

# The New Global Human Community. An Argument

by

Rafael Domingo \*

**Abstract:** The international community, under the impact of globalization, is being transformed into a new community (*novatio communitatis*) made up of new members, inspired by new principles, and based on new ideas. In the first part of this paper, I aim to justify the existence of this emerging community using four arguments that can be summarized by the Latin terms: *dignitas*, *usus*, *necessitas*, and *bonum commune*. In the second part, I argue that the new global human community comprises persons, not nation-states; that it is universal in nature; that membership in it is compulsory; and that it is incomplete but complementary to other forms of community. These features of the new global human community will determine both the structure of its legal system and its legal authority.

**Content:** 1. Introduction. 2. Four arguments for the existence of the global human community: a) *dignitas*; b) *usus*; c) *necessitas*; d) *bonum commune*. 3. Main features of the global human community: a) A political community; b) A community of persons, not of nation-states; c) A universal community; d) A community of compulsory membership; e) An incomplete community; f) A complementary community. 4. Conclusion.

**Keywords:** Global human community, complete community, *necessitas*, *usus* of the earth, dignity, global common good.

## 1. Introduction

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<sup>1</sup>, the Roman aspiration toward an empire without end (*imperium sine die*<sup>2</sup>), the Christian ideal of a world united by charity<sup>3</sup>, the Dantian longing for a universal monarchy<sup>4</sup>, and the Kantian project of world peace<sup>5</sup>, among other ideas, have

---

\* Rafael Domingo is Professor of Law at the University of Navarra School of Law (Spain) and a Joint Straus/Senior Emile Noël Fellow at NYU School of Law for academic year 2011/12.

<sup>1</sup> Cf. Seneca, *On benefits* 7.1.7 (ed. John W. Basore, *Moral Essays* III, *De beneficiis*, The Loeb Classical Library, Harvard University Press, Cambridge, MA, reprint 2001): “si sociale animal et in commune genitus mundum ut unam omnium domum spectat” [that, social creature that it is, and born for the common good, views the world as the universal home of mankind]; *On benefits* 7.19.8: “Quidquid erat, quo mihi cohaereret, intercisa iuris humani societas abscidit.” [For whatever the tie that bound him to me, it has been severed by his breach of the common bond of humanity.]

<sup>2</sup> Virgil, *Aeneid* 1.278-279 (ed. H. Rushton Fairclough revisited by G. P. Goold, The Loeb Classical Library, Harvard University Press, Cambridge, MA, 1999): “His ego nec metas rerum nec tempora pono, / imperium sine fine dedi” [For these I set no bounds in space or time, but have given empire without end].

<sup>3</sup> Cf. Tertullian, *Apology* 38 (ed. on line J. P. Migne, *Patrologia Latina, Apologeticus adversus gentes pro christianis*, col. 0465A): “Unam omnium rempublicam agnoscimus mundum” [We acknowledge one all-embracing commonwealth: the world.]

<sup>4</sup> Dante Alighieri, *Monarchy* 1.15.10 (ed. Cola di Rienzo and Marsilio Ficino, Arnoldo Mondadori Editore, Milan, 2004): “Quod si omnes consequentiae superiores vere sunt, quod sunt, necesse est ad

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<sup>6</sup>, 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 (1648) and confirmed at Utrecht (1713). 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 (1948) 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.”<sup>7</sup>

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<sup>8</sup>, liberty, or happiness<sup>9</sup>. There is a province of basic justice that can only be secured in a global context.

---

optime se habere humanum genus esse in mundo Monarcham, et per consequens Monarchiam ad bene esse mundi” [if all the above conclusions are true, as they are, for mankind to be in its best state there must be a monarch in the world, and consequently the well-being of the world requires a monarchy.]

<sup>5</sup> Immanuel Kant, *Perpetual Peace. A Philosophical Sketch* (ed. Hans Reiss and H. B. Nisbet, *Political Writings*, 2nd expanded edition, Cambridge University Press, Cambridge, New York, 1991) pgs 93-130.

