional justification
and a key to the solution of central problems of constitutional rights
document.”\(^8\) In fact, the two are so closely related that one could speak of
principled rules and rules-based principles. “Pacta sunt servanda” would
be a rules-based principle, and “nulla poena sine lege” would be closer to
a principled rule. I do not think we are rationally required to impose strict
limits on principles and rules, because doing so would make them lose their
characteristic freshness. It is a different question whether some concrete
legal order (e.g., the Federal Republic of Germany) should explicitly
enshrine some distinction to apply basic constitutional rights more
effectively.

There is a clear hierarchy among principles, with some standing out
above others. Thus, the notion of principle leads inexorably to the ideas of
unity and simplicity. Principles must be in harmony, never in contradiction;
with rules, on the other hand, there can be exceptions. Indeed, the exception
proves the rule (exceptio confirmat regulam). Thus, rules are shaped
gradually by induction. As rules become principles, exceptions become, if
you will, more exceptional.

Principles and rules are similar because just as rules are by nature
instrumental, principles, when applied, become tools of the law. A rule is an
instrument for drawing a straight line to indicate the direction to be
followed. Thus, although a principle marks the beginning of the road, a rule
indicates which direction we should take.\(^9\) It marks out the destination. So it
is not surprising that the two should be easily confused. Principles operate
deductively, whereas rules are produced inductively by abstracting from the
casuistry of jurisprudential solutions. Once both are created, it is
complicated to determine whether we deal with one or the other – whether
the road was originally traveled in a principled direction or by following
rules. Something similar happens when we travel fast on the highway in one
direction or another; whether we are coming or going, the landscape looks
the same.

In the application of the law, rule, principle, and norm have often been
used synonymously. This shows the wide gap between theory and practice.
On the subject of international arbitration of investments, for example,
consider the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” of the International Center for Settlement of Investment Disputes (ICSID). In the Spanish version of article 42(1) in fine, the phrases “normas de Derecho internacional privado” and “aquel las normas de Derecho internacional” are used; in French, on the other hand, norma is translated in one place as “rule” and in another as “principle” – “les règles relatives aux conflicts de lois” and “les principes de droit international en la matière.” And in the English version, both words are merged into “rule”: “rules on the conflict of laws,” “rules of international law.”

For the past few years, David Held has referred to eight “cosmopolitan principles” that express values to be applied universally for the protection of each person as a member of humanity.10 The principles he proposes – more sociopolitical than legal – are in agreement with those proposed here on the centrality of the person: “The first principle,” Held explains, “is that the ultimate units of moral concern are individual human beings, not states or other particular forms of human association.”11 Hence my principles and his are largely complementary because they focus on the same reality from different perspectives.

2. PRINCIPLES COMMON TO INTERNATIONAL AND GLOBAL LEGAL ORDERS

I propose seven primary principles for global law to shape all legal orders. Many others could doubtless be added. But I think all of them can ultimately be reduced to one of the seven that I propose. If pressed, I would say they all proceed from the principle of justice, which effectively includes all the others.12

The first three – justice, reasonableness, and coercion – are common to international law as well as global law, for they are part of the law's essence: a law that does not serve justice, that is not rational, or that cannot be imposed coercively simply is not law. Together with these, the principles of universality, solidarity, subsidiarity, and horizontality specify the nature of global law. These global principles are opposed respectively to the principles of totality, individuality, centralism, and verticality, which have been the foundation of modern international law. From each of these principles, and especially from the proto-principle of justice, are derived many others – the principles of property, security, legality, proportionality –
that can also affect global law.

The metaphor of a portrait can help us understand how these principles are related. In a few brushstrokes, a good artist can capture the features of a person's face. The strokes follow one another consecutively, for they are interrelated. The first is hardly finished when the next is being planned. After a number of delicate brushstrokes, but not too many, anyone can recognize the subject portrayed. Something similar happens with the principles. Some recall others, and it is difficult to establish precisely the border that divides primary from secondary principles, the painting's essential features from the baroque brushstrokes that adorn it.

A. Principle of Justice

This is a teleological principle—a real-life philosopher's stone that allows us to convert reality by a sort of legal alchemy into an object of the law. Justice is a consequence of man's social nature, his need to live in society, which requires establishing concrete social orders.

All law – including global law – aspires to fulfill the principle of giving each his due (ius suum cuique tribuere), whose validity has been recognized for centuries. In the twentieth century, it was enriched and clarified first in the work of Hans Kelsen and John Rawls, who have led the way in contemporary debates on justice.

Kelsen approaches justice from the axiological relativism reigning in Europe between the world wars. Thus he considers justice an irrational idea, unrelated to the science of law, sentimental and susceptible to different formulations. He gave an account of his own formulation in a farewell lecture titled What Is Justice?, delivered at the University of California in Berkeley on May 27, 1952. “And, indeed, I do not know, and I cannot say what justice is, the absolute justice for which mankind is longing. I must acquiesce in a relative justice and I can only say what justice is to me. Because science is my profession, and hence the most important thing in my life, justice, to me, is that social order under whose protection the search for truth can prosper. ‘My’ justice, then, is the justice of freedom, the justice of peace, the justice of democracy – the justice of tolerance.”

Kelsen's denial of the existence of objective and rational principles of justice (at least ones consistent with his own conceptions of science and rationality) led him to posit a sharp distinction between justice and the science of law properly speaking, with the goal of preserving the scientific
enterprise from ideology. He preferred to unite the law inseparably to the state rather than to justice, arguing that the latter was simply a matter of subjective valuations. This was a gross error.

I, on the other hand, do not believe that “to give each his own” is a matter of ideology and thus a maxim incompatible with science, much less (as Kelsen maintained) an obscure tautology. Of course, it is a separate question whether ideological elements might emerge in determining “what is given,” “how it is given,” and “to whom it is given” – elements that may need to be melted and separated in the crucible of science to differentiate objective norms of justice from those subjective feelings about justice all human beings have. Still, there is an unbridgeable chasm between that and the wholesale denial of the objectivity of justice – one into which Kelsen himself was always about to fall. He was saved only by the fact that his scientific relativism did not degenerate into skeptical indifference or apathy because, although for him justice was not scientifically measurable, he believed it to exist subjectively in every person's thought and concretely in his own, as his writings make clear.

Global law presupposes the idea of justice, without which there is no law, and it aims to make of justice a science: the science of the just and the unjust; of distributive justice and corrective justice, according to the famous Aristotelian division. This science must be compatible with the various theories of justice, among which John Rawls stands out. His work *A Theory of Justice* (1971; 2nd ed. 1999) concerned more with methodological questions than with substantive ones, marked a milestone in the history of twentieth-century legal thought. To be precise, his and other theories are attempts to make of justice a science; they establish objective criteria for discerning what is just and what is unjust. For that reason, every science of justice must ultimately include a systematization of its legal sources. There is no complete theory of justice that does not also determine the proper sources of law.

The reader will notice here points of agreement with Rawls, especially inasmuch as we both propose alternatives to the reigning utilitarianism. Even so, the perspective from which I approach justice is fundamentally legal, insofar as it applies to the goals of global law, and not political, in the wider sense intended by the Baltimore philosopher. Moreover, I do not think that the classical notion of justice has been superseded, although it has been clarified by Rawls's more liberal notion based on the first principle of greatest equal liberty and the second principle of greatest benefit (which
correction of social and economic inequalities). Liberty as Rawls understands it plays an essential role in a political theory of justice, but as Hart pointed out, it need not have priority over other values in that realm, much less in legal theory.

The principle of justice legitimates the intervention of the law in society. If the law acts more frequently than necessary – that is, unjustifiably – then society becomes overregulated. Societies should be properly ordered by law but not overregulated, as they often are today. We often suffer from vain, capricious, and all-embracing legislation that chokes civil society in the interest of security. Excessive bureaucracy and the legal instrumentalization of power are not idle worries but real threats that loom daily in our lives. What happens when the law hounds us, seeking to regulate, even preventively, what we think, do, and aspire to?

To regulate all aspects of life is tantamount to turning the law, reduced to rules, into society's master and lord. It is an attempt to make justice the exclusive patrimony of jurists or, even worse, the untouchable inheritance of a governing “economocracy.” In an overregulated society, jurists aim to determine society's development completely, when in fact the law should serve justice. “Servus iustitiae ius est,” one could say; the law must be the slave of justice, never its master. Overregulation (juridificación) is a pernicious manipulation of the effort to make society just (justificación).

Instead of building a just society in accordance with law, overregulation involves using the law to manipulate the community. Just as society must not be overregulated, neither may law be economized, much less politicized. This happens when the law, no longer serving justice, becomes a slave of politics, the economy, or social welfare. Legal positivism serves politics; the economic analysis of law, the economy; and utilitarianism, social welfare. These three great legal doctrines contribute to the science of law important nuances, which jurists and legislators must keep in mind. Taken in isolation, they obscure the law's proper role in society.

In the pronoun cuique (to each), which features in the classical definition of justice, we find in nuce the principle of personhood. But we also find solidarity, for the beneficiaries of justice include groups (families, communities), not just individuals. Thus, giving to each his own is specified as giving not only to each person the space required to live alone, but to each family the space to develop, and “to each people, its land” – which means giving each people a preference in their territory, not absolute sovereignty.

The verb tribuere (distribute) in the definition of justice implies two
other principles: rationality and coercion. The law should be distributed through a rational declaration (*ius dicare*) or, if that proves insufficient, through coercive imposition (*ius dicere*), always legitimized by a law.

The law as *ius suum* was inextricably linked to the idea of property – the very backbone of Western systems, especially Roman law. Beginning with Gaius, the latter divided its *ordo* into persons, things, and actions – that is, owners or property holders, things susceptible to appropriation, and procedures for appropriating them. The human person, not property, should be the center of the law, but this clearly requires the appropriation of things for personal development. What we need is an updated theory of property to supersede the ancient Roman idea of identifying with the thing itself insofar as “it belongs to me.” The principle of solidarity regulates this appropriation to keep it from becoming antisocial, abusive, or fraudulent. And on this point, casuistry abounds.

In our time, *ius suum* should be taken to refer mainly to human rights, among which we find, naturally, the right to have things necessary for subsistence. Making use of the concept of *ius suum*, global law incorporates the classical definition of justice – a definition that remains incomplete outside a legal order that attributes to humanity what always belongs not to states but to the whole human community.

**B. Principle of Reasonableness**

This is an instrumental principle derived from the principle of justice; it enjoins rational assent to what is just. To serve the cause of justice, the law operates through *rationes decidendi*, which can be imposed coercively. But even a law's susceptibility to coercion must be reasonable. It must observe proportion and harmony. This reasonableness operates on man's refined but inherent sense of justice, which rejects arbitrariness as falsely implying the supremacy of some people over others.

The development of legal reasonableness (*ratio iuris*) was one of the great contributions of Roman law, which served to turn the law into a science (*scientia iuris*). Jurists’ *responsa*, the main source of Roman law, were founded on an objective *ratio iuris*, not on subjective standards. This conformity to reason is a constitutive part of the Western tradition of civil law as well as common law, and it is the law's safeguard against arbitrariness: “Reason is the life of the law; nay, the common law itself is nothing else but reason,” as Edward Coke affirmed in his commentary on Littleton. The science of the law is built on rational postulates that are
made precise, nuanced, and enriched by the practice of the law – to which that science is by definition oriented.

Global law is therefore more about the force of reason (*imperium rationis*) than the reason of force (*ratio imperii*). Still, it must not fall into the stifling reductionism of the rationalist's *ratio scripta*, which reaches its apex in Leibniz. The term *reason* must be used in a broad sense. Thus, we can properly speak of a *customary reason* referring to the past, to tradition, to history; of a *consensual reason*, based on a broad consensus in the present; of a *precautionary reason*, referring to a future that must be anticipated by law for the sake of security; and also of timeless *natural reason* (*naturalis ratio*), which harmonizes legal thought with ethical thought in every age. In this way, we can avoid giving a hyperpositivized conception of reason a monopoly on human knowledge. To reduce global law to a simple *ratio rationalis* would be the beginning of its end. But it would be even worse to follow John Austin in understanding the law as a set of mere commands emanating from the sovereign.

The law's secular nature is a requirement of its reasonableness and maturity. Thus, despite its connection with religion – not in vain did pontifical jurisprudence contemplate a *ius divinum* distinct from *ius humanum* – ancient Roman law developed fully because it was formed as a secular order with its own, nonreligious legal sources.

Nonetheless, a secular law need not be secularist, built as if God did not exist. Likewise, from the fact that love is a metalegal concept, it does not follow that the law should be established as if love did not exist. The law, by acting according to *logos* – that is, *ratio iuris* – fulfills God's plan. For "not to act according to *logos* is contrary to God's nature." I think that this sentence, pronounced by Benedict XVI in his magisterial 2006 lecture at the University of Regensburg, contains the key to reconciling religion and the law, faith and reason. Such a reconciliation is necessary if the indispensable secularization of the legal order is not to devolve into a solvent secularism or relativism opposed to the unity of knowledge and the search for the truth.

The Gospel is clear: “Give unto Caesar what is Caesar's and unto God what is God's.” Indeed, Harold J. Berman makes a compelling case that at the heart of the Western legal tradition's development we find the distinction between the secular and spiritual jurisdictions. This explains the unambiguous Medieval European distinctions – with clear interrelations, to be sure – between civil law and canon law and between the latter and common law. These distinctions are blurred in Byzantium, where the empire
and the church appear much closer, almost identical. There the emperor was considered a representative of Christ, with clear allusions to the figure of Melchizedek, king of Salem and high priest of the Most High God.\textsuperscript{44}

That a just order should aim to be founded on nonreligious normative premises does not imply that the legal order should be based on a Babelian confrontation with the transcendent. Global law must foster dialogue between transcendent ideas and democratic values. In this vein, for example, Jürgen Habermas contends that a liberal culture can expect its secular citizens to help translate important contributions made in religious language into a language more accessible to the public.\textsuperscript{45}

\textit{Sharia} as a legal system is an exception to what I am proposing, for the Islamic tradition has not distinguished the legal realm from the religious realm, viewing the law instead as a part of religion. Effectively, if Allah is the creator of religious communities and these require the law for their proper ordering, then that law must be religious law.\textsuperscript{46} Following this reasoning, legal activity would be fundamentally a religious activity. It is a separate question whether laws passed by public authorities in any particular Muslim majority country are binding. Insofar as they are, they are not strictly a part of \textit{sharia} but rather of that country's positive law, which serves as a bridge between the secular order and \textit{sharia}.

Ultimately, this is about legal sources. The sources of global law must not be religious in nature. Neither the Bible nor the Koran nor any book considered sacred can serve as a direct source of law binding on all the earth's inhabitants. It is a separate question whether the world's religions may end up within the scope of the law or whether ethical principles derived from them can become firm pillars on which to build autonomous legal orders. Thus, for example, certain objective and subjective evaluative standards applied in civil law since the Middle Ages and firmly anchored in ethical principles – like \textit{bona fides}, \textit{honestas}, and \textit{iustum pretium} – are direct consequences of Christianity's influence on the secular \textit{ius civile} through canon law.\textsuperscript{47} The principle of legal solidarity is inspired by the Christian virtue of charity, which enjoins love of neighbor. Thus, distinguishing between the political and religious realms to protect citizens' religious liberty also makes us aware of religion's important role in forming an ethical consensus consistent with the dignity of the person.

