

Global Law and the New Global Human Community

Direito Global e a Nova Comunidade Global Humana

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The ideal of a universal human community living in perpetual peace and happiness was for centuries a dream of many philosophers, jurists and poets. The Stoic cosmopolitan vision, the Roman aspiration toward an empire without end, the Christian ideal of a world united by charity, the Dantian longing for a universal monarchy, and the Kantian project of world peace, among other ideas, have contributed over time to the growing sense that all human beings are members of a single universal community.

Ever since the discovery of the New World at the end of the 15th century, jurists and theologians alike, most notably members of the School of Salamanca, have been interested in the legal and moral implications of the potential development of such a global commonwealth. The collapse of international society after the tragic elimination of nearly 60 million people during the Second World War revealed the weaknesses of the international legal system born at Westphalia and confirmed at Utrecht. That international order was based on the concept of the sovereign nation-state as the only recognized subject of international law, and on the idea of war as a legal remedy to resolve conflicts between and among states, once diplomatic efforts had been exhausted. The Universal Declaration of Human Rights was a turning-point that gave prominence to the goal of establishing a community forged not only by national self-interest but in a “spirit of brotherhood.”

By the end of the 20th century, with the rapid rise in worldwide interdependence (and mutual vulnerability) that we call “globalization,” old utopian ideals of human unity and perpetual peace had become political imperatives. In today’s globalized world, no existing political community (local, national or supranational) can be considered fully self-sufficient or guarantee complete global justice. And without justice, there can be no peace, liberty, or happiness. There is a province of basic justice that can only be secured in a global context.

The common contemporary goal of addressing globally the problems afflicting humanity is not just a moral option but a moral and political duty with important legal implications. Global issues such as international terrorism, arms trafficking, wars, hunger and poverty, political and economic corruption, and environmental challenges cannot be adequately addressed by lone national governments or by an amorphous community of states in which self-interest trumps the global common good. In its unwieldiness, the international community today resembles a hydra, the many-headed serpent of Greek mythology, with a sovereign state for each head. Its structure and administration have become completely obsolete. It is facing one of its most profound crises since the end of the Cold War.

Without undergoing a deep transformation, the current international community can scarcely survive in this new “postnational constellation” of transnational, supranational and global actors. Global interdependence is not compatible with

complete national sovereignty. We can glimpse the emergence of a new pluralistic and global human community made up of all human beings, based on the dignity of each person, and organized according to a global rule of law.

In this lecture, I will deal with the justification and the nature of the global human community as different from the international community of nation states. I divided the lecture in three parts. In the first part, I will provide four arguments for the establishment of this human global community. In the second part, I will describe the features of this global community from a legal perspective. In the third part I will provide some ideas of how to organize this emerging global community.

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I see at least four arguments to justify the transformation of the international community of nation-states into a global human community. Because they are rooted in the Western legal tradition, I have used Latin terms to refer to them: *dignitas* (dignity) *usus* (use), *necessitas* (necessity), and *bonum commune* (common good). Each one in and of itself could justify the establishment of this new community. They focus on the same reality from different perspectives. The argument from *dignitas* refers to the strong and inherent connection between humanity as a whole and the law as a specific tool for ordering it. The *usus* argument is based on the relation between humanity as such and the planet earth as the home of our species. The *necessitas* argument is grounded in the concept of necessity as a source of binding law. Lastly, the *bonum commune* argument can be used to defend the potential global purpose as a constituent element of the global human community. The four arguments are opposed to the four arguments that support the current international community: the argument of dignity opposes to the argument of sovereignty, the argument of *usus* opposes to the argument of full ownership over the earth (*dominium*), the argument of necessity opposes to the argument of free binding obligations (*consensus*), and the argument of common good opposes to the argument of self-interest of the nation states.

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Let us start with the *dignitas* argument. International law is based on state sovereignty. Global law, however, is based on personal dignity. At the heart of international law is the nation state. At the heart of global law is the human person. Dignity is the unique, absolute, and permanent ontological status of the person; it is what makes the person an ultimate reality—that is, the ultimate concern of all our institutions and communities. Dignity is more than the set of all human rights. It is also more than a basic good, a value, or a principle. Thanks to dignity, the human

person can preserve his or her identity while living in various forms of harmony with others. In this way, dignity unites the legal, the moral, the ethical, the social and the religious—indeed all the dimensions of the human person.