<sup>6</sup> Cf., Vitoria, *De potestate civili*, question 3, article 4, section 21 (ed. Anthony Pagden and Jeremy Lawrence, *Francisco de Vitoria, On Civil Power, Political Writings*, Cambridge University Press, Cambridge, 1991) pg. 40; Francisco Suárez, *De legibus ac Deo legislatore* (1612) no. 191, in *Selections for Three Works*, vol. II (The Classics of International Law, Oxford: Clarendon Press; London, Humphrey Milford, 1944) pg. 349:

<sup>7</sup> Cf. article 1 of the Universal Declaration of Human Rights (1948) ([www.un.org](http://www.un.org)).

<sup>8</sup> We find references to peace as a fruit of justice in Isaiah 32.17: *opus iustitiae pax*.

<sup>9</sup> Perhaps this is why the Preamble of the American Constitution positions justice before other values: “We the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

The common contemporary goal of addressing globally the problems afflicting humanity is not just a moral option but a moral<sup>10</sup> 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.

Lacking in common action and universal awareness of common interests, the international community could be said to be (following Yves Simon's famous distinction) more like a partnership than a community in the strict sense. In a partnership, "authority would never be needed except on account of some fault or accident"<sup>11</sup>. But in a true community, such as the global human community, all members, regarded as free and equal, would be involved in a fair system of social cooperation<sup>12</sup>. And this kind of union would require legal authority acting through legal institutions and ordered by a legal system.

Without undergoing a deep transformation, the current international community can scarcely survive in this new "postnational constellation"<sup>13</sup> 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 and based on the dignity of each

---

<sup>10</sup> In the same vein, Allan Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford, New York, 2007) pg. 432:

<sup>11</sup> Yves R. Simon, *The General Theory of Authority* (University of Notre Dame, Notre Dame, Indiana, 1962) pg. 31.

<sup>12</sup> Cf. in the same vein, but using the term "society" and not "community", John Rawls, *Justice as Fairness. A Restatement* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2001) pg. 95. In this paper, I do not differentiate, as John Rawls does, community from society. I use the term community and not society because this is the term that legal thinkers employ to refer to the international community. For the Rawlsian difference between society and community, see John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993) pgs. 40-43 and 201-206, and *Justice as Fairness. A Restatement* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2001) pgs 20-21 and 198-200.

<sup>13</sup> Cf. Jürgen Habermas, *Die postnationale Konstellation* (Suhrkamp, Frankfurt am Main, 1998). For more on the legal implications of this postnational constellation, see Nico Krisch, *Beyond Constitutionalism: The Pluralistic Structure of Postnational Law* (Oxford University Press, Oxford, New York, 2010).

person. This global human community, in my opinion, should be organized according to a global rule of law<sup>14</sup>.

In a certain sense, we are witnessing a process of constitutionalisation, which is transforming the current international community into a global human community. In this process, certain constitutional standards are being elevated to the status of global legal “first principles” or “primary truths”<sup>15</sup>. That does not mean, however, that this new global human community would need a formal written constitution, or that it would have to be consolidated into one comprehensive structure that thoroughly embraces all existing legal relations. We cannot apply to this emerging community the same principles that inspired the constitutional nation-state. The new constitutionalism is very far from the idea of a world state<sup>16</sup>. There is at its core no formal Constitution, no sovereign constituent power, but a certain “mindset”<sup>17</sup>, a “particular cognitive frame for the construction of legitimate authority”<sup>18</sup>, or “authoritative standards of legitimacy for the exercise of public power wherever it is located”<sup>19</sup>. Insofar as I try to argue here that the new global human community, like any community, needs a legitimate and dispersed global authority, I am working on the same assumptions as cosmopolitan constitutionalism<sup>20</sup>, although not exactly using the same tools, as the reader will soon note. We are climbing different sides of the same mountain.

---

<sup>14</sup> For more on this concept, see Rafael Domingo, “Gaius, Vattel, and the New Global Law Paradigm”, in *European Journal of International Law* 42.3 (2011) (forthcoming). Cf also Gianluigi Palombella, “The Rule of Law Beyond the State. Failures. Promises and Theory”, in *International Journal of Constitutional Law* 7 (2009) 442-467; Leonardo Morlino and Gianluigi Palombella (eds.), *Rule of Law and Democracy. Internal and External Issues* (Brill Publications, Leiden and Boston, 2010), as well as Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law* (Hart Publishing, Oxford, Portland, Oregon, 2010).

<sup>15</sup> Cf. these expressions at the beginning of Alexander Hamilton, *The Federalist Papers*, no. 31 (1788) (www.constitution.org): “In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend.”