A key to any legal system, the principle of reasonableness helps ensure law as integrity,\textsuperscript{48} due process and the coherence of evidence, and generally provides a normative basis for the enforceability of legal judgments.
C. Principle of Coercion

Here, as before, we have an instrumental principle proceeding from the principle of justice, for justice must be not only declared but applied. Any coercion – be it political, economic, military, or legal (e.g., the nullity of any act contrary to law) – must be protected by a norm that legitimizes it (principle of legality) and should be proportional. Otherwise, coercion (vis iusta) becomes violence – in force, that is, outside of the law (vis iniusta). However, every legal order must consolidate its monopoly on coercion – not by the old means of forcing capitulation from agents who would use violence as a strategic instrument, but rather by striking a balance between the authority of reason and the force of coercion.

The history of the law has essentially been the history of the justification of the law – that is, the history of the justification of coercion. Ancient laws – including Roman law, which elevated law to the status of science – were originally embodied in formally ritualized acts of force. So the law was originally understood more as vis than as ratio, based more on imperium than on auctoritas.

In the constant Roman tension between lex and ius – unfortunately lost in the common law tradition – coercion belongs to the realm of lex, not to ius properly speaking. Derived from legere (from the Greek legein), a law (lex) in this sense is a formal and binding (Bindungsakt) act, as much for the people who approve it (lex publica) as for the parties (lex privata). The violation of the lex always carries a legal sanction, ranging from the nullity of an act contrary to itself (leges perfectae) to the invalidity of the act's effect (leges imperfectae) or even a penalty (poena) for its nonfulfillment (leges minus quam perfectae). The legal sanction par excellence is reserved for crimes, that is, the most socially undesirable acts or omissions.

The most developed aspect of primitive legal systems was criminal law, this being the first stage of any legal order because it provides the minimum necessary to keep society from fracturing. Every process of social modernization is inextricably tied to a rational and coherent development of law that aims little by little to justify its various essential spheres by the need to protect human dignity and freedom.

Legal orders cannot do without coercion, but it does not follow that the law itself is pure coercion. For this would imply that human rights would cease to exist if they could not be coerced – as if they were not inalienable and inherent to persons.

In giving primacy to states over persons as subjects of rights, the
international order placed coercion ahead of reason, subordinating it to the Machiavellian “reason” of the state. The international legal order, anchored in the idea of sovereignty, politicized the origin and the exercise of legal coercion, making the state its only rightful holder, in virtue of a constitution that recognizes and limits it.\(^{51}\) This politicization has diluted the legal character of coercion, uniting it inexorably to the state. Only as the state continues to diminish can global jurisdictions develop. Thus can we have a conglomerate of overlapping jurisdictions that complement and at the same time limit the reach of state coercion, giving legal status around the world to various global institutions, on different bases in different settings.

Coercion based on international law is more often political than truly legal. For centuries, war has been considered the last legal remedy for the resolution of civil or international conflicts.\(^{52}\) This explains why the law of peoples has evolved to be so closely tied to *ius ad bellum* as well as *ius belli*. Global law cannot and should not fall into a pacifism hopelessly disconnected from our dangerous world, but neither should it justify war as a mere isolated conflict *inter partes*. In reality, the idea of war in its modern sense, like the notions of sovereignty and state, has been superseded.\(^{53}\) War is inseparable from the principle of territoriality. This is a matter of ownership of spaces, which should be coordinated by global law and not by the capricious will of states.\(^{54}\)

Peoples should submit their differences to trial by a third party, for no one is a good judge in his own cause. And the resolution adopted by the impartial judge must be enforced coercively, by another legal institution. It is necessary to incorporate the adversarial model of civil procedure and to put it into effect at all levels. This is the only way to avoid vengeance, that eye-for-an-eye principle that has informed legal relationships for centuries without being curbed by international law. Thus, any unilateral declaration of war is contrary to global law.

However, the rule of *vim vi repellere licet*, sanctioned by article 51 of the U.N. Charter,\(^{55}\) continues to be valid. Thus, force is repelled by force (principle of legitimate international defense). But only a global institution can authorize an invasion, which will have to be carried out by global armed forces distinct from the military of the attacked country. In this way, global law recovers the principle of legal equality taken to its logical conclusions without ceasing to regulate armed conflicts that arise around the world – for the law cannot overlook a persistent reality. The equality before global law of all political communities impedes the triumph of one entity's will to dominate another. This equality must be promoted and protected by
new global institutions. Two parties in conflict, if they are equal, cancel each other out, as do two opposed forces.56

Personal defense includes the use of arms. But this does not mean that there is an individual right to bear arms, as the U.S. Supreme Court has maintained, basing itself on the second amendment to the Constitution.57 Such a doctrine cannot be extended to global law because this individual right granted to American citizens is in no way inherent to the human person. It is rather a constitutional specification, particular to a certain nation and time of everyone's fundamental right to self-defense.

As the global legal order is an order designed for all of humanity, it is binding on the whole human race. Thus, its acceptance should be considered a precondition for the legitimacy of any authority, public or private. However committed it is to democratic formalities, any power that does not accept the global order as well as the jurisdiction of new global institutions cannot be recognized globally by humanity. This acceptance may be personal or collective.

Any person who so arranges can, whatever his or her nationality, be taken in and protected by the global institutions if he or she expressly accepts the validity of the global legal order – the global charter. This is possible even if the political community of which he or she is a part maintains a different legal framework. On the other hand, the fact that a concrete community accepts global law binds all of its individual members. To those political communities that do not accept the global legal order, the criteria of international law will continue to be applied: the principle of reciprocity and the fulfillment of international treaties.

3. SPECIFIC PRINCIPLES OF THE GLOBAL ORDER

Although little by little they are penetrating the international order, the following four principles are specific to global law, for they determine its origin and validity. Without them, we could not properly speak of a global legal order, only an international order. To the extent that international law incorporates these principles, it becomes a law of humanity and thus surpasses the idea of a legal enterprise among states.

A. Principle of Universality

Global law is common because it represents for humanity an instrumentum
*ius*itiae valid for all men independently of their race, sex, religion, age, etc. Its universal nature is rooted in the fact that it is to be accepted by all the world's inhabitants and applied everywhere. Although it is expansive, it is not exclusive, for it admits other legal orders. The global legal order seeks to become not the only system, as states aim to be for nations, but a universally valid structure that guarantees human rights and justice in those legal matters and relationships that affect the whole of humanity. Nothing more than that.

Today, universality and totality are often confused in different legal settings. What is universal is common to all, general – as opposed to the particular, or what is specific to a group of persons or communities. What is total, on the other hand, is comprehensive, all-encompassing – as opposed to things that are partial or incomplete. What is universal may or may not be total, and vice versa, for there can be particular totalities, like the nation as it is traditionally conceived.

To overcome the identification of universality and totality, we consider the hereditary system, where universality is especially relevant. An heir by definition is universal, for he acquires the inheritance in its entirety. A legatee is just the opposite. But even such universal hereditary succession, which allows the heir to be substituted in all the deceased's transferrable legal relations, may not necessarily apply to the totality of the hereditary goods; hence this universality in succession is compatible with the existence of coheirs who receive some share, equal or not, as well as with the naming of legatees, who acquire specific hereditary goods. Something similar occurs with sonship, which inspires the hereditary principle of universal succession: a son is not less of a son the more siblings he has, just as an heir does not become less of an heir by sharing an inheritance with coheirs. Being a son, like being an heir, is not exclusive or by any means absolute.

State law is by nature particular and necessarily total, for it embraces all the legal relations that operate within it. For this reason, Kelsen (coherently, if not accurately) identified the state with the legal order. The legal order of a state, like the state itself, is closed and must have free rein to fill its own gaps and resolve whatever legal issues arise within it. As a law between states, modern international law cannot develop as a universal law unless the world is regarded as a superstate, a global state, as some hope will happen. Of course, this would stifle freedom and produce a homogeneity at odds with democratic pluralism, as we have already seen. Religious fanaticism in all its forms and radical nationalism are equally expressions of an extreme application of state totality, which reached its apex in Hegelian thought. For Hegel, the state was totality, and its
individuals found their liberty in the heart of that reality, of that effective actualization (Wirklichkeit), considered an end in itself (Selbstzweck) that completes the particularity of every individual insofar as liberty is an equally valid norm for all. Thus, the state for Hegel is the actuality of concrete freedom: “Der Staat ist die Wirklichkeit der konkreten Freiheit.”

International law, being between states, is not universal. It tried to become universal when it incorporated the idea of the person starting after the Second World War, and especially with the Universal Declaration of Human Rights (1948), which (not in vain) declares itself “universal” despite not having been ratified by all the world's countries. There it reached its summit. In reality, universality means more than nonterritoriality. It is a necessary complement of solidarity and a recognition of the interests of persons as such, as beings of moral worth independently of their location. Universality is not opposed to territoriality; it simply surpasses it. Such is the case with so-called universal jurisdiction, which is operative in the case of crimes against humanity by authorizing tribunals without a connection to the criminal to extradite or judge (aut dedere aut iudicare).

In the realm of the law, for the sake of freedom and pluralism, total structures like states must not pose as universal, that is, as unique. The cosmopolitan universal state would be the beginning of the end of liberties. Humanity is universal and total, but legal–political structures that govern and organize need not be. On the contrary, humanity would be constrained and trapped if they were. The founding of a global state would mark the triumph of imperialism, which aims to turn the universal into the total to produce a homogenous and coercive structure. We would then certainly face one of history's greatest threats to humanity.

Perhaps an analogy to universal languages will help. English is the most universal language, but it cannot become total, unique, absolute, exclusive of the others in such a way that it alone is used everywhere. So the defense of English as the universal language of communication is perfectly compatible with the defense of one's own culture, expressed mainly through its own common language. English is universal, but it is neither total nor absolute, which is why as it develops it enriches its vocabulary with expressions taken from other languages.

Global law, unlike international law, is necessarily universal insofar as it binds all of humanity. It is to be universal but partial, for it does not seek to impose itself as unique, thereby excluding other legal orders. Derived from the social nature of the person, global law unites the world's inhabitants, forms groups, and constitutes peoples. For historical reasons, on the other
hand, international law is exclusive. It cannot easily shed the concept that gave it life – sovereignty – even now that this concept has been so impoverished as to mean simply a maximum area of autonomy.62

When someone attempts to impose a particular, concrete legal order on the world, legal imperialism results. This happened, for example, in the era of Emperor Justinian I (483–565) who, wanting to restore the Roman Empire's unity after the fall of Rome in A.D. 476, ordered the development of a legal compilation – called since the sixteenth century the *Corpus Iuris Civilis* – to fortify his imperialist policy.63 Something similar happened under Napoleon who, zealous about his *Code*, fought to extend its reach and application throughout the world, especially in Europe and Latin America.64

Currently, the same phenomenon is reemerging with regard to American law insofar as it attempts to impose itself as the only law of transactions and becomes (by inertia) an effective instrument for consolidating the imperialist policy of the United States. Because of its flexibility, effectiveness, and firmness, American law should have a place of honor in a globalized world, and many of its elements can be transferred to the global legal order. Still, it would be a serious error to make it the nucleus of global law, ignoring many other legal families in the world today. Neither is this a matter of developing a synthesis along the lines of a “legal Esperanto.” Rather, we must create a universal and partial global law, based on the person and on various traditions, especially those, like American law, that have proven best adapted for survival in the postmodern world.

The universality of global law is imposed, in a certain sense, by the society in which we live, which has created cyberspace and what Pierre Lévy65 calls a “cyberdemocracy” future, something still hard to imagine fully. Although not of law generally, universality is a necessary feature of global law. Globalization has been the unavoidable result of new technologies like the Internet, which has lowered traditional geographic and political barriers and facilitated the development of a humanity conscious of its collective status.

**B. Principle of Solidarity**

This principle is derived from those of justice and personhood. Essentially, if the law is born of the person and not of the state, society should be organized according to solidarity, in virtue of man's social nature. No woman or man can live only for herself or himself; we live for others. Thus,
no human life is unimportant to humanity. But it is not the modern state's nature to show solidarity with other states: the state needs only to keep its treaties (pacta sunt servanda) and to act with diplomacy and courtesy in its international relations. Thus, the principle of solidarity forms no part of the foundation of modern international law even though the latter has finally discovered, recognized, and applied it. But solidarity is a shaping principle of global law.

It was an achievement of the social state (Sozialstaat), born with the Weimar Republic in the Europe nouvelle, to institutionalize the idea of solidarity, thus securing vital assistance for persons and groups and helping to check the strong individualism produced by a voracious and inhuman capitalism. The idea penetrated deep into the German spirit, to which we owe much of the progress we have made in this area.

Still, the social state only had to concern itself with its own citizens, not the rest of the world's inhabitants. And it ceases to be self-sufficient when its economic and social interests require looking beyond its borders. The sovereign state is given to navel-gazing; it is doomed to solipsism. But men depend on each other in pursuit of their common interests, the common good, to which each person's particular good must always be subordinated. From the moment of our birth, we must share with others almost our whole life. We have no other way. The state, on the other hand, is born to be almighty within its territory.

This principle of solidarity, although it enjoys great social prestige, often fails to take root in advanced democratic societies in part because of structures that unnecessarily prolong the agony of that obviously obsolete entity, the state. The social state has monopolized solidarity and undermined subsidiarity, the space necessary for any human community to build a civil society in harmony. For this reason, nongovernmental organizations’ enhanced role in the field of solidarity raises hopes for increased international cooperation.

The principle of subsidiarity finds an important application in a complex society's efforts at integration, where there are no easy formulas. This principle of integration links public and private institutions in their programming and functions in such a way that the system evolves with harmony and balance, taking advantage of synergies and collaboration from completely different realms. The dialogue between the state and civil society incentivized by the defenders of the social state is a first step but not enough to produce the level of solidarity humanity requires.

Global citizens must act in solidarity. Acts of solidarity are more
expansive than what is required by good faith, which for centuries has shaped legal relationships in the West but remains secondary throughout much of the East. Solidarity also includes the three Ulpian precepts of law-related ethical behavior: to live honestly, not to harm one's neighbor, and to give to each what is his. Our principle adds to these three precepts the positive legal obligation of solidarity proper to a mature citizenry – a pillar of global society and universal justice.

The first commitment of solidarity is that all people have at their disposal the resources necessary to live in keeping with their human dignity. This requires everyone's effort to eradicate world poverty, a real curse on today's society. This duty is stronger in developed societies that have sufficient means to solve the problem and that are responsible for colonial injustices. Moreover, to promote the economic and social progress of those countries that need it most, we need an effective policy of cooperation on development.

The second commitment of solidarity is to struggle together against international terrorism, which is closely related to drug and arms trafficking, money laundering, and all organized transnational crime. International terrorism can be toppled only through a sustained global strategy that includes regional, national, and international organizations, states, and all the world's inhabitants who defend democracy as a way of life.

The third great commitment of solidarity is disarmament, mainly nuclear and biological. It is completely unacceptable that enough nuclear material to destroy the world rests in the hands of nine states, five recognized as such – the permanent members of the U.N. Security Council – and four – Israel, India, Pakistan, and North Korea – by their own initiative. The Nuclear Non-Proliferation Treaty of 1968 has been violated repeatedly and has not achieved its purpose of eliminating nuclear arms within twenty-five years of coming into effect. Unfortunately, the conference to revise it, held in New York in 2005, was a total failure. In the realm of biological disarmament, the signing of the Biological Weapons Convention of April 10, 1972, in effect since March 26, 1975, accomplished a good deal. Still, the remaining risk is substantial.

Finally, global solidarity must fix its best efforts on the care and protection of the natural environment so the earth can be inhabitable for future generations. Issues like purification of polluted waters and elimination of waste, cleanliness of the soil, acidity and the reduction of carbon dioxide emissions, and the fostering of alternative energies, should
take priority in the political agenda of all the world's countries, not only the most developed. We global citizens have to be committed to the environment, for the earth belongs to everyone.