Since dignity is inherent to all human beings, or, in other words, since dignity is recognized and non-granted by political communities, humanity as such is naturally interested in protecting human dignity. The responsibility of protecting dignity rests primarily with each human person, and only secondarily with nation-states, just as the responsibility of staying healthy rests primarily with each person and only secondarily with any kind of community. So there is no reason to restrict the legal protection of dignity, and its most important expression—human rights—to national or supranational boundaries. Dignity must be protected in all provinces of law, including the global legal domain. This global protection of human dignity has to begin, empirically speaking, with the so-called “basic human rights”, that is, rights whose protection is essential to the enjoyment of all other rights. International institutions and global actors are working hard on the protection of dignity as fundament of human rights, but every day we realize that this protection is inadequate due to a lack of a global rule of law.

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The second argument for the justification of the establishment of a true global human community is the peculiar legal relationship that links humanity as such with its home: the earth. This relationship, which I have called “*usus* of the earth”, is prior to and deeper than the relationship between each sovereign state and its own territory, and demands the establishment of a particular legal human community encompassing all the inhabitants of the earth. Traditionally, however, international lawyers have applied to plots of land the Roman legal doctrine of private ownership (*dominium*) and its different modes of acquisition.

The Roman doctrine of *dominium* became key for international law theorists because the primary subject of international law, the nation-state, could not exist without a territory. So the new theory of sovereignty appearing for the first time in Jean Bodin’s *Les six livres de la République* was strongly associated with Roman law, especially by Alberico Gentili, a great admirer of both Roman law and the theories of Bodin.

Under this doctrine, just as the Roman owner (*dominus*) has the right to use, enjoy, possess and dispose of things in the most absolute way, so also does each sovereign state have an absolute and exclusive right over its own territory, which would include a definite portion of the surface of the earth, territorial waters, and the atmosphere above. One consequence of applying this Roman doctrine of *dominium* to the territory of the sovereign state was that the land of the earth along with its

territorial waters *usque ad sidera* was considered the result of the partition of the earth as such, with the capacity for it to belong to different absolute owners (the nation-states) as an independent partitioned entity. These nation-states, as absolute and full owners of their respective territories, have the power to dispose of it. Emmer de Vattel is radical on this point. He said: “Those who think otherwise cannot allege any solid reason for their opinion.”

Beginning with Alberico Gentili, the international community was considered a community of equal nation-states ruled by private law standards. So, the idea of a global and public commonwealth *de iure*, so present in Francisco de Vitoria’s prior work, gradually declined in importance in the realm of international law, which was conceived more as an agreement between and among different absolute owners (sovereign nation-states) than as a law between and among common users.

Thanks to the phenomenon of globalization and the expanding body of scientific knowledge about the earth, legal thinkers are now better able to determine the legal nature of the relationship between the earth and humanity. On the one hand, globalization affects this relation by increasing territorial interdependence. On the other hand, expanding scientific knowledge of the planet affects this juridical relation by clarifying its content, since the rights of a holder depend on the nature of the thing held.

The role of the earth is unique since humanity needs it to survive as a species, at least at the moment. For this reason, it is sometimes rightly called “mother earth”. The earth is an indivisible unit which allows for solidary exploitation and preferential rights of possession but not for a permanent or absolute division among co-owners. So the legal relation between humanity and the earth is not a relation of absolute ownership (*dominium*) but a relation of use (*usus*).

Here *usus* has to be understood in opposition to *dominium*. *Dominium* refers to full and absolute ownership. *Usus*, however, is what *dominium* is not, and refers the right to use or enjoy a thing but without altering its nature, because the user is not an owner. In this sense, any act of environmental protection, administration, or enjoyment, insofar as it does not alter the nature of thing itself (*res*) but only what the thing produces (*fructus*), as well as temporary or permanent *possessio* in its more general sense, is a part of *usus*. So *usus* excludes only those acts that imply an absolute ownership over the earth (*dominium*), i.e. acts of disposal (*habere*), and, of course, of abuse (*abusus*). The construction of an atom bomb, for instance, is a clear act of abusive disposal, not of use of the earth.

Usus of the earth means that humanity has the rights (and derivative duties) to long-term use (*usus* in the strictest sense), full enjoyment (*fructus*) and complete possession (*possessio*) of the planet, but not to alienation (*habere*), let alone destruction. The necessary distribution of the land between and among political communities is not by way of absolute ownership or absolute sovereignty, but by way of *usus*.