<sup>16</sup> Cf. J. H. H. Weiler and Marlene Wind, *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge, New York, 2003).

<sup>17</sup> Vid. Martti Koskiennemi, “Constitutionalism as Mindset. Reflections on Kantian Themes About International Law and Globalization,” in *Theoretical Inquiries in Law* 8.1 (2007) 32.

<sup>18</sup> Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism”, in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, New York, Cambridge, 2009) pg. 321.

<sup>19</sup> Cfr. Martin Loughlin, “What is Constitutionalisation?”, in Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism* (Oxford University Press, Oxford, New York, 2010) pg. 47-69, at 61.

<sup>20</sup> For an overview of the different dimensions of global constitutionalism, see Christine E. J. Schwöbel, “Situating the debate on Global Constitutionalism”, in *International Journal of Constitutional Law* 8 (2010) 611-635.

So I can consistently refer to this new global human community as a global constitutional community, as Anne Peters indeed does<sup>21</sup>. Nonetheless, it is important to note that the international community, under the impact of globalization, is being transformed into a new community (*novatio communitatis*) made up of new members, inspired by new principles, and based on new ideas and ideals<sup>22</sup>. There are deep conceptual differences between the current international community and this new global community. The most important one is that the current international community is a community of nation-states (*communitas communitatum*); the new global community, however, is a community of individual persons (*communitas omnium hominum*). The implications of moving the primary subject of international law from the nation-state to the human person are so profound that they will change the very legal foundations of public law<sup>23</sup>.

## 2. Four arguments for the existence of the new global human community

I see at least four arguments for the existence of a global human community. Because they are rooted in the Western legal tradition, I have used Latin terms to refer to them: *dignitas*, *usus*, *necessitas*, and *bonum commune*. Each one in and of itself could justify the existence 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. If necessity gives rise to law, as we soon shall see, the necessity of protecting dignity and of preserving the planet as a human home are sufficient grounds for the existence of a global human community. Lastly, the *bonum commune* argument can be used to defend the potential common good as a constituent

---

<sup>21</sup> Anne Peters, "Membership in the Global Constitutional Community", in Jan Klabbbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, New York, 2009) pgs. 153-262.

<sup>22</sup> For the differences between ideals and ideology, 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, New York, Cambridge, 1999) pgs. 239-240.

<sup>23</sup> Indeed, public law proceeds from private law and not vice versa (*ex privato iure publicum*). Cf. Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010) pgs. 147-153 and 187. For a recent approach to public law, see Martin Loughlin, *Foundations of Public Law* (Oxford University Press, Oxford, New York, 2010).

element of the global human community. Let us start with the *dignitas* argument because it supports not only the existence of the global human community but also the very idea of law.

**a) *Dignitas*.**

As a community of persons and not of nation-states, the global human community is based on the personal dignity of the human being and not on national sovereignty. The sovereign state is no longer the primary source (*fons iuris*) for international law. The dignity of the person has now become the primary source for all law, even for international law<sup>24</sup>. The reason seems clear: without sovereign states, there can still be law. It is a fact that there has been law for centuries, even during times when there were no sovereign states. Yet no law can exist without persons (*nullum ius sine persona*). Indeed, law emanates from the person (*ex persona ius oritur*), from the inherent dignity of each person, and not from the state<sup>25</sup>. This does not mean that nation-states do not play an important role as principal guarantors of dignity or that they should have only a secondary position. What it does mean is that the nation-state is not the only sphere where human dignity needs protection.

Dignity is the intrinsic link between law and the human person<sup>26</sup>. From a juridical perspective, dignity is the status of each person as a “bearer of rights” and “law maker”. It is what calls for the special protection that law must provide to every human being, who is the origin, subject, and end of all law. 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. From the perspective of law, the person acts with dignity when he or she acts justly, i.e. in accordance with justice.

If law emanates from the person, the human being has to be the center of any legal order: local, national, transnational, supranational or global. The current crisis of

---

<sup>24</sup> Cf. Preamble and Article 1 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948 ([www.un.org](http://www.un.org)).

<sup>25</sup> For more on human dignity, see Rafael Domingo, *The New Global Law* (Cambridge University Press, New York, Cambridge, 2010) pgs. 131-136.