In these four radically important world issues, global law must be an effective instrument allowing all social agents to find a solution that transcends the states’ unilateral efforts. Hence these belong to the global legal domain, over which United Humanity has authority to rule.

C. Principle of Subsidiarity

Although not without precedent – in the thought of Johannes Althusius (ca. 1557–1638) and Abraham Lincoln (1809–1865), among others – the principle of subsidiarity is a development of what has been called “Catholic social teaching.” It was first formulated by Pope Pius XI in his May 15, 1931 encyclical Quadragesimo anno, written in commemoration of the fortieth anniversary of Leo XIII's encyclical Rerum Novarum in the context of the struggle against the fascist, socialist, and communist totalitarianisms of the interwar period. The Roman Pontiff was inspired by the writings of the bishop of Mainz Wilhelm Emmanuel von Ketteler (1811–1877), who promoted social Catholicism in Germany and especially in an unfinished essay posthumously published in 1899, Christentum und Sozialdemokratie. In this short text on Christianity and social democracy, the founder of the Catholic Workers’ Movement (the Katholische Arbeitnehmer-Bewegung) lamented the disappearance in Germany of social entities mediating between the individual and the state, which totalitarian statism eliminated.

Pius XI sharply reminds us in his encyclical that “as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.” The principle of subsidiarity is nothing but an organizational specification of the norm of justice to “give to each what is his”; it is opposed to the totalitarian “principle of absorption” that one finds at the foundation of the idea of the modern state. If each person has a right to something, we are socially responsible for guaranteeing it (solidarity). For its part, society should recognize the personal responsibilities and capacities of its individuals.
(substantia), respect for which vivifies the social community.

The encyclical that John XXIII released months before his death, *Pacem in terris* (1963), is important for the development of this principle in the international order. Here Pope Roncalli dedicates two important paragraphs to the principle of subsidiarity, observing with great foresight that it “must apply to the relations between the public authority of the world community and the public authorities of each political community” (no. 40). Following the doctrine expounded by Pius XII after the end of the Second World War, John XXIII clarified that the goal of this global political authority, elected by consensus rather than imposed by force, is not “to limit the sphere of action of the public authority of individual States, or to arrogate any of their functions to itself” (no. 141), but rather to complement already existing authorities: “On the contrary, its essential purpose is to create world conditions in which the public authorities of each nation, its citizens and intermediate groups, can carry out their tasks, fulfill their duties and claim their rights with greater security” (no. 41). So John XXIII proposes a complementary and thus limited global authority to serve the universal common good (*bonum commune universal*), authorized to wield power in those matters that, because of their complexity or global reach, exceed lesser authorities’ purview. More recently, Pope Benedict XVI has stressed the same idea: “Hence the principle of subsidiarity is particularly well-suited to managing globalization and directing it towards authentic human development. In order not to produce a dangerous universal power of a tyrannical nature, the governance of globalization must be marked by subsidiarity, articulated into several layers and involving different levels that can work together. Globalization certainly requires authority, insofar as it poses the problem of a global common good that needs to be pursued. This authority, however, must be organized in a subsidiary and stratified way, if it is not to infringe upon freedom and if it is to yield effective results in practice.”

The principle of subsidiarity is gaining prominence for the important role it played, actually and symbolically, as one of the fundamental pillars of the European Union (EU). Romano Prodi in his book *Un’idea dell’Europa* praises the EU for affirming that “a just society is built on two coessential and concomitant principles: solidarity and subsidiarity.” Solidarity appears in a more legally developed form in the Preamble and article 2 in fine of the Treaty on EU and, above all, in article 5 of the Treaty Establishing the European Community, now replaced by article 3 of the
recent Treaty of Lisbon of December 13, 2007, which modifies the former two treaties.

This preference for the principle of subsidiarity was not lost on American jurists, who were quick to compare the principle of subsidiarity with their own federalism as detailed in the Tenth Amendment to the Constitution of the United States – the last of the Bill of Rights – of December 15, 1791. The amendment affirms that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the People.” But federalism is not equivalent to subsidiarity, although the two may share some features. Thus, federalism is compatible with imperialism; subsidiarity, for its part, is not. Subsidiarity is the very antithesis of imperialism insofar as it fosters and protects small and flexible social structures, which by definition lack the power to dominate or conquer.

Subsidiarity not only affects the division of jurisdictions between the state and federal organs. It also operates within each state or institution, whether public or private, to foster citizen participation and social interaction, beginning with the person and the family as primary units of society. The principle of subsidiarity reflects a way of conceiving society from the perspective of the person and her dignity – from the bottom up, not from the top down, as our state society is currently configured. Maurizio Ettore Maccarini suggests that subsidiarity is above all a method for confronting the concrete needs of persons and the collectivity, not a rule of priority to determine levels of jurisdiction. In our time, Paolo Carozza has underscored subsidiarity’s relevance to the sound application of human rights, for a society that does not defend human rights at the level of the smallest communities will find it hard to protect them on a global scale.

Thus, the global community must be organized according to subsidiarity, not hierarchically, such that bigger institutions do not impede the development of smaller ones, which in turn must act consistently with the demands of the common good (solidarity). Therefore, the global legal order must be built gradually, to the extent that smaller communities demand it as they observe that the problems arising within them have grown beyond their abilities.

Subsidiarity requires recognition of the collectivities’ self-governance and thus respect for smaller legal orders. In global society, the big fish cannot eat the small fish; global institutions must keep close watch to ensure that universal institutions assume only those functions, competencies, and powers that really cannot properly be wielded by smaller institutions. The
application of the “global legal domain doctrine” should be restricted. On the other hand, subsidiarity requires smaller entities to participate and collaborate in the development and consolidation of global institutions because these would be in everyone’s interest. Clearly, the common good of humanity is served beginning with the particular good of individuals.

The right to self-determination, far removed from any radical nationalism, is nothing but a specification of this principle of subsidiarity, which asserts that peoples and smaller communities can decide their own fate and be the true shapers of their own objectives and of their own promotion in the global community setting.91 Nationalism, on the other hand, turns determination into determinism and self-governance into independence, distancing itself from any larger structure as superfluous. For this reason, radical nationalism is contrary to the principles of solidarity and subsidiarity, two pillars of the global legal order.

D. Principle of Horizontality or Democratization

Global law must be built on dialogue and consensus, never coercion. Never with weapons. More by authority than by power, by reason than by might. To be between equals, dialogue requires a horizontality – a shared language specific to democracies. Thus, this principle can be called a principle of “democratization.” It is not about transferring the ways of the democratic state to the new legal order that will rule the whole of humanity, but about democratizing decision-making systems.92

The principle of horizontality fosters political pluralism in the global community, protects minorities, and helps society be harmonious, flexible, and respectful of the sensibilities and ideologies that enrich rather than disturb its framework. If we use the trope of the global pyramid,93 we can say that the principle of horizontality is what sustains the base of the pyramid, composed of humanity as a collectivity joined by our common human nature and social consensus. This principle of horizontality stimulates the formation of social consensus, only possible owing to our common nature, which acts at once as the cause and limit of agreement. That is, it is our common nature that allows men to act consensually and coherently, thus also limiting the extent of our own consensus. For example, the consensual decision of all humanity to self-destruct would be incoherent because it is opposed to human nature, even if the mechanisms of consensus-building are scrupulously followed in arriving at it.94

A basic geological principle is the principle of original horizontality,
according to which layers of rock are first deposited horizontally in an arrangement that remains fixed so long as no other force acts upon it. This same principle can be applied to the law because humanity also comprises different levels: personal, familial, local, regional, national, continental, and global. We must maintain this distribution, limiting as much as possible the use of force on its layers. The law should act upon them only when there is sufficient reason. In this way, society will be stratified, but not vertically, and it will comprise a great variety of intermediate, mutually permeable groups whose ultimate foundation is the person. Thus, as the local and the global are respected, a system of harmonized and coherent legal orders will be formed, solid as the earth itself, and joined by global law, which will encompass other orders without homogenizing them or crushing the legal traditions on which it is founded.

Horizontality stimulates the democratization of the global order's institutions through citizens' participation in decision making by assembly. The principle of horizontality also fosters the development of structures based on fairness, protecting minorities and ensuring an adequate distribution of power.

Without falling into anarchist or utopian excesses, we must encourage the autonomy of persons and institutions in a framework of social equality and democracy. So it is urgent that we empower the world's peoples to play a greater role in making decisions that directly affect them. The principle of democratization fosters a worldwide civil society – modern, nimble, and quick to react to new problems facing humanity – that keeps the sovereignty of peoples from destroying citizens’ liberties. It also keeps global institutions on which most human beings currently depend – like the World Bank, the International Monetary Fund, and the World Trade Organization – from resting in the hands of a select few from the most powerful countries.

The hierarchical nature or verticality of international law – which has in practice privileged a group of states – offends against the principle of horizontality that global law promotes. Thus, the order established by international law enshrined a system in which states of various classes coexist, protected by a process of excessive legalism that legitimates the dominion of some over others. Such is the case, for example, with the U.N. system, in which members of the Security Council have veto power even against the majority of the General Assembly. Unjust by any standard, this is not the result of coherent legal reasoning but rather of the politicization into which a discipline as distant from reality as international law has
degenerated. We cannot give unqualified legal cover to such a stratification of states and the eagerness of a handful of powers to use the law for their own interests. Moreover, the impermeability of state sovereignty weakens citizens’ protections from the state’s manifestly unjust actions.

Integration around new global goals will foster social cohesion, which in turn will facilitate the fair distribution of power. Cooperation and coordination will finally replace the drive toward unilateral impositions of will that sometimes animates international politics. This does not mean, of course, that a horizontal order cannot choose to delegate the management of global affairs to a representative, so long as this does not devolve into tyranny. Global decisions must be based on a wide consensus in which all actors involved have a voice and a vote, share equal obligations and rights, and do not discriminate for economic, political, or strategic reasons. United Humanity must play a decisive role in the pursuit of these objectives, above all through its Global Parliament, the authentic vehicle for universal political action.

Decentralization of international government is the foundation on which the new global law must be built. Global institutions cannot retain the veto scheme that undermines the legitimacy of the international order. As authentic instruments of global law, global institutions should be open organizations that seek to harmonize the competing interests of their members, who operate on very different levels. For this the principle of subsidiarity must be applied. Such balancing eliminates the highest levels of structural separation to which internationalist idealism has led us, and it allows international leadership to be assumed on the basis of authority, not imperial power. The horizontality of power does not obliterate the organizational structure but rather orders it. A permeable order in which institutions control one another fosters stability and dialogue – one between equals, not between feudal lords and servants. Nor is it one only between states, those intellectual pipe dreams that determine the current world order.

Pluralism is an expression of human and cultural richness, and it can be seen in the interpersonal and intercommunity relations supported by global law. Global society should be broken down into various kinds of centers of decision making to avoid an excessive concentration of economic, political, or media power. This tripartition of power superseded that defended by Locke in his *Two Treatises of Government*(1690) and by Montesquieu in his well-known book *De l’esprit des lois*(1748). Today, the economy exercises its power. It is what shapes politics, not vice versa, as was the case at other points in history. Hence, it is important that the world economic system be subordinated to the law and that we preserve the law's
autonomy from politics and wealth creation.

Social pluralism requires treating all human beings with the dignity they deserve and respecting the various cultures and religions that enrich the global village. In reality, as Rawls observes, pluralism is the natural result of the activities of human reason protected by free institutions, and it should include religious as well as secular doctrine. This imperative to encompass both worldviews requires the global order to open up to the transcendent if it is to avoid eliminating religious doctrines, thus limiting its citizens’ freedom to choose.

Technocracy is a great danger for horizontality and pluralistic democracy, for it ends up imposing decisions based not on the people’s will but on technological imperatives, which experts can always manipulate. A technically homogeneous society runs the risk of being controlled by those more powerful or equipped with more information. Man is faced with a new global juncture at which the tendency is to homogenize ways of life. A global society can become the culprit in this positivist utilitarian trend or in a globally imposed economic determinism. To slow this pernicious current, global law should put mechanisms in place to protect various spheres of civilization, economy, and power. Otherwise, we will succumb to an economic monopoly that ends up overtaking the law. This would yield a sort of totalizing pan-economy, inimical to freedom and justice alike.

4. RULES OF GLOBAL LAW (IURIS UNIVERSALIS REGULAE)

Imitating the style of Justinian's Digest and of so many jurists who have modeled their writing after it, I incorporate at the end of the book a series of simple statements – rules (regulae), as the Romans would say. These aphorisms and maxims should help promote global law in the world.

They are written in Latin because this has been and is the language of rules. Some are not my own invention but represent a centuries-long tradition to which global law can only append itself. Others have appeared throughout these reflections. I think they can help us shape the universal legal culture necessary to consolidate a new global order. That is how Roscoe Pound remembered it in a lecture given on September 1, 1953 at the University of Calcutta. Aware of the difficulties of establishing a universal order, the Harvard Law dean encouraged his listeners to create an adequate environment in which to pursue an important goal: “Instead of formulation of precepts, should we not be seeking to create the universal ideal atmosphere in which the precepts may develop and be made living law in a
world prepared for them?" he asked rhetorically. More than fifty years later, Pound has been proven right, although many things have changed. We have the right environment; now is the time to build. The science of the law can accomplish a great deal in this regard. I think we must begin from below, setting about an authentic global education to prepare the new generation of young jurists to assume posts at the vanguard of the transformation of law. These brief rules, which offer a clarifying synthesis of what has been said in this book, are meant to contribute to this yearning for renewal.

1. Cuius tempora, eius ius

To each age, its law. The law regulates a specific society at a concrete time and place. Thus, it cannot flee from social realities. At first, it is society that shapes the law, but gradually the legal order ends up shaping society. It gives society flesh, muscles, stability. Law and society thus influence each other. A global society needs a global law, just as centuries ago a Europe fragmented into states cried out for a *ius publicum Europaeum*. The *ius gentium* gave way to a *ius inter gentes* and then to an international law now completely overtaken by globalization, which has crossed previously insurmountable barriers to unite a divided humanity. Such a variety of legal orders shaping different societies is compatible with a common foundation to all law, a permanent element that gives the law its existence, nature, substance: in virtue of which it is law. The harmonious balance between permanent and transient, stable and passing, perennial and perishable, has constituted one of the most important legal contributions of Greek culture, one which should be incorporated into global law.

2. Differentiae inter gentes promovendae universale ius incumbit

It is incumbent on global law to protect and foster differences among peoples, nations, and persons. It must stimulate a healthy social pluralism, the fruit of freedom of enterprise and of the responsibility of social agents. Indeed, global law should create a harmonious and coherent social fabric in which natural human sociability can give rise to different communities. The great risk of globalization is homogeneity, which human malleability favors. Global law must protect the diversity of customs, languages, and cultures by struggling to keep fashions from homogenizing the planet through the media. This is the great difference between global law and imperialist law, of
which there is no shortage of examples. Homogeneity impoverishes democratic debate and poses obstacles to the development of humanity and the pursuit of the common good.

3. Dignitas et aequalitas iuris universalis sunt aurigae

Dignity and equality are the carriage drivers of global law. Based on the person, global law incorporates these constitutive elements: the dignity and equality of persons. Dignity is a metalegal but not an a-legal concept, and it plays a key role in the law. Person and dignity are two inseparable realities. Dignity does not entail otherness; equality, on the other hand, does, for it involves a comparison. Equality makes clear the human being's essential sociability. We are equal before the law because we have equal dignity. Only from the perspective of dignity can equality be understood. Dignity is recognized, not granted. The legal absolutization of the idea of dignity has been one of the great contributions of the twentieth century to the science of the law, and it marks the transition from international law to global law: international law was founded on the sovereignty of the states; global law, on the other hand, on the dignity of persons, on the sovereignty of human beings. From this perspective, personal dignity is specified in the right of every person to be treated in accordance with justice in keeping with his or her inherent human rights.