Why is this so? Firstly, humanity is so dependent upon the earth that it could not survive apart from it. Thus, humanity does not have disposal capacities over the earth. Nor is alienation possible since there would be no counterpart to humanity to receive the alienated good. Secondly, the earth as a unified whole is indivisible. This is so because a potential division of the earth into different spheres of absolute ownership or full sovereignty would alter substantially the very nature of the earth at least from a legal perspective. Absolute co-ownership, on the contrary demands the faculty of disposal and alienation. Indeed, a co-owner without the capacity to alienate his part of a commonly owned item would not be a true absolute owner.

The doctrine of “*usus* of the earth” tries to recover the key idea that humanity rather than the community of nation states has ultimate responsibility for the protection of the earth. The *usus* of the earth also grants to every human being the right to use the planet as a home. Each human being, as a “co-user” of the earth, becomes a member of a single community which has the right and the power to govern and administer this *usus* of the earth. This *communio in usu* requires the recognition of humanity as a legal community. The *usus* of the earth has important legal applications in matters of immigration, and preservation of the planet. As a co-user, for instance, each human being has the right to decide in which part of the planet will develop his existence, and to change to another place when it is convenient for the pursuit of happiness.

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The third argument for the justification of the creation of a human global community is necessity (*necessitas*) as a source of binding law. Necessity affects the law in two different ways. Sometimes the plea of necessity should be taken into consideration for the purpose of legally justifying a departure from ordinary law. This is indeed the case with respect to the doctrine of necessity in international law, which is based on the rule that human law does not apply when necessity comes into play. Sometimes, however, necessity creates law by grounding legal obligations and duties. Thus necessity becomes an important source of law, that is to say, of binding legal obligation. I am using the concept of necessity in this latter way, though the two legal implications are interconnected. As necessity must be under law, if it can suspend laws it must also be able to create them. Otherwise, society would dissolve into chaos.

It is no mere coincidence that in the wording of the most famous definition of *obligation*, from Justinian’s *Institutions*, there appears the word “necessity”. In this context, necessity expresses the idea that the legal bond created by obligation constrains the wishes of the party. The Roman jurist Modestinus expressed very well what we are trying to explain here. He says: “all law has been made either by consent, or

established by necessity, or confirmed by custom.” In this sentence, the term necessity has its ordinary, non-technical meaning: an imperative need or desire, a pressure of circumstances, a physical or moral compulsion, which excuses from the fulfillment of an existent obligation or creates a new one.

Since 17th century, a strong sense of consensualism has fueled disregard for the decision of sources of law into consent, custom, and necessity, thereby relegating custom and necessity to irrelevance. Custom, however, has succeeded in maintaining its (admittedly secondary) status in the international realm due to the very nature of international law. But we still need to recover the concept of necessity in order to develop a correct approach to the law in this era of globalization. As Tony Honoré aptly puts it, “As regards the world community, necessity is the relevant ground”. The reason was already explained by Francisco de Vitoria, based on Aristotelian thought: necessary causes are final causes.

Indeed, because of globalization, relationships between and among human beings have become necessary for humanity to manage its global needs well. Some of those needs derive directly from human dignity (e.g. eradicating poverty, managing immigration, and combating international terrorism). Thus, *necessitas* and *dignitas* are intertwined. Indeed, the necessity to protect human dignity justifies the existence of a global community because this is the only framework in which human dignity can be comprehensively protected. But also there is a connection between necessity and *usus*. The need of protecting the earth as a whole demands a relation of use over the entire earth and not of divided co-ownership among sovereign nation-states.

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The fourth argument focuses on the existence of a common good which calls for a global human association to advance and protect it. I prefer the expression “common good” to “public interest”, “public good”, or “general welfare”, among others, for its longstanding tradition. The common good is the final purpose of the existence of the community. So a common purpose of the humanity that could not be achieved according to the structure of the international community would justify the need of establishing a new community in order to achieve this purpose. But even a common purpose that could be achieved easy and better in a global community than in an international community could justify the creation of a global community. We know, by experience, that these global public goods exist: the preservation of the earth, the eradication of poverty, the elimination of wars, the solidary distribution of the goods, are example of public goods than can achieve easier in the context of a global community based on solidarity that in an international community based on national self-interest.