<sup>26</sup> Cf. Jeremy Waldron, “Dignity, Rank, and Rights”. The 2009 Tanner Lectures at UC Berkeley, April 2009, in *New York University School of Law. Public Law & Legal Theories Research Paper Series. Working Paper 09-50* (Electronic copy available at: <http://ssrn.com/abstract=1461220>) pg. 3. Although it is true, as Jeremy Waldron recently affirms, that *dignitas* was a relative concept and not an absolute one, I do not entirely subscribe to his legal approach. In my opinion, one of the great contributions to the science of law in the twentieth century has been the effective legal consideration of dignity as an absolute concept. Cf. my argument in Rafael Domingo, *The New Global Law* (Cambridge University Press, New York, Cambridge, 2010) pgs. 131-136.

international law derives from its having been founded on the self-interest of the sovereign state, without sufficient grounding in the person, the real source of all law<sup>27</sup>. The law, as the Roman jurist Hermogenian indicated, has been constituted for the sake of human beings (*hominum causa*)<sup>28</sup>. So the law becomes the servant of the person, and never the person a dehumanized instrument in the hands of the law.

If this is true, then all human beings taken together, as “legal sources”, must constitute a legal community, which existed, at least conceptually, prior to the emergence of the idea of nation-state as a legal community<sup>29</sup>. We can deploy this argument using human rights, which are the most important expressions of human dignity. If no state has jurisdiction over all humanity and yet human rights exist, it is because the state is not the primary source of law; the person is. It follows that there already exists a legal community composed of all human beings insofar as they are bearers of human rights, which can only exist in the context of a human community<sup>30</sup>.

The responsibility of protecting dignity rests primarily with all human persons, and only secondarily with nation-states, which are legal creations of human beings. So there is no reason to restrict the legal protection of dignity, and its most important expression—human rights—to national or supranational boundaries. Moreover, in a globalized world, dignity cannot be fully protected unless there are global institutions representing humanity as a community of human rights bearers<sup>31</sup>. This does not mean that dignity can only be protected in a global jurisdiction, or that the protection of dignity at the global level will always be more efficient than such protection at a lower level. What it does mean is that dignity must be protected in all provinces of law, including the global legal domain<sup>32</sup>. This protection of human dignity at a global level

---

<sup>27</sup> For more about this argument, see Rafael Domingo, “The Crisis of International Law”, in *Vanderbilt Journal of Transnational Law* 42 (2009) 1543-1593.

<sup>28</sup> Hermogenian, Digest 1.5.2: “Cum igitur hominum causa omne ius constitutum sit...”

<sup>29</sup> Cf. in this sense, the Preamble of the United Nations International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly on December 16, 1966, and in force from March 23, 1976, which recognizes that the rights contained in the covenant “derive from the inherent dignity of the human person.” (www.un.org).

<sup>30</sup> Cf. Tony Honoré, “The Human Community and Majority Rule”, in Tony Honoré, *Making Law Binding. Essays Legal and Philosophical* (Clarendon Press, Oxford, 1987) pg. 228.

<sup>31</sup> For a similar argument, see Tony Honoré, “The Human Community and Majority Rule”, in Tony Honoré, *Making Law Bind. Essays Legal and Philosophical* (Clarendon Press, Oxford, 1987) pg. 228: “If, therefore, there is no human community, there are no human rights.”

<sup>32</sup> Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press, New York, Oxford, 2009) esp. pgs. 209-211.

has to begin, empirically speaking, with the so-called “basic human rights”, i.e. rights whose “enjoyment is essential to the enjoyment of all other rights.”<sup>33</sup>

The centrality of the person in the legal arena allows for the establishment of an open constitutional global framework that is distinct from a constitutional democratic statism, derived from a plurality of constitutional sources, and not limited by a written constitution<sup>34</sup>. In this sense, the view of the person, not the nation-state as the center of the legal system dovetails with modern constitutionalism’s commitment to implementing constitutional principles beyond the boundaries of sovereign states. Indeed, if the person were not at the core of the cosmopolitan paradigm, constitutionalism could not operate in the global arena, because at the heart of constitutionalism there must be free, equal and rights-bearing persons joined by a government limited by checks and balances<sup>35</sup>.