4. Ex persona oritur ius

The law emanates from the person. All law, including global law. The human being must be the center of any legal order. The crisis of international law derives precisely from its having been built from and for the state, without sufficient grounding in the person, the source of all law (*fons omnis iuris*). The law is not just a creation of the state, for it does not proceed exclusively from its constitutions and norms. Rather, it precedes the state to the extent that it has its origin in the human person. Without persons, there is no law (*nullum ius sine persona*). And, being its original source, the person is also law's final end. The law, as the jurist Hermogenian indicated, has been constituted for the sake of men (*hominum causa*). Thus, it must carefully respect the ethical imperatives surrounding the human person, that is, every “living human,” from conception to natural death. To the law, a person is not a mere species within the genus “subject of law” – which would also include the poorly named “legal person” – but a distinct reality.
prior to the law, which the person in turn creates. Thus, the law becomes the
servant of the person (servus personae) and never the person the instrument
of the law (instrumentum iuris).

5. Ex privato iure publicum

Public law proceeds from private law. In the theory expounded in this book,
the number one represents the person; two, private law, inter cives; and
three, public law. For law to exist, one needs at least two human beings, that
is, otherness. But the law finds its perfection only with the existence of an
organized community, which requires at least three persons. This allows us
to incorporate into the legal science the structure of a pyramid, which is
certainly the most adequate for explaining the law. This original model of
the construction of the law, from the bottom up and not from the top down,
must be transferred to all legal spheres, including global law. Although at
times it is difficult to differentiate public law from private law, and
sometimes this distinction itself has no practical consequences, its
differentiation is one of the first specifications of the idea of law. We learn
to read before we learn to write. This may not have practical importance
after several years, but it does initially, and of course it still does when it
comes to forming people. Something similar is the case with the distinction
between private and public law: it offers us keys for understanding law's
deepest internal structure.

6. Harmoniam communitatum ius universale tuetur

Global law protects harmony among people. This global harmony is not the
simple balance of forces in chaos but real cooperation on a common project
in solidarity. The promotion of harmony inter communitates is one of the
goals of global law, unlike the ancient ius gentium and modern international
law. The Roman law of peoples was based on the superiority of the Roman
people with respect to the rest of the world's inhabitants. International law,
for its part, is founded on the equality of sovereign states, that is, of entities
that exclude each other. Global law fosters the self-governance of peoples
and communities against a background of unity of purpose, but not autarchy
or self-sufficiency, for no modern people could develop completely without
the cooperation of others. This, essentially, is globalization: interdependence among all human beings that there can be no totally autarchic government unless it becomes global, with all the risks that this
One man is to another a person. A living human being should be recognized as a person and thus should never be objectified or commoditized. The constant fight against racism and slavery, humanitarian law, the universal effort to let women assume their rightful place in society, the absence of any type of discrimination, support for the infirm or disabled and increased volunteering – all of these indicate humanity's clear progress on this front. Unfortunately, such progress is tarnished by attacks against human life; the existence of large areas of poverty in the world; or scandalous abuses of power by those who control the strings of an unbounded capitalism that turns people into puppets on an inhuman universal stage. When humans do not treat their neighbor according to their inherent dignity, humankind itself is degraded, animalized to the point of becoming an antisocial being. But even in these conditions, humans do not cease to have worth and therefore command respect as people.

8. In solidum agi praeceptum est

To act in solidarity is a legal norm. Global law is built on solidarity. The latter is not only a moral duty but a legal requirement that must be reflected in all the world's legal orders. Solidarity in a legal setting means that every person should try to secure according to the ideal of justice not only his or her own good but that of others. This duty of solidarity is greater when human rights and personal dignity are at stake. Global law opposes any form of individualism that refuses to look beyond personal ends, neglecting the common good of humanity without which no one can be completely fulfilled in this interdependent new world order. The complete justification of solidarity is one of the great challenges of the twenty-first century.

9. Iustitiam humano consortio tueri universalis iuris est

The protection of justice for the human community is proper to global law. The global community must be ordered and supported by a global law. The latter is not simply the sum of bilateral and multilateral treaties among sovereign states but a unique legal system that shapes and complements the other, smaller orders to form a nonhomogenizing unum. Essential to the
legal order is its universal character. But global law is not total and all-encompassing like state law, for it regulates only those issues that fall within the global legal domain because they interest all of humanity. The maintenance and development of global law, whose goal is universal justice, rests on the United Humanity institution (heir to the U.N.), especially on its Global Parliament.

10. *Non in bello sed in actionibus dirimendae sunt lites*

Disputes should be resolved not by war but by legal procedures. The law requires a separate and impartial process to resolve controversies between parties. Any other way of proceeding would exhibit an imperfect justice closer to vengeance, whether public or private. War is contrary to man's nature insofar as it resolves conflicts not by reason, which is characteristic of trials, but by force. The coercion of *vis* can only serve as a mode of execution, never as a way of deciding or resolving conflicts. Global law is incapable of justifying war for itself. For global law, war is a lamentable and horrible fact, but a certain one. It is not a legal institution in a strict sense, as it was for the law of peoples or for international law. Thus, global law does not contemplate or regulate war because its goal is to order humanity in a regime of peace in which no one can take justice into his or her own hands. This does not mean that global law renounces the force of arms, as we shall explain in more detail in rule 20.

11. *Nulla legitima potestas quin ius universale agnoscat*

No authority that rejects global law is legitimate. This is a condition of legitimacy owing to the interconnections that arise in our time among distinct legal orders. In the formation of global law, one must distinguish at least two phases: creation and establishment, and development and consolidation. In the first, global law is forged by consensus among states and international organs; in the second, once United Humanity is constituted, global law will develop more independently, especially in those matters belonging to the global legal domain. Conduct with those authorities that do not approve global law should be different in each of the phases because the social support that gives global law full legitimacy will not exist until it is fully institutionalized. For now, in this first phase of creation and establishment, global law must harmonize wills, form consensus, open roads for itself, and become indispensable. The time for coercion will
come.

12. Nullum ius sine libertate, nulla libertas sine dignitate

There is no law without liberty, nor liberty without dignity. Thus, the law is a genuinely human project. A declaration of will (*Willenserklärung*) lies at the heart of the law and even more at the core of global law, which requires an act of the will to become binding. Dignity, always absolute, supports liberty, which can be taken in a negative and absolute sense (absence of ownership) or a positive and relative one (exercise of freedoms). The loss of positive liberties (prison, incapacitation) can never affect every human being's absolute dignity. The limit of the exercise of liberty is dignity, which is also its cause. Thus, acts that constitute an abuse of freedom (theft, homicide) are contrary to the dignity of the person and should earn civil or criminal censure when they affect third parties or the common good. Dignity thus illuminates liberty, and liberty becomes the engine of the law.

13. Pacta sunt servanda

Agreements must be kept. This is one of the central principles of all legal orders. It is the basis of international law (applied only to interstate agreements) but also to global law. A society can hardly be built in peace and justice if the legal obligation to fulfill what has been agreed upon is not respected. Without agreement, there is no peace (*nulla pax sine pacto*). And without social action, there is no coexistence. A specification of this principle is the theory according to which a social contract is the source of society. An agreement harmoniously combines the static and dynamic elements of the law. To the extent that a contract determines an agreement, it helps stabilize society; as a way of finding new solutions to problems that society itself generates, it is an instrument of social dynamism and progress. Ethical considerations limit humanity's capacity to form agreements establishing the framework within which the law may act.

14. Poena tum iusta, cum ex lege orta necnon delicto conveniens

Punishment should flow from the law and be proportionate to the crime. The principles of legality and proportionality are assumed by global law as requirements of universal justice. The most basic universal justice must begin with a universally accepted criminal law that prosecutes the crimes of
fallen humanity. Although important steps have been taken in this regard, the International Criminal Court of the Hague being an example, much remains to be done. A personalist conception of the law like that defended by our theory of global law opposes the death penalty as a violation of the principle of proportionality. The death penalty far exceeds the content of a social contract of humanity because it violates the dignity of the person, the source of all law. The law cannot damage its own source, for this would entail its self-destruction. The inhumane and disproportionate nature of the death penalty, its scant deterrent effect, its incompatibility with social reintegration – all of these make it more a chastisement than a punishment in the legal sense of the term, so it should be completely excluded from our global society.

15. Privilegia ne inroganto

Privileges should not be granted. This is a commandment from the Law of the Twelve Tables\textsuperscript{106} that has never been repealed and that global law gladly accepts. All men are equal before the law. Thus, global law abhors privileges, so common in nondemocratic societies. Any privilege, that is, any law \textit{ad casum}, especially if it is negative (\textit{privilegia odiosa}), is contrary to law. It is a separate question whether the law may (without discriminating) encourage actions that produce equality by giving legal benefits to certain groups whom it would be objectively helpful to promote (the poor and expatriated, immigrants, the unemployed, disabled persons, large families). Social promotion does not discriminate but fosters social cohesion. Thus, it is supported and protected by law. Its ultimate goal is to achieve greater social equality, unlike discrimination, which weakens the social framework.

16. Quod omnes tangit ab omnibus approbetur

What affects everyone should be approved by everyone. This late Roman principle, applied often in the Middle Ages, picks out the basis of democratic orders and of government by the anthroparchy into which humanity must be organized. Global law rests firmly on this axiom to establish the competencies that belong to it on the basis of subject matter. Throughout this book, this principle is considered a rule of recognition for global law. Decision-making capacity cannot be removed from the persons and social groups affected by conflicts. Thus, the problems that affect
humanity must be resolved by humanity itself, organized legally. The protection of human rights, the maintenance of world peace, the judgment of international crimes, arms regulations, the environment and international commerce, and the eradication of world poverty are subjects that affect us all and that therefore should be resolved by humanity, not by a select cryptocracy.

17. Ratio iuris, auctoritas; imperium legis, potestas

Reason is the authority of the law (ius), and rule is the power of the law (lex). The recovery of the Roman distinction between authority and power can be useful for global law in distributing various functions of consultation, execution, and control among international organs. Counsel and control are functions proper to authority; execution, on the other hand, to power. This aphorism unites two great tools that the law uses: the reason of authority and the coercion of power. The modern state has confused authority with power, turning authority into a sort of superior might, as Octavius Augustus did in his own time (auctoritas Principis) to control the decadent Roman Republic. Authority is the natural limit of power and the expression of progress, harmony, and social evolution. It is expansive, social, essentially communicable, and communicative – which is why it is difficult to think of concentrating authority in a few hands. The opposite is the case with power, which tends, by nature, to be concentrated to the point of corruption.

18. Unicuique suum

Ulpian's definition of justice remains valid in our time. To each, what is his. This is the best way to live in peace. But this ius suum cannot become an absolute and unlimited property over persons, animals, or things. Solidarity is a social commitment that burdens any property law. Moreover, this justice is above all between equals. The cuique of Ulpian's definition identifies us as equal persons. The principle of justice legitimates the intervention of law in society. If the law acts unjustly, society becomes overregulated; its vitality, diminished. Societies must be instead made just, that is, ordered according to law, rather than overregulated. The latter sort of society easily becomes corrupt, as the law becomes an instrument of power and abdicates its role in the service of justice.

19. Universale ius est commune idque saeculare

242
Global law is common and secular. It is common insofar as it potentially pertains to every human being. It is also common by being compatible with the law specific to each people and political community. And it is secular because the sources of law are not religious. The two are distinct realities, although they are not opposed. Global law should scrupulously respect religious freedom, the first and most genuine expression of freedom. It cannot be identified with a religious or confessional law because then it would cease to be global. But neither can it be built without the idea of transcendence, inherent in the human person – a central concept of global law. The Gospel rule “render unto Caesar what is Caesar's and unto God what is God's” is universally valid. That the law belongs to the first system – to what is Caesar's – does not entail that it should not recognize God. For if it does not, it may soon give to Caesar what is God's. It is the job of religion and ethics, not of the law, to impose on citizens the duty to give God due worship. On the other hand, it is the law's obligation to ensure that everyone can fulfill his religious duties unimpeded.

20. *Vim vi repellere potest* 108

It is legitimate to repel violence with violence or force with force. However, any armed attack requires authorization by an external party. In no case can an attack be decided unilaterally because no one is permitted to take justice into his or her own hands. Global law surpasses the dual structure of war, turning it into a pyramidal structure that allows for impartial decisions by an independent authority. Global law limits such dualism to the assumption that force can be repelled by force, thus accepting the principle of legitimate defense but not legally institutionalizing war, as the law of peoples and international law once did. Moreover, global law seeks a drastic reduction of arms. It fosters the proliferation of societies and communities without armies that are guarded by global institutions designed for the armed protection of all humanity. The army, as a legal institution, would be configured as a global *unum* – indivisible, based on solidarity, and dependent on the Global Parliament. With national armies giving way to a global army, the idea of war among states would be superseded. The fight against international terrorism remains different; this struggle is not technically a war because it is not territorial and does not unfold between states. 109

1 From this comes the word prince (*princeps*), which designates
someone who occupies the first place. By antonomasia, Octavius Augustus was princeps (the first among citizens), from which we derive the term principate. This refers to the first period of the Roman Empire (from the beginning of his reign to the crisis of the third century), which was replaced by the dominate.


3 A milestone in the history of legal rules is title XVII of book L of the Digest (533), which the emperor Justinian, who advocated a return to classicism, wished to dedicate to rules as the great thread tying together his monumental compilation (Corpus Iuris Civilis). This title De diversis regulis iuris antiquae collects more than 200 legal rules that have been points of reference for centuries. For instance, we find many of them centuries later in the famous compilation, Las Siete Partidas (1265) by the king of Castile and Leon Alfonso X the Wise (1252–1284) (Partida VII, title XXXIV).


9 On rules and norms, see Álvaro d’Ors, “Sobre norma en Derecho canónico,” in *Nuevos papeles del oficio universitario* (Rialp, Madrid, 1980), pp. 369–376. The difference between a norm and a rule lies in the fact that norms, used by the law beginning with the Roman Empire, are instruments for tracing not straight lines but right angles, which presuppose a closed system. This is why they arose in the realm of tax law.


12 Plato himself conceived of justice as harmony, and thus as a principle and universal virtue from which all the others were derived. It consisted basically in looking after one's own, without interfering with what belongs to others, performing a social service in the state for which his nature is best adapted. *Cf.* Plato, *Republic* 4.10.433a.

13 *Cf.* in this vein Aristotle, *Nicomachean Ethics* 5.1.1129b:
“Therefore, neither evening nor morning star is so wonderful,” the philosopher says, citing Euripides. This teleological sense, applied to the law, takes account of the well-known work of Rudolf von Jhering, Der Zweck im Recht vol. I (4th ed., Breithopf und Härtel, Leipzig, 1904; reprinted Georg Olms Verlag, Hildesheim, New York 1970), p. V: “Der Grundgedanke des gegenwärtigen Werkes besteht darin, dass der Zweck der Schöpfer des gesamten Rechts ist.” In the background, for Jhering the goal (Zweck) is the creative lever (Hebel) of the will, which contains man, humanity, and history: “In dem Zweck steckt der Mensch, die Menschheit, die Geschichte” (p. 18).

14 So begin Justinian's Institutes 1.1 pr.: “Iustitia est constans et perpetua voluntas ius suum cuique tribuens.” The phrase is taken from the first book of the rules of Ulpian (Digest 1.1.10. pr.).