The term *holon* coined by Arthur Koestler can help me to explain this idea. *Holon* refers to something that is at the same time a whole and a part. In reality, the first general sense of the concept had been understood and articulated by Aristotle many centuries before, expressed in his well-known phrase, “the whole is greater than the sum of its parts.” But Koestler’s term *holon* adds something more: Each emerging holon both integrates what precedes it and at the same time transcends it. In the same way a cell incorporates and transcends its component molecules; the molecules incorporate and transcend the atoms; and, at the same time, include and transcend its particles. The holon theory offers an apt application to the science of global law. Each model of community integrates that which precedes it and at once transcends it. If we consider the global human community as a whole, it integrates and transcends all other communities. From this perspective, the universal common good and the common good of the global human community are identical. If we consider the global human community as a part, the global common good of this community is different that the universal common good, since the global human community has not the goal of satisfying all human needs. The common good of the global human community would only be a part of the “universal common good”.

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In the second part of my lecture, I will deal with the nature of the global community determines both the structure of its legal system and its legal authority. I will argue that the new global human community is a community of persons not of nation-states, is universal in nature, of compulsory membership, necessary, incomplete and complementary. These key features are intrinsically intertwined and they serve to highlight the differences between the global human community and the international community in which old and new paradigms coexist.

a) A community of persons, not of nation-states. The global human community is first and foremost a community of human persons, not a society or federation of states “over whom there is no human power established”, as Hobbes, among others, argued. It can be said of the global human community what Jean Monnet applied to the unification of Europe: “We are not bringing together nation-states, we are uniting people.” Of course, the only way for persons to work together in a global context would be through different global institutions, supranational entities, nation-states, transnational corporations, NGO’s and other non-state actors that integrate the global human community. But working through these global actors does not remove the person as a global citizen from the spotlight. Perhaps this is the most significant difference between the current international community and the new global human community.

One consequence of the recognition of the global human community as a community of equal persons and not of nation-states is the application of majority rule. In a community of equals, if members cannot reach a unanimous decision, the majority has the right to act for the whole. Since the global human community is a community of equal persons, majority rule comes into play. Francisco de Vitoria thought that this rule could be applied to the world community and that a monarch could be appointed over the whole of Christendom by the majority of Christians. He said: "Once the commonwealth assumes the right to administer itself, and once the principle of majority rule is established, it may adopt whatever constitution it prefers."

Majority rule, however, cannot be applied to a society of sovereign states, legally considered equals, since this would be too strong a limitation on the sovereignty of each state. But the fact that some international actors have recently tried to apply this rule in the international arena is a good sign of the ongoing transformation of the international law paradigm into a new global law paradigm.

b) A universal community. The global human community is universal because it includes each and every human being without exception. But universality is not totality. Whatever is universal is common to all, and general as opposed to particular (i.e., specific to a group of persons or communities). Whatever is total, however, is comprehensive, all-encompassing, as opposed to partial and incomplete. What is universal may or may not be total, and vice versa, for there can be particular totalities, like the nation-state. The international community is the sum of particular totalities (sovereign states).

This is why the global human community cannot be structured as a sovereign world state or a federation of sovereign states. To exist, a sovereign state requires the existence of at least one other state susceptible to being excluded from its territorial jurisdiction. There is no sovereign state without other sovereign states. The concept of the state, like that of sibling or friend, requires otherness: for any of these to exist, there must be at least two of its kind. One is not enough. According to the famous Schmittian view, which I do not share, the reason for this is the essential antagonistic nature of politics, expressed in the dualism of "friend and enemy".

One of the goals of this global human community would be precisely to prevent the creation of a world state, which would be, in the words of Hannah Arendt, "the end of all political life as we know it", the end of liberty itself. The founding of a global state would mark the triumph of imperialism, which aims to turn the universal into the total in order to establish a homogeneous and coercive worldwide governing structure. This would present mankind with its greatest threat.

Indeed, in the global law paradigm, for the sake of freedom and pluralism, total legal structures like nation-states cannot be universalized. Humanity as such is universal and total, but legal-political structures that govern it should not be. That is why the human global community has to be, by definition, universal, but not total.

c) The global community is an incomplete but necessary community. We call *complete* those communities that, informed by the principle of autonomy, endeavor to satisfy as many as possible of human needs within their borders (work, health, education, security, and so on). By contrast, we call *incomplete* those societies that strive to satisfy only certain specific human needs. The nation-state is the paradigm of a complete community. In addition to being complete in this sense, the nation-state is also an instrumental society: it is not necessary in itself inasmuch as its purpose is not natural and its responsibilities can be carried out by other intermediate political and social groupings. In the same manner that Belgium, Japan or the United States began to exist in a concrete historical moment, they can also cease to exist. These communities are not an irreplaceable requisite for human existence. They are a cultural product of human experience and historical development. The rich variety of existing political communities is mutable, insomuch as they are subject to political vicissitudes. In these political communities, the science of the possible reigns, that is to say, these entities do not have an intrinsic value so much as they are valued and maintained because of their instrumental value. They are not an end in itself since they are instrumental and political by nature.