#### **b) *Usus***

The second argument for the existence of a global human community is the peculiar juridical relationship that links humanity as such with its home: the earth. This relationship, which we have called “*usus* of the earth”<sup>36</sup>, is prior to and deeper than the relationship between each sovereign state and its own territory, and requires the establishment of a particular legal human community encompassing all the inhabitants of the earth (*communio*).

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

---

<sup>33</sup> Charles R. Beitz and Robert E. Goodin, “Introduction. Basic Rights and Beyond”, in Charles R. Beitz and Robert E. Goodin, *Global Basic Rights* (Oxford University Press, New York, Oxford, 2009) pg. 4.

<sup>34</sup> Cf. Mattias Kumm, *The Best of Times and the Worst of Times. Between Constitutional Triumphalism and Nostalgia*, in Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism* (Oxford University Press, Oxford, New York, 2010) pgs 201-219, at. 203.

<sup>35</sup> Cf. Martin Loughlin, “What is Constitutionalisation?”, en Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism* (Oxford University Press, Oxford, New York, 2010) pgs. 47-69, at. 59. Cf. Anne Peters, “Membership in the Global Constitutional Community”, in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, New York, 2009) pgs. 153-262, at 155 and 179.

<sup>36</sup> The expression brings to mind Schmittian connotations. This section constitutes a critique of the doctrinal exegesis articulated by Carl Schmitt in his work *Der nomos der Erde im Völkerrecht des jus publicum europaeum* (4th ed., Dunker & Humblot, Berlin, 1997).

clarifying its content, since the rights of a holder depend on the nature of the thing (*res*) held<sup>37</sup>.

The role of the earth is unique since humanity needs it to survive as a species. 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 owners. Indivisibility among several owners presupposes solidarity and common responsibility. An indivisible thing can only be governed by a single owner or else an indivisible community. That is why humanity has to be construed as a community.

We use the Roman term *usus* because it is the best one to express the combined ideas of solidarity and indivisibility. Over the centuries the meaning of the Roman term *usus* has evolved<sup>38</sup> along with the concept of ownership. Here *usus* has to be understood in opposition to *dominium*, which refers to full and absolute ownership. *Usus* is what *dominium* is not, and refers to those uses that do not alter the nature of the things used (*rerum natura*). In this sense, any act of environmental protection, administration, or enjoyment, insofar as it does not alter the 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*<sup>39</sup>. 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*).

In other words, *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*). The necessary distribution of the land between and among political communities is not by way of absolute ownership, as some international thinkers thought, but through *usus*. In

---

<sup>37</sup> It is very different to be the owner of a car, which is very short-lived, than to be the owner of a painting of Picasso, called to endure for centuries and for ever attributed to Picasso.

<sup>38</sup> For an explanation of the word *usus* in Roman law, see William W. Buckland, *A Text-Book on Roman Law from Augustus to Justinian* (3rd ed. revised by Peter Stein, Cambridge University Press, Cambridge, 1963) pgs. 120-121 and 273-274; and Max Kaser, *Das römische Privatrecht I* (2nd ed., Beck, Munich, 1971) section 106, pgs. 447-454.

<sup>39</sup> Historically sometimes the term *usus* also embraces both aspects. For more on this, see Giuseppe Grosso, *Usufrutto e figure affini nel diritto romano* (2nd ed., G. Giappichelli, Turin, 1958) pgs. 85-87 and 430-436; and Max Kaser, *Eigentum and Besitz in älteren römischen Recht* (2nd ed., Böhlau Verlag, Cologne, Graz, 1956) esp. 87-88 and 313-340: “Es ist wohl unbestritten, dass *usus* ein alter Ausdruck für den Besitz ist.” (pg. 87).

fact, throughout the earth, there is no such thing as absolute ownership<sup>40</sup>. Therefore, it would be wrong to consider humanity as a full owner of the earth (*domina mundi*).

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 it. 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 would alter substantially the very nature of the earth. Absolute ownership, on the contrary, is by definition divisible, at least legally. Indeed, a co-owner without the capacity to alienate his part of a commonly owned item would not be a true absolute owner. The agreement between co-owners not to divide their common property thus prevents them from being true absolute owners. In a common absolute ownership, there are no absolute co-owners but only relative ones because common ownership limits the power of all co-owners. Absolute ownership involves ultimate rights over a thing. It is a “signoria”<sup>41</sup>, and humanity does not have this right.