22 Cf. In this vein Augustine of Hippo, *De civitate Dei* 19.21.649: “non est autem ius ubi nulla iustitia est.”


25 Interesting in this respect is the nuance that Isidore of Seville incorporated into the traditional definition of justice in his *Etymologiae* 2.24.6: “iustitia, qua recte iudicando sua cuique distribuunt.” In effect, justice, applying a correct criterion, allows the distribution to each of what is his. Therefore, it belongs to the science of the law to determine the criteria for fair distribution.


27 On these two principles, *vid.* his more recent opinions in John


29 In the fitting expression of Álvaro d’Ors, *La posesión del espacio* (Civitas, Madrid, 1998), p. 45.


31 Gaius, *Institutes* 1.8: “Omne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones.”


33 Witness William Shakespeare, in his famous comedy *The Merchant of Venice*. *Cf.* Act III, Scene III: Antonio: “The Duke cannot deny the course of law”; Act IV Scene I: Portia: “It must not be; there is no power in Venice/Can alter a decree established.”

34 *Cf.* Álvaro d’Ors, *Derecho privado romano* (10th ed. executed by Xavier d'Ors, Eunsa, Pamplona, 2004), § 31, p. 63.


Cf. John Austin, *The Province of Jurisprudence Determined* (1832) (ed. Wilfrid E. Rumble, Cambridge University Press, Cambridge, New York, 1995), p. 18: “The matter of jurisprudence is positive law...A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.”

Vid., among others, Cicero, *De partitione oratoria* 129: “Quod dividitur in duas partes primas, naturam atque legem, et utriusque generis vis in divinum et humanum ius est distributa, quorum aequitatis est unum, alterum religionis.”


Harold J. Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, Cambridge, Massachusetts, London, 2003), p. IX: “The dualism of spiritual and secular jurisdictions and the pluralism of secular jurisdictions within the same polity were at the heart of the formation of the Western legal tradition.”


In this vein, Ronal Dworkin, *Law's Empire* (Hart Publishing, Oxford, 1998), pp. 176–224. In my opinion, integrity is not, as Dworkin says, an “independent ideal” (p. 178) of justice and fairness, but only a consequence of the rational dimension of justice.

On this distinction, which is found at the very heart of private law, *vid.* Max Kaser, *Das römische Privatrecht* I (Beck, Munich, 1971), pp. 29–31, as well as Álvaro d’Ors, *Derecho privado romano* (10th ed., executed by Xavier d’Ors, Eunsa, Pamplona, 2004), § 33, pp. 68–70.


In this vein, Titus Livius 38.38.17 observes that controversies are resolved through a legal process or, when the parties agree to it, by war: “controversias inter se iure ac iudicio disceptanto aut, si utrisque placet, bello.”

Of course, it is still necessary to regulate war, not only in terms of the circumstances that can legitimize it, but also in terms of the means that can be used within it. A utopian prohibition of war would inexorably lead to the endangerment of civilians and combatants in those wars that would be declared in violation of the prohibition.

The verses of the second book of Horatius’ satires are fitting. No person or people owns the earth: “Propriae telluris erum natura neque illum / Nec me nec quemquam statuit” (*Liber Secundus Sermonum* 2.129–130).

*Cf.* Cassius-Ulpian, *Digest* 43.16.1.27; like Paulus, *Digest* 9.2.45.4: “vim vi defendere omnes leges omniaque iura permittunt.” *Vid.* article 51 of the United Nations Charter of 26 June 1945: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Despite the international supremacy given to it by article 103 of the United Nations Charter, the United Nations is not the international institution that will give global law its stability. The United Nations fulfilled its mission during the Cold War, despite scant operative powers. But now we urgently need to rebuild it with the efforts of all nations, especially the permanent members of the Security Council (China, the United States, France, the United
Kingdom, and Russia), which must renounce their privileged position. The reform of the United Nations would be an adequate way to recover international balance and limit some states’ hegemony. The new world order has exposed the stagnation of the U.N. system. Unbounded optimism has given way to pessimism about the role of the United Nations on the global stage. The excessive bureaucratization, the proliferation of other international organizations that limit its capacity for influence (cf. Michael Barnett and Martha Finnemore, *Rules for the World. International Organization in Global Politics*, Cornell University Press, 2004, p. 1), and the instrumentalization of its proceedings by hegemonic states – all these signal a crisis of authority that has often produced widespread indifference to its policies and initiatives.

57 Amendment II (1791): “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” Vid. the legal case District of Columbia et al. v. Heller (no. 07–290), decided 26 June 2008 (554 U.S. 2008), in which the Supreme Court of the United States held, “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”


61 The principle has its origins in ancient Roman law, which allowed the father or owner of a child or slave that had committed a crime to deliver him to the plaintiff (noxae deditio) instead of paying the penalty (cf. *Digest* 9.4: *De noxalibus actionibus*).

University Press, Oxford, New York, 1997), p. 224, as well as p. 223, which relies on a more restrictive and critical concept of sovereignty: “It is worth observing that an uncritical use of the idea of sovereignty has spread similar confusion in the theory both of municipal and international law, and demands in both a similar corrective.”


64 Cf. the extensive preliminary study by Álvaro Núñez Iglesias and Francisco J. Andrés Santos, in Rafael Domingo (ed.), *Code Civil* (Marcial Pons, Madrid, Barcelona, 2005), pp. XLI-CII.


67 Thus, for example, article 1 of the 1948 Universal Declaration of Human Rights recognizes the universal fraternal ties that unite all members of humanity: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

68 A view of the social state is offered by Katrin Kraus and Thomas Geisen (eds.), *Sozialstaat in Europa: Geschichte, Entwicklung, Perspektiven* (Westdeutscher Verlag, Wiesbaden, 2001). On its fragmentation, see the classic contributions of Ernst Forsthoff and Otto Bachof, “Begriff und Wesen des sozialen Rechtsstaates” on the occasion of the “Tagung der deutschen Staatsrechtslehrer zu Bonn am 15. und 18. Oktober 1953 (Walter de Gruyter & Co., Berlin, 1954), pp. 8–128. For a reformulation of the general part of administrative law in light of the principles of the social state,


70 *Vid.* Ulpian *Digest* 1.1.10.1 (= *Justinian's Institutes* 1.1.3): “Iuris praecpta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.”


74 Johannes Althusius, *Politica methodice digesta atque exemplis sacris et profanis illustrata* (Herborn, 1603; 3rd ed., 1614; repr. Scientia, Verlag, Aalen, 1981). For Althusius, there is a progressive continuity in human society, just as in the law that regulates societies (*ius symbioticum*). It goes from smaller to bigger societies, from private associations (*consociationes privatae*) to public ones (*publicae*): “societas humana certis gradibus ac progressionibus minoru societatu a privatis ad publicas societates pervenit” (p. 59). This progression culminates in the *ius regni*, the law of the public, universal association, which Althusius calls interchangeably *regnum* or *res publica*. Men gathered without a “symbiotic law” are a crowd, a multitude, but not a society: “hominis congregati sine iure symbiotico sunt turba, coetus, multitudo, congregatio, populus, gens” (p. 59).

University Press, New Brunswick, New Jersey, 1953), p. 2021: “The legitimate object of government, is to do for a community of people, whatever they need to have done, but cannot do, at all, or cannot, so well do, for themselves in their separate, and individual capacities. In all that the people can individually do as well for themselves, government ought not to interfere. The desirable things which the individuals of a people cannot do, or cannot well do, for themselves, fall into two classes: those which have relation to wrongs, and those which have not. Each of these branch off into an infinite variety of subdivisions.”

76 Cf. Pius XI, *Quadragesimo anno* §79 (ed. on line: [www.vatican.va](http://www.vatican.va)).

77 In no. 13, we already find the outlines of this principle: “If the citizens, if the families on entering into association and fellowship, were to experience hindrance in a commonwealth instead of help, and were to find their rights attacked instead of being upheld, society would rightly be an object of detestation rather than of desire” ([www.vatican.va](http://www.vatican.va)).


79 *Pacem in terris*, nos. 140–141 ([www.vatican.org](http://www.vatican.org)).

80 Cf. Pius XII’s address to Young Members of Italian Catholic Action, Rome, Sept. 12, 1948, AAS 40 (1948), 412.

Benedict XVI, Encyclical Letter *Caritas in veritate*, 29 of June 2009, no. 57 in fine (www.vatican.va): Cf. also no. 41: “As well as cultivating differentiated forms of business activity on the global plane, we must also promote a dispersed political authority, effective on different levels”; and no. 67: “[…] there is urgent need of a true world political authority.”

*Cf.* in this vein, Nicholas W. Barber, “The Limited Modesty of Subsidiarity,” in *European Law Journal* 11.3 (2005), 308–325: “Though its legal effects may be slight, its symbolic significance is enormous” (p. 308).


The Treaty of Lisbon came into force as of December 1, 2009, after the deposit of the instruments of ratification in Rome by the final signatory, the Czech Republic. The Treaty of Lisbon marks a new era in the evolution of the European Union, which will have increasingly important consequences for its role as a global entity.

Number 3.1 of article 3 of the Treaty of Lisbon, which recognizes the principle of subsidiarity, includes the following: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Number 3.2 of article 3 refers to the *Protocol on the application of the principles of subsidiarity and proportionality*.

*Vid.* the extensive article by George Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States,” in *Columbia Law Review* 94 (1994) 331–456, which concludes with a good synthesis: “However, for a polity that is still seeking to establish its basic federal-state equilibrium, rather than merely to preserve it, the search for a guiding principle of regulatory federalism, and the designation of subsidiarity as that principle, are entirely appropriate.”

*Cf.* in this vein Pierpaolo Donati, “La sussidiarietà come forma di
governance societaria in un mondo in via di globalizzazione,” in Pierpaolo Donati and Ivo Colozzi, La sussidiarietà. Che cos’è e come funziona (Carozzi Editore, Roma, 2005), pp. 65–68, for whom federalism, although a form of political governance, is not necessarily based “su relazioni propriamente sussidiarie” (p. 63).

89 Maurizio Ettore Maccarini, “I modelli di attuazione della sussidiarietà orizzontale,” in Pierpaolo Donati e Ivo Colozzi, La sussidiarietà. Che cos’è e come funziona (Carozzi Editore, Roma, 2005), p. 113: “La sussidiarietà è anzitutto un metodo per affrontare i bisogni concreti della persona e della collettività e non, come troppo spesso viene rappresentata, una regola di priorità per individuare il livello istituzionale o di aggregazione al quale assegnare le competenze.”


92 In a certain sense, this principle is a synthesis of the fourth and fifth principles (of consent and of collective decision making about public matters through voting procedures) proposed by David Held in his “principles of cosmopolitan order.” Vid. David Held, “Principles of Cosmopolitan Order,” in Gillian Brock and Harry Brighouse, The Political Philosophy of Cosmopolitanism (Cambridge University Press, Cambridge, New York, 2005), pp. 12–14. Ultimately, as Held himself admits, “the principle of consent constitutes the basis of non-coercive collective agreement and governance” (p. 13). Thus, “Principles 4 and 5 must be interpreted together” (p. 13).

93 Cf. previous chapter.

94 Cf. in this vein, the speech by Benedict XVI before the General Assembly of the United Nations on 18 April 2008.
(www.vatican.org): “It is evident, though, that the rights recognized and expounded in the Declaration apply to everyone by virtue of the common origin of the person, who remains the high-point of God's creative design for the world and for history. They are based on the natural law inscribed on human hearts and present in different cultures and civilizations. Removing human rights from this context would mean restricting their range and yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural, political, social and even religious outlooks. This great variety of viewpoints must not be allowed to obscure the fact that not only rights are universal, but so too is the human person, the subject of those rights.”

95 Isaiah Berlin, “Two Concepts of Liberty,” in Four Essays on Liberty (Oxford University Press, Oxford, 1969), p. 163 puts this same idea in the mouths of the liberals of the first half of the nineteenth century: “They pointed out that the sovereignty of the people could easily destroy that of individuals.”

96 Of great interest in this regard are Joseph Stiglitz's personal experiences in the World Bank and his assessments of these global institutions in his best-seller, Globalization and its Discontents (Penguin Books, London, New York, 2002).

97 Philip C. Jessup lamented this situation already in The International Problem of Governing Mankind (The Castle Press, Claremont, California, 1947), p. 24: “It is true that in the most important cases the right of veto does apply. This is a very serious defect in the development of international machinery for the preservation of the international peace.”


John Rawls, *Political Liberalism* (expanded edition, Columbia University Press, New York, 2005), p. XVI: “A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines (...) Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.”


Cf. Hermogenian, *Digest* 1.5.2: “Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris, ordinem edicti perpetui securi et his proximos atque coniunctos applicantes titulos ut res patitur, dicemus.”


Ulpian, *Digest* 2.14.7.7.

Cf. The Law of the Twelve Tables 9.1.12, supported in Cicero, *De legibus* 3.4.11; 3.19.44.

Ulpian, *Digest* 1.1.10 pr. “Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.”


It is incorrect to speak of terrorist states rather than of terrorist governments that control the powers of some state.
Conclusion: The Third Time Is the Charm

After the Second World War, the conflicts of the Cold War, and the wreckage of September 11, a new global society cries out for a law that can order it according to its new global needs. If the ancient *ius gentium* served the hegemonic interests of Rome, and international law those of a state-based Europe, the new global law, based on the person, must contribute to the common good of humanity and to the development of world peace. The third time is the charm!

Global law is a *ius pacis* and not a *ius belli*. Although wars in the traditional sense of the term exist, we must use all the political and diplomatic means to avoid them. But once in war, the norms of international humanitarian law should be applied. Global law transcends the concept of war insofar as it no longer regards war as a legal tool for resolving conflicts. Hence we have referred to it only on occasion.

The new global law seeks the globalization of justice and the jurisdictional resolution of conflicts between peoples and persons. This does not entail that the use of armed force is eliminated for specific cases, but it may never be authorized by the will of a state, except in case of legitimate defense (*vim vi repellere licet*).

Global law does not forget the legal tradition. It takes its great treasures: the idea of a law common to different peoples (*ius commune*), the value of one's word (*fides*), the authority of the voice of nature (*vox naturae*), the obligation to fulfill agreements (*pacta sunt servanda*), the importance of principles and customs, the need to respect the status quo, the distinguished role of jurisprudence, the interrelation among sources of law, as well as the accomplishments of modern international law. But most important is that it rescues the concept of the person for the law, which had been lost in the modern era with the birth of the state. And with the person returns the idea of dignity, which acquires absolute value as an attribute typical of, and unique to, persons.

Each person, that is, every living human being, has dignity as a bearer of rights that should be recognized, not simply *granted*, by legal orders. Dignity comes in this way to substitute for the important role sovereignty plays in international law, where the state becomes the only subject of international law. The subject of global law is, on the other hand, the person – any person, independently of language, color, birthplace, age, sex, or
social condition. And this is so in virtue of the dignity of that person, who submits to the global order at least in its formation phase by his or her own will, not under state command. Thus, the legal coercion that can be exercised against him or her is justified. Only in a later phase, when the global legal order protective of the *bonum commune universale* is fully developed, will legal coercion be applied without requiring prior adherence. Still, global law is more a law of agreements than of impositions, more about authority than power. Hence global law should go hand-in-hand with arbitration and, in general, various means of conflict resolution.

The peaceful coexistence of international and global law is necessary. The challenge is to transform international law into a global legal order, according to the principles of this *ius novum*. It is unnecessary at this point to introduce a radical break, for global law can continue developing in step with the process of transformation, precisely because its nature differs from that of international law.