The opposite is true with the family and with the global community. Both are essential for the proper functioning of humanity, and each, in its turn, is *incomplete* in the measure that it is not self-sufficient: neither the family nor the global community is designed to satisfy all that is necessary for human life, rather only some of the needs of men and women. But both communities are necessary. The family opens to us the doors of life and of love. The family nurtures us and prods us into becoming autonomous beings, capable of constructing our own personal history and being citizens of a political community. The territory of the family moreover—“home, sweet home”— is the place to which one can always return. The global community, for its part, satisfies exclusively those needs that affect humanity in its common existence, needs that can only be met globally, such as global terrorism, global health, global crises, or global warming. Its territory, planet earth, is the place from which, in this life, we never escape.

Though both the family and also the global community need a territory, the home and the planet, neither of them is eminently sovereign, as is, by contrast, the nation-state. In these two essential and incomplete communities, the political is present, since both involve a shared life, but with less intensity than in instrumental societies. And by the nature of these incomplete but essential communities, the principle of human solidarity prevails over the principle of the political. This explains why the models and structures of governance of these two communities should be very different among themselves and with respect to other instrumental political societies, whether they be regional, national or supranational. On the other hand the practice of political freedom

can suffer more restrictions in the realm of essential communities (family and global human community) than in the realm of instrumental communities.

The global human community is incomplete because it is complementary in nature. The degree of complementarity between the incomplete global human community and each complete political community is not perfect or mutual, like a left and a right shoe, which must be worn together. The two shoes are solidary but not subsidiary. Nor is it like the relation between complement goods and base goods, as between airlines and airports. There is a more profound relationship that integrates human beings and the earth, providing the necessary environment in which the human person can thrive with dignity. This degree of complementarity must ultimately be determined through political decision-making according to global law and the principles of solidarity and subsidiarity.

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To finish let me summarize in broad strokes the form of governance I propose for global human community. Anthoparchy would be a good name for this form of global government since it is deeply stepped in the human dignity of each human being (*anthropos*), and not in nation state sovereignty. I underscore *anthroparchy* and not *anthrocracy* because is a form of government predicated more on the legitimacy of rule (-archy) than on unbridled power of rule (-cracy).

The establishment of a global legal system for the Anthroparchy demands the full harmonization of the various national and supranational legal systems, as well as a global institutional authority that would exist above the states themselves. I propose the name of United Humanity. United Humanity would be the culmination of a profound reform of the United Nations, in order to adapt it to this new global paradigm.

At the heart of the United Humanity would be the Global Parliament, the democratic institution *par excellence*. The Global Parliament would be the only conceivable institution in capable of bringing into reality that which I would consider, using terminology of Herbert Hart, the “rule of recognition” of the new global law: “quod omnes tangit ab omnibus approbetur”. Law which affects all must be approved by all. This basically means that rules governing issues affecting all humanity (and only those issues, and only to the extent they affect all humanity and not just a part) would have to be approved by humanity as a whole. So, the main purpose of the Global Parliament would be to determine which public goods and to which extend would be under the global legal domain and not under the jurisdiction of other national, international or supranational entities or institutions.

Among others, global issues or global public goods would include, for example, those fundamentally relating to the preservation of the planet (environmental

protection, climate change, etc.), and the physical survival of human beings (poverty eradication, natural disaster prevention and post-disaster aid/rebuilding efforts, elimination of nuclear arms, etc.). They would also cover questions like global security, dealing with international terrorism, the prosecution of crimes against humanity, etc. Of course, the protection of human rights would be privileged and a priority, but only to the extent that such rights were not sufficiently protected under the various local or national legal systems.

Decisions of the Global parliament regarding what constitutes a truly global issue (and what its actual parameters would be) must always be made in light of the key global law foundational principles of subsidiarity and solidarity. This, and nothing else, would be the means by which we could democratize the new global human community right to its core.

It could be considered utopian what I am saying, but it was also considered an utopia the very idea of human rights, the separation of church and state, the birth of the United States of America, the European Union, an many other big political and legal ideas and ideals, that today constitutes part of our ordinary life. At the end of the day, “Progress is the realization of Utopias,” as Oscar Wilde said, and we are dealing with progress. Thank you very much for your attention.

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