If there is no absolute ownership over the earth, it follows that there could be no absolute ownership of a part 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<sup>42</sup>. Indeed, in the five classic modes of acquiring territory according to international law—occupation, accretion, cession, conquest, and prescription—it is easy to see strong similarities between the doctrines of international law regarding the distribution of the earth and the ancient Roman law of *dominium*<sup>43</sup>.

---

<sup>40</sup> In the same vein, Álvaro d’Ors, *La posesión del espacio* (Civitas, Madrid, 1998). D’Ors defends that with respect to space -conceived of as “the totality of the perceptible environment” (pg. 14)- and thus with respect to any specific instance of it, there is possession but not ownership.

<sup>41</sup> Cf. William W. Buckland, *A Text-Book on Roman Law from Augustus to Justinian* (3rd ed. revised by Peter Stein, Cambridge University Press, Cambridge, 1963) pg. 188.

<sup>42</sup> Cf. for instance a reference to the Paulus enumeration of the modes of acquisition in Hugo Grotius, *De jure belli ac pacis*, book 2, chapter 3, section 3 (ed. William Whewell, Cambridge University Press, John W. Parker, London, 1853) pg. 256. In any case, the same Grotius recognizes that this Roman *ius gentium* is not immutable. See Grotius, *De jure belli ac pacis*, book. 2, chapter 8 section 26 (pg. 416): “Haec ideo annotavimus, ne quis reperta juris gentium voce apud Romani juris auctores statim id jus intelligat quod mutari non possit” [We have noted these things, in order that when anyone finds the term *jus gentium* in the Roman jurists, he may not, as a matter of course, understand that jus which is immutable]. See also another reference in Alberico Gentili, *De iure belli libri tres* (The Classics of International Law, ed. James Brown Scott, Clarendon Press, Oxford; Humphrey Milford, London, 1933) book 1, chapter 1, section 3, pg. 4. For an exploration of the influence of Roman law in the law of nations, see Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, Oxford University Press, New York, Oxford, 2010) esp. pgs. 1-123.

<sup>43</sup> This Roman doctrine is very well explained by Gaius, *Institutes*, book 2, nos 1-96(ed. Francis de Zulueta, *The Institutes of Gaius*, Clarendon Press, Oxford, 1946) vol. I., pgs 66-90 and vol. II, pgs. 55-82.

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* (1576) was strongly associated with Roman law, especially by Alberico Gentili, a great admirer of both Roman law<sup>44</sup> and the theories of Bodin, whom he referred to as "clarissimus jurisconsultus terrae Galliae."<sup>45</sup> Based on a famous fragment from the *Institutes* of Justinian<sup>46</sup>, for instance, Gentili defended the permissibility of a king's disposing of a territory without the people's permission<sup>47</sup>.

The strong Absolutism of European nation-states in the sixteenth and seventeenth centuries served to fuel this trend to such an extent that some international theorists (especially John Selden) tried to apply the Roman doctrine of dominion to ownership of the seas. They defended the proposition that the sea could be made someone's property (*mare clausum*), which goes against the doctrine proposed by Hugo Grotius in his treatise *Mare liberum* (1609) and in his subsequent work *De jure belli ac pacis* (1625). Finally, there is the prevailing view of Cornelis de Bynkershoek, who allowed in his work *De dominio maris* (1702) that certain portions of the sea in close proximity to the land (*mare terrae proximum*) could be susceptible of exclusive dominion. The open sea was considered a *res communis omnium* because no settlement could be formed on it.

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

---

See also William W. Buckland, *A Text-Book on Roman Law from Augustus to Justinian* (3rd ed. revised by Peter Stein, Cambridge University Press, Cambridge, 1963) pgs. 204-258.

<sup>44</sup> Alberico Gentili, *De iure belli libri tres* (The Classics of International Law, ed. James Brown Scott, Clarendon Press, Oxford; Humphrey Milford, London, 1933) book 1, chapter 3, section 26, pg. 17: "[...] that if the empire were destroyed, the [Roman] law itself, although long buried, would yet raise again and diffuse itself among all the nations of mankind."