Man should not be the slave of his own words, his language. Neither can one enslave concepts, giving them a meaning opposed to their natural one. Otherwise, language ceases to be a means of communication, becoming instead a mere tool of power. The politicization of certain words and their constant political manipulation makes them unusable for the consolidation of global law. Words, like men, also fall ill. And they die by falling into disuse. Global law, therefore, defends more the idea of people than of nation, for the latter has since the French Revolution produced secessionist nationalism. Global law promotes Roman *maiestas*, whose nature is inclusive, more than it does exclusive modern sovereignty. And it rejects in every case any hegemonic principle. This is a great difference between the law of nations and global law. The former was not a law among equals as international law is, at least in theory, because all the states are equally sovereign. This does not necessarily hold in practice – witness the functioning of the Security Council of the United Nations.

The great risk for global law in our time is that it would be Americanized, turned into a mere American version of *ius publicum europaeum*. To globalize the law is not necessarily to Americanize it. But it could become that. In the same way that *ius gentium* was a Roman law and international law was effectively European, so could global law become an American law. The strategy of the United States is clear: to refuse to play the legal globalization card and establish itself *de facto* as the true champion of democracy in the world, using American law for this purpose. Everything that is not American law becomes civil law – that is, a second-
rate law, a non-American law.

For American jurists, heirs of common law, international law in our time could evolve into civil law – a foreign law, respected but not acknowledged. The United States is at the moment disposed to accept an American global law, but not a “foreign” law that serves to limit its imperialist zeal or undermine its position as *defensor pacis totius orbis*. It has reasons and arguments for this position. But that is not the way it should go – not by a long shot.

September 11 has revealed the insecurity in which the world lives in the twenty-first century. It is no longer in the battlefields or in the trenches but in every corner of the world: an airport, a train station, a bus. Faced with the gravity of this situation, the United States is not ready to make concessions of sovereignty to an ineffective international community in which the state, despite having a vote in the General Assembly of the United Nations, submits to the whims of the Security Council. No, the United States does not want to – cannot – play the international card as if this poses no threat to its hegemony.

Jeremy A. Rabkin's previously mentioned book, *Law Without Nations?*, lucidly explains the American arguments. The security of the United States is in danger, and it is the United States that must defend itself by appeal to sovereignty and independence. For Rabkin, concessions of jurisdiction to global institutions that diminish American sovereignty would be harmful for democracy. Thus, the solution for American leaders is unilateralism based on the North American giant's immense military capacity.

Nothing is more opposed to global law than a unilateralism based on power, just as nothing is more opposed to democracy than partitocracy. Both bring about political impoverishment, and in the long run, social misery. I agree with Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik in their defense of multilateralism, even as an enriching element in domestic democracy. As these authors note, multilateralism emulates James Madison's strategy of improving national government by raising decision making to a higher level when a common interest is at stake.

With or without the United States, global law has to follow the path of justice. If the United States joins the global law initiative, the risk of Americanization will be greater. But if it does not, the development of global law will be much slower than it would be with the support of the American colossus. Consider, for example, the International Criminal Court or the Kyoto Protocol.

The key to global law is not only in the hands of the United States, but
also of the United Nations. This world organization, having accomplished much internationally, has failed to fulfill its main objective of maintaining peace in the world. The cold war and later conflicts have impeded that. Now whereas global law can develop without the support of the United States, the support of the United Nations is a condicio sine qua non. But the United Nations itself must become a new institution, not just reform itself. It has to change its appearance, as Europe has, to establish itself as the great coordinating institution for global law. For that we have proposed a new name, United Humanity, which reflects continuity with the previous label of “United Nations” but replaces the term “nation” with “humanity.” In effect, international law has been a law of states and nations, whereas global law is a law of humanity. Nations do not unite – rather we, all the earth's inhabitants, do. Hence the novelty of global law, which resembles common law more than the law of nations.

The formation of the United States and the process of building the European Union (EU) contribute key ideas for global law. As a national revolution, on the other hand, the French Revolution contributes less. The great American contribution is the recovery of the idea of people (demos, populus), rationally supported by the American philosopher John Rawls in his book The Law of Peoples (1999). Humanity comprises persons organized into families, and these into communities, which in turn form peoples – but not, strictly speaking, states. States are a way of organizing society in the modern era that has now been superseded thanks to a crisis in its shaping principles, especially those of sovereignty and territoriality.

James Wilson, Abraham Lincoln, and Joseph Story considered the American people a nation even before the states were constituted. They believed, in other words, that the people predated the state: “The Union is older than any of the States; and in fact created them as States.” Thus, the American constitution only more perfectly united what already existed: a people. This is the way to treat sovereignty in our time: change it back into majesty, thereby recovering the idea of people. Humanity can be called a people, a people of peoples (populus populorum), but it cannot be a state, as if it were a nation. And because humanity is prior to states, the law of humanity as a universal community should prevail against the law of states.

From the EU, global law learns that much can be accomplished in a short period of time when there is a will to unite and a desire for reparation and forgiveness. In this process, the Christian message of reconciliation has played an important role. Europe has known how to forgive and has therefore become a much more solid union than those created by the weak ties of economic interest. The New Europe has been consolidated on the
basis of solidarity and subsidiarity, two indispensable ingredients for the establishment of a global legal order.

Global law must be an order and not just a handful of moral principles that guide the conduct of peoples. But it is a *sui generis* order, with some shaping principles common to all orders (justice, rationality, coercion) and others specific to itself, like universality. It is an order centered on the person, with a rule of recognition based on a centuries-long democratic principle: “*quod omnes tangit ab omnibus approbetur.*” What affects everyone should be approved by everyone, and not only by a handful of powerful states or a small country that manages to intimidate others with the atomic bomb. This rule of recognition will make room for a global domain for global institutions that yet must never accumulate too much power. This is the basic objective of United Humanity: to coordinate global institutions according to a jurisdictional criterion that discerns what belongs to the global legal domain.

Global law is the great legal challenge of the twenty-first century. It is the main contribution that legal science can make to humanity. It requires everyone's effort and the renunciation of a series of rights and privileges that the world's peoples and nations have been acquiring over time. We must respect the *status quo* but without viewing it as fixed. Globalization is a process that must be realized, unfortunately, with or without the law. It is unstoppable, and there is no return. It is the duty of all men of law to order that process according to principles of justice. It falls to us, twenty-first century jurists, to lay the foundation of this new edifice that is global law: the common law of humanity.

1 In this vein, Jürgen Habermas, *The Divided West*, edited and translated by Ciaran Cronin (Polity, Cambridge, Malden, Massachusetts, 2006), p. 121: “The abolition of war is a command of reason. Practical reason first brings the moral veto to bear against systematic killing.”


James Madison, “The Union as a Safeguard against Domestic Faction and Insurrection,” of 23 November 1787, in *The Federalist Papers*, no. 10, in the online version at *The Avalon Project at Yale Law School* (www.yale.edu/lawweb/avalon): “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”


<table>
<thead>
<tr>
<th>Topic</th>
<th>Page(s)</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>abortion</td>
<td></td>
<td>135n56, 136n57</td>
</tr>
<tr>
<td>absorption, principle of</td>
<td></td>
<td>177</td>
</tr>
<tr>
<td><em>Ab Urbe condita</em> (Livius)</td>
<td>82</td>
<td></td>
</tr>
<tr>
<td>Accursius</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>Alexy, Robert</td>
<td>141–142, 155</td>
<td></td>
</tr>
<tr>
<td>Alfonso X of Castile</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>al-Shaybani, Muhammad</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>Althusius, Johannes</td>
<td>176n74, 176, 177</td>
<td></td>
</tr>
<tr>
<td>Ambrose (Saint), and natural law</td>
<td>45–46</td>
<td></td>
</tr>
<tr>
<td>animal liberation movement</td>
<td>129</td>
<td></td>
</tr>
<tr>
<td>animals</td>
<td></td>
<td>129n25</td>
</tr>
<tr>
<td>cruelty to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>natural law and</td>
<td>10, 10n47, 130n32</td>
<td></td>
</tr>
<tr>
<td>as persons</td>
<td>129–131</td>
<td></td>
</tr>
<tr>
<td>Ulpian on due protection of animals as persons</td>
<td>130</td>
<td></td>
</tr>
<tr>
<td>animals as persons</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Animals as Persons</em> (Francione)</td>
<td>129–130</td>
<td></td>
</tr>
<tr>
<td>Anthroparchy</td>
<td>xxi, 117–120</td>
<td></td>
</tr>
<tr>
<td><em>See also</em> United Humanity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Antigone</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Aquinas, Thomas (Saint)</td>
<td>13, 46</td>
<td></td>
</tr>
<tr>
<td>arbitration</td>
<td>110–112</td>
<td></td>
</tr>
<tr>
<td>alternatives to</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>commercial arbitration</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>consensual nature of arbitrations</td>
<td>111–112</td>
<td></td>
</tr>
<tr>
<td>proliferation of decisions</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>Aristotle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>on natural/positive justice</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>on <em>polis</em></td>
<td>105–106, 106n20</td>
<td></td>
</tr>
<tr>
<td>arms, right to bear</td>
<td>169</td>
<td></td>
</tr>
<tr>
<td><em>Attic Nights</em> (Gellius)</td>
<td>82</td>
<td></td>
</tr>
<tr>
<td>Augustine (Saint), and natural law</td>
<td>45–46</td>
<td></td>
</tr>
<tr>
<td>Austin, John</td>
<td>32, 32n43, 164</td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>See Kelsen, Hans</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>autonomy</td>
<td>41, 182</td>
<td></td>
</tr>
<tr>
<td>as element of international relations</td>
<td>78–79n61</td>
<td></td>
</tr>
</tbody>
</table>
sovereignty and 172

*axioma* (what is deserved) 131n34

Basil I (Emperor) 13
Bederman, David J. 98–99
Bello, Andrés 31

*bellum iustum* 6–7

Benedict XVI (Pope)

- on globalization 135n53
- on human dignity 143n85
- on human rights 181–182n94
- on legal reasonableness 164
- on subsidiarity 178

Bentham, Jeremy xx

- animal liberation movement and 129
- criticism of expression *law of nations* 30–31
- influence of 124
- influence on international law 30–32
- introduces concept of international law xxn13

*An Introduction to the Principles of Moral and Legislation* 30, 44–45

- on natural law 44–45

*Principles of International Law* 30–31

*Theory of Legislation* 44–45

- use of word *international* 30–31
- utilitarianism of 129

Berman, Harold J. xxn13, 18, 99, 164–165

Biological Weapons Convention 176

Blackstone, William 44–45, 47

Bluntschli, Johann C. 25

Bodin, Jean 83

- first appearance of *sovereignty* in works of 66

*Les six livres de la République* 66, 83

- on sovereignty 66, 69

Bonaparte, Napoleon 84, 172–173

Boniface VIII (Pope) 18, 143n82

Boyd, Alexander C. 34

Boyle, Joseph M. 46–47

Braman, Sandra 61n17

Buchanan, Allen 86n79
Bush, George W. 73
Byzantine law, concept of *ius gentium* in 13

Calasso, Francesco 15

canon law
  Code of Canon Law 18
  and *ius gentium* 13
  and *ius naturale* 46

Carozza, Paolo 180

Castilian common law 15

*casus belli* 33–34

Catholic Church
  on human dignity 133
  See also canon law

Catholic social teaching 176–178

Cato the Elder 6–7

Celsus 138
  “change of State” 61n17

chaos theory 81

China, in Council of Human Rights 89n85

*Christentum und Sozialdemokratie* (von Ketteler) 177

Church Fathers, and natural law 45–46

Cicero, Marcus Tullius
  *De haruspicium responso* 8
  *De officiis* 7
  *De oratore* 8
  *De partitione oratoria* 8
  *De re publica* 8
  *On Duties* 7
  on *fides* (faith) 7, 7n20
  *ius gentium* first used by xix
  *ius gentium* in works of 6–8
  on *ius gentium* vs. *ius civile* 7
  on *ius naturale* 8
  on *maiestas* 103n13
  *Natura deorum* 82
  *Pro Roscio Amerino* 8
  *Tusculaneae Disputationes* 8
  on unwritten law 8
  use of *dignitas* 131–132
use of nation 82
civitas maxima 27
Clementine Constitutions (Clement V) 18
Clement V (Pope) 18
Code Napoléon 16
Code of Canon Law 18
Codex Canonum Ecclesiarum Orientalium 18
Codex Iuris Canonici (1917) 18
Codex Iuris Canonici (John Paul II) 18
coercion principle 166–170
   based on global law 168–170
   based on international law 167–168
   legitimate international defense 168
   right to bear arms 169
co-existence of law xviii–xviii
Cohen, Jean L. xviii
Coke, Edward 163
Cold War 89, 93, 169n56, 198
colonialism 113
Commentaria (Bartolus de Saxoferrato) 12
Commentaries on the Laws of England (Blackstone) 47
commercial arbitration 112
common human project (bonum commune universal) 105–106
The Common Law (Holmes) 3
Common Law of Mankind (Jenks) 39–40
common patrimony of humanity 77
Congress of Vienna 31
conscience, freedom of 136n57
Constitution (U.S.), and sovereignty 67–68n33, 67–68
Corpus Iuris Canonici (Gregory XIII) 18
Corpus iuris civilis 26
cosmopolitan law (Weltbürgerrecht) xviii, xx, 29, 104–105, 106
cosmopolitan order, principles of 157, 157n10, 181n92
Coulson, Noel J. 19
Council of Constance 83
Council of Human Rights 89n85
crimes against humanity 80, 81
criminal jurisdiction, global xvii
criminal law 167
cryptocracy 71
Cuba, in Council of Human Rights 89n85
cuique (to each) 162
cyberdemocracy 173
d’Andrea, Giovanni 13
de Bracton, Henry 13
De cive (Hobbes) 24
Declaration of Human Rights 108n25
Declaration of Independence (U.S.)
on independence 90n87
natural law and 47
self-determination and 85
self-government and 31–32
sovereignty in 67–68n33
Declaration of the Rights of Man and the Citizen 83
decolonization 31–32
Decree of Gratian 13
Decretals (Gregory IX) 18
defensor pacis totius orbis 197
De iure belli (Gentili) 23
De iure belli ac pacis (Grotius) 24
De iure naturae et gentium (von Pufendorf) 26
De legibus ac Deo legislatore (Suárez) 23
De Legibus et Consuetudinibus Angliae (de Bracton) 13
De l’esprit des lois (Montesquieu) 184
Della nazionalità come fondamento del diritto delle genti (Mancini) 34
democratization principle 181–185
social pluralism and 184
technocracy and 184–185
Der nomos der Erde (Schmitt) xxi
de Saxoferrato, Bartolus 12
de Vattel, Emer 27–28
Die Metaphysik der Sitten (Kant) 28
difference principle of Rawls 141n78
Digest (Gaius) 10–11, 12
dignity (dignitas) 131–136
20th-century concept of 133
Benedict XVI (Pope) 143n85
Catholic Church on 133
Church Fathers concept of 132
Cicero on 131–132
dignified society 134
freedom and 137–138
global law and 99, 186–187, 190
Kant on 132–133
modern concept of 132–133
Pico della Mirandola on 132n42
religious dignity 135
Roman concept of 131–132

Dike 5
dike 5–6
Diogenes of Sinope 104–105
disarmament 175–176
doctrine of the two swords 164n42
domestic sovereignty 65
d’Ors, Álvaro xx, 11, 47
Geodierética 43–44
La posesión del espacio 43
on property rights 43–44
Du Boulay, César-Egasse 83
Du contract social (Rousseau) 66–67
Dworkin, Ronald 136, 139, 155