<sup>45</sup> Cf. Alberico Gentili, *De iure belli libri tres* (The Classics of International Law, ed. James Brown Scott, Clarendon Press, Oxford; Humphrey Milford, London, 1933) book 1, chapter 1, section 3, pg. 4: "[...] I mean the above-mentioned Bodin and Peter Faber, most distinguished jurists of the land of France." For the influence of Bodin in Gentili, see Peter Schöder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations", in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, Oxford University Press, New York, Oxford, 2010) pgs. 163-186, esp. at 169-174.

<sup>46</sup> Cf. *Justinian's Institutes* 1.2.6 (ed. Paul Krüger, *Institutiones. Corpus Iuris Civilis*, vol. I, 16<sup>a</sup> ed., Weidmann, Berlin, 1954): "Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit." The sentence comes from the first book of Ulpian's *Institutes*, *Digest* 1.4.1 pr. (ed. Theodor Mommsen and Paul Krüger, *Digesta. Corpus Iuris Civilis*, vol. I, 16<sup>a</sup> ed., Weidmann, Berlin, 1954).

<sup>47</sup> Alberico Gentili, *De iure belli libri tres* (The Classics of International Law, ed. James Brown Scott, Clarendon Press, Oxford; Humphrey Milford, London, 1933) book 3, chapter 15, section 609, pg. 371: "But as regards the emperor of Rome one might have had a different opinion: 'since by law of sovereignty, which was passed with respect to his powers, the people granted to him full dominion and power over themselves'."

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: “Those who think otherwise cannot allege any solid reason for their opinion.”<sup>48</sup>

The land of the earth has been divided into a multitude of territories which we call sovereign states, breaking up the *communio* of humanity. Beginning with Alberico Gentili<sup>49</sup>, the international community was considered a community of equal nation-states ruled by private law standards<sup>50</sup>. So, the idea of a global and public commonwealth *de iure*, so present in Francisco de Vitoria’s prior work<sup>51</sup>, gradually declined in importance in the realm of international law, which was conceived more as a law between and among different absolute owners than as a law between and among common users.

The doctrine of “*usus* of the earth” tries to recover the key idea that humanity rather than the community of 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.

---

<sup>48</sup> Emmer de Vattel, *The Law of Nations* (ed. Joseph Chitty, T & J. W. Johnson & co, Philadelphia, 1861) book 1, chapter 21, section 257, pg. 116.

<sup>49</sup> Alberico Gentili, Alberico Gentili, *De iure belli libri tres* (The Classics of International Law, ed. James Brown Scott, Clarendon Press, Oxford; Humphrey Milford, London, 1933) book 1, chapter 21, section 167, pg. 103.

<sup>50</sup> Alberico Gentili, Alberico Gentili, *De iure belli libri tres* (The Classics of International Law, ed. James Brown Scott, Clarendon Press, Oxford; Humphrey Milford, London, 1933) book 1, chapter 21, section 167, pg. 103. For a contrast between the two different conceptions of the global legal community in Vitoria and Gentili, see now Andreas Wagner, “Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth”, in *Oxford Journal of Legal Studies* 31.3 (2011) (forthcoming; pro manuscripto). See also more generally Anthony Pagden, “Gentili, Vitoria, and the Fabrication of a ‘Natural Law of Nations’”, in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, Oxford University Press, New York, Oxford, 2010) 340-361.

<sup>51</sup> Cf. for instance Vitoria, *On Civil Power*, question 3, article 4, section 21 (ed. Anthony Pagden and Jeremy Lawrence, *Francisco de Vitoria, Political Writings*, Cambridge University Press, Cambridge, 1991) pg. 40: “The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men.”

### c) *Necessitas*

The third argument for the existence of a real global community is necessity (*necessitas*) as a source of binding law. *Necessitas* was the Roman goddess who personified the constraining force of destiny, the inevitable. She was identified with the Greek goddess Ananke and was depicted as a powerful goddess who walked before Fortuna carrying brazen nails and wedges<sup>52</sup> to fix fast the decrees of Fate<sup>53</sup>. Opposed to free will (*libera voluntas*), *necessitas* is a force or influence that compels an unwilling person or a group of persons to act<sup>54</sup>.