Ehrlich, Eugen 109, 109n30
Elementa iurisprudentiae universalis (von Pufendorf) 25–26
emigration, right to 108n25
England See Bentham, Jeremy, Hobbes, Thomas, Locke, John
English common law 15
contrasted with civil law 16–18
environmental protection 105, 176
equality among persons 131, 139–142
anti-poverty efforts to promote 140–141
discrimination and 139–140
equality and principle of justice 141–142
Etymologiae (Isidore of Seville) 11, 82
Europäisches Völkerrecht 25
European Commission for Human Rights 36
European Convention for the Protection of Human Rights and Fundamental Freedoms 36
European Court of Human Rights 36
European Union (E.U.) contributions to global law 199
creation of 37
fundamental pillars of 178–179
jurisdiction of supranational organizations 79
roots of law 16
euthanasia 135n56, 136n57
extradition/judgment (aut dedere aut iudicare) 80
extradition or judgment principle 80
Extravagantes (Pope John XXII) 18
Extravagantes Communes 18
Ezzati, Abul-Fazl 49

Falk, Richard xiv, 101
family name (nomen Romanum) 103
federalism 67, 122, 179, 179n88
Fichte 84
fides (faith) 7, 7n20, 195
Finnis, John 46–47
Fiore, Pasquale 33
First World War 35
fitrah 49
foedera 8–9
Foelix, Jacques G. 33
France See Bodin, Jean
Francione, Gary L. 129–130
freedom-law relationship 138–139
freedom of conscience 136n57
free will, in ancient Greece 6
French common law 15
French Revolution
and concept of nation 82, 83
and global law 198
jurisprudence and 112

G-20 95
Gaius
on guardianship of minors 10n39
on hereditary succession 8n24

272
on *libertas* 136
on local law and law and nations 14
on property 162
on relationship between types of law 9–10
on superstructure on land xiv

Gatopardism 61–62
Geffcken, F. Heinrich 34
Gelasius (Pope), on doctrine of the two swords 164n42
Gellius, Aulus 6–7, 82
General Agreement on Tariffs and Trade (GATT) 37
general hospitality (*allgemeine Hospitalität*) 29
Geneva Conventions of 1949 59, 80
genocide 37
Gentili, Alberico 23
Geodierética *(d’Ors)* 43–44
geodieretics vs. geopolitics 43–44
George, Robert P. 46–47
German civil code (BGB), on animals 129
Germany

common law in 15
sovereignty and 68–69

See also Hegel, Georg W. F., Kant, Immanuel, Kelsen, Hans, von Pufendorf, Samuel, von Wolff, Christian

Glenn, H. Patrick 14
global civil society 102–103
global community

vs. global civil society 102
vs. international society 102–104
global criminal jurisdiction xvii
*Globalization and International Law* (Bederman) 98–99
global knowledge, third wave of 55
global law

concept of *usus* in 114–115
difference from international law xxii, 98
existing legal systems and xvii, xvii, xviii
globalization of justice 195
jurisdictional resolution of conflicts 195
legal coercion 196
legal tradition of 195–196
need for xiv, xv–xix, 98–102
objectification of human beings 135–136
as person-centric 99, 196
risk of Americanization of 196–198
as transcending concept of war 195

See also global law, principles of, global law, rules of, global legal order

global law, principles of
horizontality/democratization 181–185
solidarity 173–176
subsidiarity 176–181
universality 170–173

global law, rules of (iuris universalis regulae) 185–194
agreements 190–191
approval by all xxi–xxii, 141, 191–192, 199
armed attack authorization 193–194
differences, fostering 186
dignity and equality 186–187
dispute resolution 189
to each age, its law 3–4, 185–186
to each what is his 192–193
global law as common and secular 193
harmony 188
ius vs. lex 192
justice 189
legitimacy of authority 189–190
liberty and dignity 190
one man is to another a person 188
person, role in global law 187
privileges 191
public law-private law relationship 187–188
punishment 191
solidarity 188–189

global legal order
and animals as persons 129–131
anti-poverty efforts to promote 140–141
discrimination and 139–140
equality and principle of justice in 141–142
human rights as heart of global law 142–144
local orders and 123
need for 121–122
and rule of recognition 144–145

See also dignity, equality among persons, person, as center of global law, personal liberty, pyramid of law, United Humanity

Global Parliament xxii, 119, 145–146, 183
global state 171, 172
global warming 105, 116
Goldman, Berthold 112
Gratian's Decree 18
Greece, ancient
  concept of harmony in 157n12
dike concept in ancient 5–6
  Dike in 5
  free will in ancient 6
  greatest contribution to law 4
  Hellenic customary law in 5–6
  on natural/positive justice 5
  polis in 105–106, 106n20
Gregory IX (Pope) 18
Gregory XIII (Pope) 18
Grisez, Germain 46–47
Grotius, Hugo xv, 24, 113
Grundgesetz 133
Grundlegung der Metaphysik der Sitten (Kant) 28
Grundlinien der Philosophie der Rechts (Hegel) 29
Guantánamo Bay Naval Base 74
guardianship of minors 10n39

Habermas, Jürgen xx, 36
hadith 19
Hanifa, Abu 20
Hart, Herbert 122–123, 155
Heffter, August W. 34
Hegel, Georg W. F.
  Grundlinien der Philosophie der Rechts 29
  on state as totality 171
Held, David 122, 122n2, 157
Hellenic customary law (hellenika nomina) 5–6
Heller, Hermann 69–70
hereditary succession 8n24
hereditary system 170–171
Hermogenian, Aurelius 10, 125
Hervada, Javier 47
Hesiod 5
*Historia Universitatis Parisiensis* (Du Boulay) 83
Historical School 33
Hobbes, Thomas
  *De cive* 24
  influence of 27
  *Leviathan* 24, 66–67, 83
  on sovereign nature of monarchy 66–67
  use of *nation* by 83
Holmes, Oliver W. 3
homeland, concept of 107
homogenization 117
horizontality/democratization principle 181–185
  social pluralism and 184
  technocracy and 184–185
human dignity *See* dignity
humanity, crimes against *See* crimes against humanity
human rights
  Council of Human Rights 89n85
  enforcement of 36
  global legal order and 142–144
  as heart of global law 142–144
  internationalization of 59
  universality of 49n117, 66
Human Rights Watch 86n80
human vanity 132n40
hunger, worldwide 140–141n75

ideals, *vs.* ideology and morality xvii–xviin8
immigration
  regulation of 108, 108n25
  territoriality and 74–75
imperialism 53–54, 172–173, 179
independent sovereignty 65
indifference 44
informational state 61n17
Innocent IV (Pope) 126–127
Institutes (Gaius) xiv, 9–11, 136
Institutes (Justinian) 10n47
Institutiones (Ulpian) 130
Institutiones iuris naturae et gentium (von Wolff) 26–27
interdependence vs. independence 116
International Court of Justice 79
international courts, creation of new 35–36n56
International Covenant on Civil and Political Rights 133
International Covenant on Economic, Social, and Cultural Rights 133
International Criminal Court 37, 79
international defense, legitimate 168, 193–194
international/global legal order principles 170
coercion 166–170
interrelationship among 157–158
justice 158–162
reasonableness 162–166
international law (inter nationes)
co-existence with global law xiv
concept of person in 58, 59–61
death of 32
emergence and diffusion of expression 30
first manual of public 23
globalization of law and 55–57
insufficiency of 53–54
ius gentium europaeum 25–28
ius gentium in Spain 22–23
moral foundations of 86n79
organizations and 59
permeability of 98–99
public and private 32–35
state-centric character of 57–61
transformation to global law 196
transnational law of Jessup 37–39
verticality of 182–183
See also global law, ius gentium, nation-state, sovereignty, territoriality
International Monetary Fund 37
international organizations 37, 104
international relations law 57
international society vs. global community 102–104
international treaties law 57
interventionalism 80
*An Introduction to the Principles of Moral and Legislation* (Bentham) 30, 44–45
Iraq 73
Isidore of Seville (Saint)
  *ius gentium* in writings of 11, 160n25
  *nation* in writings of 82
  on natural law 45–46
Islam 19–21
  *hadith* 19
  *isnad* 19
  *sharia* 19–20
  *siyar* 20, 21
  *sunna* 19
*Islam and Natural Law* (Ezzati) 49
  *isnad* 19
Italian nationalism 34
*iura propria* (local law) xix–xx, 14
*iuris universalis regulae* See global law, rules of
ius, as distinct from *lex* 48n115
*ius ad bellum* 168
*ius belli* 168, 195
*ius canonicum* 13, 18–19
*ius commune* xix–xx
  in Italian 15
  in Middle Ages 14–16
*ius ex persona oritur* (law stems from the person) xvi
*ius fetiale* 6
*ius gentium* (law of nations) xx
  Bentham criticism of *law of nations* 30–31
  in Byzantine law 13
  co-existence with global law xiv
  common law relationship with 15
  *ius naturale* relationship with 10n47, 24, 45
  voluntary 24, 27
*ius gentium*, in Middle Ages
  basis on law of the sea 12
references in canon law 13
references in Christian theology 13
references in civil law 12
references in common law 13

ius gentium, in Rome xix, xx
  equity and good vs. 8
  Gaius on 9–10
  Hermogenian on 10
  Isidore of Seville on 11
  ius civile–ius naturale relationship with 9–10
  Justinian on 10–11
  Livy on 8–9
  as public international law 11
  Sallust on 8

ius gentium europaeum 25–28
  based on civitas maxima 27
  natural law 25–26
  reason and usage as basis for 26
  system of states and 26

Ius gentium methodo scientifica perpetractatum (von Wolff) 26–27

ius in bello 59

ius naturale (natural law) 44–50
  American independence and 47
  in ancient Rome 45
  animals 10, 10n47, 130n32
  as applicable to animals 10, 10n47, 130n32
  Christianization and 46
  Church Fathers on 45–46
  Cicero on 8
  civil law and 47
  Declaration of Independence (U.S.) 47
  early Christianity and 45–46
  Islam and 49
  ius civile relationship with 9–10
  ius gentium europaeum and 25–26
  ius gentium relationship with 10n47, 24, 45
  ius-lex relationship and 48
  land as prevailing over structure in xiv
  modern era and 46–47
  as morally superior 10
romanticism and 47
Ulpian on 10, 130n32
utilitarianism and 47
Ius naturale methodo scientifica perpetractatum (von Wolff) 26–27
ius pacis 195
ius publicum europaeum 25
ius suum cuique tribuere (giving each his due) 158–159, 162
ius voluntarium (voluntary law of nations) 27

Japan 35
Jellinek, Georg 69
Jenks, C. Wilfred xix–xx, 39–41
Common Law of Mankind 39–40
on eight principles of world morality 39
Law, Freedom and Welfare 39
Law in the World Community 39
A New World of Law? xxiii, 39, 40
Space Law 39
Jessup, Philip xx
on international law 36
on sovereignty 99
on transnational law xxn13, 37–39

Jewish question 83
jihad 20
John XXII (Pope) 18
John XXIII (Pope) 177–178
John Paul II (Pope) 18
judiciary, influence of sovereignty on 70–71
juridical pyramid xxii
jurisdiction 77–88
  crimes against humanity application 80, 81
ius dicere vs. ius dicare 78
jurisdiction-sovereignty relationship 78
origins of jurisdiction 78
separating from sovereignty 79
universal jurisdiction applications 80–82
jurisdictional law xviii–xix
jurisdictional unity of judiciary 111
justice, etymology of 4
justice principle (vis iusta) 158–162

280
ius suum cuique tribuere (giving each his due) 162
Kelsen on 159–160
overregulated society 161–162
personhood principle 162
science of justice 160–161
See also coercion principle

Justinian 155n3
imperialist policy of 172–173
on ius gentium 10–11
on Natural Law–Law of Nations distinction 10n47

Kant, Immanuel 28–29
cosmopolitan law xx, 29
Die Metaphysik der Sitten 28
on dignity 132–133
on freedom and law 138
Grundlegung der Metaphysik der Sitten 28
on law of nations 28–29
Zum ewigen Frieden 28

Kaser, Max 7, 10

Kelsen, Hans
on concept of person xvi, 124, 127–128n22
on internationalization of law 55
on justice 159–160
on legal order of state 171
on non-state law 110
normative pyramid ascribed to xxii, 147–148
on sovereignty 69–70
on state-centric character of international law 58, 60–61
Theory of Pure Law 58

Kent, James 31
Keohane, Robert O. 197–198
Kingsbury, Benedict xx
Kissinger, Henry 95n90
Krasner, Stephen 65

Laertus, Diogenes 104–105
Lambert of Cremona 82–83
land, as prevailing over superstructure xiv
language, universal 172, 173
Law, Freedom and Welfare (Jenks) 39
law, meanings of 3n1
Law in the World Community (Jenks) 39
law of nations See ius gentium
law of peoples 41–42, 98
Law of the Peoples (Rawls) 41–42, 198
law-rule relationship 154–155
Law without Nations? (Rabkin) 89–90, 103n14, 197
League of Nations 35
legal imperialism 172–173
legitimacy principle 31
legitimate international defense (vim vi repellere licet) 168
Leibniz, Gottfried 26, 163
Leo I (Pope) 132
Leo VI (Pope) 13
lèse majesté 37
Les six livres de la République (Bodin) 66, 83
Leviathan (Hobbes) 24, 66–67, 83
Lévy, Pierre 173
lex, as distinct from ius 48n115
lex mercatoria 17–18, 57, 112
lex Rhodia 12
Liber Extra (Gregory IX) 18
Liber Primus Iuris Epitomarum (Hermogenian) 10
Liber Sextus (Boniface VIII) 18
Life's Dominion (Dworkin) 136
Lincoln, Abraham 176n75, 176, 177, 199
Livius, Titus 8–9, 82
local law (iura propria) xix–xx, 14
local orders, and global legal order 123
Locke, John
on freedom and law 138
on natural freedom 137
Second Treatise of Government 83, 137
Two Treatises of Government 184
use of nation by 83

Maccarini, Maurizio E. 180
Macedo, Stephen 197–198
Machiavellianism xxii, 167

282
Madison, James 68, 197–198
*maiestas* xvi, 66, 103n13
  See also *sovereignty*
*maiestas universalis* 103
Maine, Henry S. 44
Mancini, Pasquale S. 34
Maritain, Jacques 47
Martin v. Hunter’s Lessee 68
*Memorabilia* (Xenophon) 5
Menchú Tum, Rigoberta 81–82
Middle Ages
  *ius canonicum* during 18–19
  *ius commune* during xviii, xix–xx, 14–16
  *ius gentium* during
    basis on law of the sea 12
    references in canon law 13
    references in Christian theology 13
    references in civil law 12
    references in common law 13
  uses of *nation* during 82–83
migration
deterrents to 74–75, 108n26
  See also *immigration*
*The Millennium Development Goals Report* (UN) 140, 140–141n75
minors, Gaius on guardianship of 10n39
monarchy, sovereign nature of 66–67
Monnet, Jean xv
Montesquieu 184
morality/morals
  difference from ideals xvi–xviin8
  eight principles of world morality 39
  as foundation of international law 86n79
  *ius naturale* as morally superior 10
  moral necessity for international legal reform xiv
Moravcsik, Andrew 197–198
multilateralism 197–198
  See also *United Nations*
Nagel, Thomas 118–119
*nation*
use in ancient world 82
use in Middle Ages 82–83
use in modern world 83–84
use in twentieth-century 84

nationalism, Italian 34
nationality, crisis of 106–107
nationality principle, transition to 34
nation-state
crisis of xx, 82–88
as focus of international law 53
globalization effect on 122n2
global law effect on xvii
self-determination and 84–86

See also international law, sovereignty,
territoriality, United Nations

*Natura deorum* (Cicero) 82
natural justice (*dikaion physikon*) 5
natural law See *ius naturale*
natural obligations 49
natural reason 9–10, 13, 47, 163
nature (*physis*) 5–6
Nazi Germany 35, 125, 133
need for 121–122
*A New World of Law* (Jenks) xxiii, 39, 40
*Nicomachean Ethics* (Aristotle) 5
*Noctes Atticae* (Gellius) 6–7
*nomen Romanum* 103
nomophors 125, 127
*nomos* See norms
non-governmental organizations 100
non-liberal decent society 41
non-state law 109–110
norms
international law and 55, 58, 101–102
of law of nations 7
physical person and 124, 124n9
universality of 5–6
validity of 48, 125
Nuclear Non-Proliferation Treaty of 1968 101, 176
Nuremberg principles 101
Nussbaum, Arthur 26

Obama, Barak H. 94, 95, 97
*On Common Laws* (Glenn) 14
Oppenheim, Lassa xv
*Ordinary Gloss* (Accursius) 12
overregulated society 161–162

*pacta sunt servanda* (obligation to fulfill agreements) 195
*Panormia* (Yves de Chartres) 18
paradigm shift xiv
*Partidas* (Alfonso X) 15
patriotism, and cosmopolitism 107
Paul of Tarsus, and natural law 45
*Pax Islamica* 20
Peace of Westphalia 54, 114, 121

person

law as stemming from xvi

See also person, as center of global law

person, as center of global law 56, 123–131
law as stems from the person xvi
legal quasi persons 127–128
meanings of person 126
persons as legal persons 126–128
reductionist concept of person 125
personal liberty 131, 136–139
freedom-law relationship 138–139
human dignity relationship with 137–138
negative conception of freedom 136–137
Roman concept of *libertas* 136–137

personhood principle 162
Philippines, computer hacker from 73–74
Phillimore, Robert J. 33–34
*physis* (nature) 5–6
Pico della Mirandola, Giovanni 132n42
Pinochet, Augusto 80–81
piracy 80, 81
Pius XI (Pope) 177
planetary state 72
Plato 5, 157n12
Plautus 131
pluralism 184
polis, Aristotle on 105–106, 106n20
political liberalism 184n100
political liberalism, Rawls on 184n100
polyarchy 72
positive/conventional justice (dikaion nomikon) 5
positive law 164n38
postmodern secessionism 76n56
postmodern tyranny 44
poverty, worldwide
  goal of eradicating 140–141n75
  reduction in 140n74
power, concentration of 117
Praetorian law (ius praetorium) xviii, 100–101
Précis de droits de gens modernes de l’Europe (von Martens) 25
Preuss, Hugo 69
princeps (prince) 154n1
princeps legibus solutus 17
Principios de Derecho Internacional (Bello) 31
principle-rule relationship 155–156
principles
  common to international/global legal orders 170
    coercion 166–170
    interrelationship among 157–158
    justice (vis iusta) 158–162
    reasonableness 162–166
  specific to global law 170–185
    horizontality/democratization 181–185
    solidarity 173–176
    subsidiarity 176–181
    universality 170–173
Principles of International Law (Bentham) 30–31
The Problem of Global Justice (Nagel) 118–119
Prodi, Romano 178–179
pyramid of law 147–153
  individual dimension 150–151
  interrelation among dimensions 150
  legal three-dimensionality 149–153
  social dimension 150, 151
structure of pyramid 147–149
universal dimension 150, 151–152
Pythagoreans, on justice 5

Qu’est-ce que le Tiers État? (Sieyès) 83

Rabkin, Jeremy A. 90, 103n14, 197
Radbruch, Gustav 139
rationalism 48
ratio naturalis (natural reason) 9–10, 13, 47, 163
Rattigan, William H. 33
Rawls, John xx
on American Revolution xvi
on basic liberties 141n78
difference principle of 141n78
on justice 160–161
Law of the Peoples 41–42, 198
on nonliberal decent societies 41
on political liberalism 184n100
on societies of peoples 41
statement of principles 41–42
A Theory of Justice 160–161
reasonableness principle 162–166
consensual reason 163
customary reason 163
legal reasonableness (ratio iuris) 163
natural reason 163
precautionary reason 163
secular law and 164–165
sharia law and 165
reciprocity 5, 21, 28, 29, 76, 107–108n24, 170
recognition, rule of xxxi–xxii, 125, 144–145, 199
religious liberty 133n50, 135n54
Renan, Ernest 84
rerum natura (inherent nature of things) xiv
res nullius (territory open to unrestricted occupation) 25
Revitalizing International Law (Falk) xiv
Rhetoric (Aristotle) 5
right to bear arms 169n57
Roman law
coercion and 166–167
fides 7
formulary procedure 78n60
ius gentium See ius gentium, in Rome
ius naturale 45
ius praetorium xviii, 100–101
legis actiones discredited 166–167n49
natura 7
ratio iuris 163
rerum natura xiv
secular nature of 164
Romano, Santi 128
Rome
bureaucratization of justice in 111
citizenship in 10
libertas in 136–137
See also Cicero, Marcus Tullius, Gaius, Roman law, Ulpian
Rome Statute 37
Rousseau, Jean Jacques 66–67
rule-based principles/principled rules 154–157
rule of recognition xxi–xxii, 125, 144–145, 199
rules of global law See global law, rules of
Russia, conflict with Georgia 64, 80, 89
Salamanca School 22, 46
Sallust 8
Saudi Arabia, in Council of Human Rights 89n85
Scelle, George 38, 58–59
Schmitt, Carl xxi, 25, 69–70, 114
Schuman Declaration 37
secessionism, postmodern 76n56
Second Treatise of Government (Locke) 83, 137
Second World War 35–36
Selden, John 113
self-determination 69
self-governance 87, 116, 180–181
Selznick, Philip 109
separation of church and civil power 164n42
sharia 19–20, 165
Shaw, Martin 71
Sieyès, Emmanuel J. 83
Singer, Peter 129
siyar 20, 21
slavery, in ancient Rome 82
social Catholicism 176–178
social pluralism 184
social state (Sozialstaat) 174–175
solidarity principle 86, 88, 115, 173–176
disarmament 175–176
environmental protection 176
eradication of poverty 175
struggle against international terrorism 175
sovereignty xvi, 65–73
in 20th century 69–70
concept of person and 114
domestic 65
first appearance in writing 66
as foundation of international law 99
indivisibility of 66–67
influence on judiciary 70–71
international 65
of monarchy 66–67
role in formation of states in 19th century 68–69
role in formation of U.S. 67–68
territoriality relationship with 76
universality as irreconcilable to 71
Soviet Union 35
Space Law (Jenks) 39
Spain See d’Ors, Álvaro
Spanish Constitution 111
Spanish Constitutional Court 81–82
stare decisis 17
state
bureaucratization and 63–64
crisis of 61–65
globalization and 62
legal equality of individual states 63
original purpose of 61
otherness and 116–117
primacy in international law 57–61
sovereignty and 62–63, 65–73
super-state 171
territorialism and 64
theory-policy gap in international law and 64
Statute of the International Court of Justice 101
Stein, Peter 16
Stewart, Richard xx
Stiglitz, Joseph 140–141
Stoicism 7
Story, Joseph 199
Suárez, Francisco 23
subsidiarity principle 145, 175, 176–181
  Catholic social teaching as basis for 176–178
  as fundamental pillar of European Union 178–179
  self-governance and 180–181
  in U.S. Constitution 179
sunna 19
super-state 171
superstructure prevailing over land xiv
system of systems (iuris ordorum ordo) xvii

technocracy, and principle of horizontality 184–185
technological revolution 55
teleology 158
territoriality xx–xxi, 73–77
  as complementary to principle of personhood 74
  crisis of 73–77
  earth as common patrimony of humanity 77
  globalization and 76, 113–115
  immigration and 74–75
  nationalism and 114
  sovereignty relationship with 76
  territorial sea 113–114
  universality and 171–172
A Theory of Justice (Rawls) 160–161
Theory of Legislation (Bentham) 44–45
Theory of Pure Law (Kelsen) 58
Theory of the Global State (Shaw) 71
Thirty Years’ War 24, 113
totalitarianism 59, 72, 95, 117, 177
totality, vs. universality 170–171
Traité du droit international privé (Foelix) 33
transnational company 100
transnational law, Jessup on xxn13, 37–39
Treaty of Lisbon 37, 179, 179n86
Treaty of Maastricht 37
Treaty of Versailles 35
Treaty of Westphalia 65, 73
Two Treatises of Government (Locke) 184
tyranny 44, 72, 117, 117n47

Ulpian
on definition of justice 150
on due protection of animals 130
on ius naturale 10, 130n32
on law-related ethical behavior 175
princeps legibus solutus adopted by 17

Un’idea dell’Europa (Prodi) 178–179
unified intersocial law (droit intersocial unifié) 38
unilateralism 88, 89–90, 92, 95, 197–198
United Humanity xxii, 108, 119, 145–147
Global Parliament xxii, 119, 145–146
voting by global citizens 146

United Nations (U.N.)
conflict resolution methodology 90–91
creation of 35–36, 54
credibility issues 92
failure to meet peacekeeping goal 91
future of 88–97, 198
global financial stability and 95–96
goals of 88
need for multidisciplinary problem solving 93
need for own armed forces 92
need for reform 91–93
politics and 62, 64, 89, 93–94, 182–183
primacy of person and 94–95
role on global stage 169n56
sovereignty effect on inertia of 79–80
structural reforms 93
successes of 88, 94–95
U.S. unilateralism and 89–90, 92

See also United Humanity, Universal Declaration of Human Rights

United Nations Charter 101, 168
United States (U.S.)
 contributions to global law 198–199
hegemony of 53–54, 73, 95n90
intervention in Iraq 80
unilateralism and relation with U.N. 89–90, 92

See also Jessup, Philip, Rawls, John

universality of human problems 38–39
universality of human rights 49n117, 66
universality principle 170–173
global law as universal 172
international law as not universal 171–172
universality vs. totality 170–171
universal jurisdiction 171–172
universal languages 171, 172
usus fruendi 115n46

Vallet de Goytisolo, Juan B. 47
van Bynkershoek, Cornelis 26, 113–114
Vienna School 148
Villey, Michel 47
vim vi repellere licet (force repelled by force) 168
vim vi repellere potest (repelling violence with violence/force with force) 193–194
Vinogradoff, Paul 3n1, 16
Vitae Philosophorum (Laertus) 104–105
Vitoria, Francisco de 22–23, 46
voluntarism 48
von Ketteler, Wilhelm E. 177
von Martens, Georg F. 25
von Pufendorf, Samuel 25–26
De iure naturae et gentium 26
De systematibus civitatum 26
Elementa iurisprudentiae universalis 25–26
influence of 26
von Wolff, Christian 26–27
influence of 27–28
publications of 26–27
voting, by global citizens 146
vox naturae (voice of nature) 195

Walt, Stephen M. 117
war
declaration of 6–7, 8–9
and global law 168, 189, 195
justification of 41
necessity to regulate 168n53
See also United Nations
war crimes, universal jurisdiction applied to 80
Washington, George 83–84
Weeramantry, Christopher G. 35
Weimar Republic 174–175
welfare state 61n17
Weltbürgerrecht See cosmopolitan law
Wharton, Francis 33
Wheaton, Henry 34
Wilson, James 199
Wilson, Woodrow 35
World Bank 37
world law xxn13
World Trade Organization (WTO) 37

Xenophon, on justice and law 5

Zouche, Richard 23
Zum ewigen Frieden (Kant) 28
Índice

Preface 10
Acknowledgments 23

PART ONE: FROM THE IUS GENTIUM TO INTERNATIONAL LAW 25

1 The Ius Gentium, a Roman Concept 26
   1. A Law for Every Age 26
   2. A Word about Dike 27
   3. Cicero, Father of the Ius Gentium 28
   4. The Ius Gentium in Other Roman Writings 30

2 The Ius Commune, a Medieval Concept 38
   1. The Ius Gentium in the Middle Ages 38
   2. European Common Law 39
   3. English Common Law Contrasted with Civil Law 41
   4. Ius Canonicum 42
   5. Islamic Sharia and Siyar 43

3 International Law, a Modern Concept 50
   1. From Ius Gentium to Ius Inter Gentes 50
   2. Ius Gentium Europaeum 52
   3. Kant, between Staatenrecht and Weltbürgerrecht 54
   4. Bentham and International Law 56
   5. Public and Private International Law 58
   6. New Attempts at Conceptualization 60
      A. Philip C. Jessup's Transnational Law 62
      B. C. Wilfred Jenks and the Common Law of Mankind 63
      C. John Rawls and The Law of Peoples 65
      D. Álvaro d’Ors and Geodierética 66
      7. Ius Naturale in the Shadow of Ius Gentium 67

PART TWO: TOWARD A GLOBAL LAW 87

4 The Crisis of International Law 88
   1. International Law and the Globalization of Law 90
2. The Basic Primacy of States as Subjects of International Law 92
3. The Death Throes of the State 94
   A. Sovereignty and the Sovereign People 98
   B. The Crisis of Territoriality 104
   C. Jurisdiction: Does It Belong to the State? 108
   D. The Nation-State: A Marriage of Convenience Doomed to Divorce 112
4. The Future of the United Nations 117

5 Global Law, a Challenge for Our Time 142
   1. The Need for Global Law 142
   2. International Society versus Global Community 145
   3. Cosmopolitanism and Global Law 147
   4. Crisis of Nationality, Global Citizenship, and Patriotism 148
   5. Global Law and Nonstate Law 150
   6. Arbitration and Globalization 152
   7. The Usus of the Earth 153
   8. Humanity as Anthroparchy 156

6 The Global Legal Order 169
   1. The Person, Center of the Global Legal Order 171
      A. Are Persons Legal Persons? 173
      B. Are Animals Persons? 174
   2. Personal Dignity, Liberty, and Equality 176
      A. Human Dignity 176
      B. Personal Liberty 179
      C. Equality among Persons 181
   3. Human Rights, at the Heart of Global Law 183
   4. Quod Omnes Tangit ab Omnibus Approbetur 185
   5. United Humanity 186
      A. Structure of the Pyramid 188
      B. Legal Three-Dimensionality 189

7 Legal Principles of Global Law 211
   1. Rules-Based Principles and Principled Rules 211
   2. Principles Common to International and Global Legal Orders 213
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Principle of Justice</strong></td>
<td>214</td>
</tr>
<tr>
<td><strong>B. Principle of Reasonableness</strong></td>
<td>217</td>
</tr>
<tr>
<td><strong>C. Principle of Coercion</strong></td>
<td>220</td>
</tr>
<tr>
<td><strong>3. Specific Principles of the Global Order</strong></td>
<td>222</td>
</tr>
<tr>
<td><strong>A. Principle of Universality</strong></td>
<td>222</td>
</tr>
<tr>
<td><strong>B. Principle of Solidarity</strong></td>
<td>225</td>
</tr>
<tr>
<td><strong>C. Principle of Subsidiarity</strong></td>
<td>228</td>
</tr>
<tr>
<td><strong>D. Principle of Horizontality or Democratization</strong></td>
<td>231</td>
</tr>
<tr>
<td><strong>4. Rules of Global Law (Iuris Universalis Regulae)</strong></td>
<td>234</td>
</tr>
<tr>
<td><strong>Conclusion: The Third Time Is the Charm</strong></td>
<td>260</td>
</tr>
<tr>
<td><strong>Index</strong></td>
<td>266</td>
</tr>
</tbody>
</table>