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 the law does not apply when necessity comes into play (*cessat lex ubi venit necessitas*)<sup>55</sup>. Sometimes, however, necessity creates law by grounding legal obligations and duties. This is reflected in the well-known legal French aphorism: *nécessité oblige*<sup>56</sup>. 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 *obligatio*, from Justinian's *Institutes*<sup>57</sup>, there appears the word "necessity". In this

---

<sup>52</sup>Cf Horace, *The Odes* 1.35.17-20 (ed. Niall Rudd, Loeb Classical Library, Harvard University Press, Cambridge MA, 2004): Te semper anteit serva Necessitas / clavos trabalis et cuneos manu / gestans aena nec severus / uncus abest liquidumque plumbum [Ruthless Necessity always strides in front of you, carrying beam nails and wedges in her brazen hand, not forgetting the immovable clamp and lead for melting down.]

<sup>53</sup> Cf. A. Wagner, "Necessitas", in Wilhelm Heinrich Roscher (ed.), *Ausführliches Lexikon der griechischen und römischen Mythologie* III.1 (B. G. Teubner, Leipzig, 1902) columns. 70-72.

<sup>54</sup> Cf. *Black's Law Dictionary* (ed. Bryan A. Garner, West Group, St Paul, 1999) pg. 1053.

<sup>55</sup> Accursius, *Glosa Ordinaria ad Digestum Vetus*, glosa *expedire*, ad D. 1.10.1.1, (ed. *Digestum vetus seu Pandectarum iuris civilis, Tomus primus*. Editio postrema, no printer, Venice, 1575) pg. 56. For a commentary on this rule and other similar rules, see Rafael Domingo (ed.), *Principios de Derecho Global* (3<sup>a</sup> ed., Thomson Aranzadi, Cizur Menor, 2006) no. 146. There is a similar meaning in the well-known statement by Cicero (*Pro Milone* 4.11, ed. [www.thelatinlibrary.com](http://www.thelatinlibrary.com)) which apply to war: "silent enim leges inter arma" [In times of war, the law falls silent].

<sup>56</sup> The difference between obligation and duty is that an obligation always requires a voluntary agreement; a duty, however, does not because it derives from a law. A different meaning, but close to this, is offered by H. L. A. Hart, *The Concept of Law* (Oxford University Press, Oxford, New York, 1997) pgs. 82-91.

<sup>57</sup> *Justinian's Institutes* 3.13 pr. (ed. Paul Krüger, *Institutiones. Corpus Iuris Civilis*, vol. I, 16<sup>a</sup> ed., Weidmann, Berlin, 1954): "obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae

context, necessity expresses the idea that the legal bond created by obligation constrains the wishes of the party (*necessitate adstringimur*). This definition of *obligatio* entered the Anglo-American common law tradition via the work of Henry de Bracton's (c. 1210-1268) *De legibus et consuetudinibus Angliae*, and adapts the first part of the wording used in Justinian's *Institutes*: "iuris vinculum quo necessitate adstringimur."<sup>58</sup>

In the Roman jurist Modestinus's first book of legal rules, he expressed very well what we are trying to explain here: "Ergo omne ius aut consensus fecit aut necessitas constituit aut firmavit consuetudo"<sup>59</sup>. "[Thus, 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"<sup>60</sup>.

In his second book of rules, Modestinus again refers to necessity as a source of legal obligation (*obligamur necessitate*<sup>61</sup>). He says that those persons "who are not allowed to do anything other than that which they are ordered to do are bound by necessity"<sup>62</sup>. He notes the case of the necessary heirs (*necesarii heredes*), i.e. those heirs compelled to serve as heirs without power to refuse the inheritance (for instance, those subordinated to the *patria potestas* of the deceased who became *sui iuris* upon his death).

Today, a strong sense of contractualism has fueled disregard for the tripartition of sources of law into consent, custom, and necessity, thereby relegating custom and

---

rei secundum nostrae civitatis iura" [An obligation is a legal binding whereby we are bound by a necessity of performing some act according to the laws of our community].

<sup>58</sup> Henry de Bracton, *De legibus et consuetudinibus Angliae (On the Law and Customs of England)* (ed. George E. Woodbine & Samuel E. Thorne, Selden Society, Harvard University Press, Cambridge Massachusetts, 1968) vol. II, pg. 283: Et sciendum quod obligatio est iuris vinculum quo necessitate adstringimur ad aliquid dandum vel faciendum [An obligation is a legal bond whereby we are constrained by necessity (whether we wish to be or not), to give or do something.]

<sup>59</sup> Modestinus, *Digest* 1.3.40 (ed. Theodor Mommsen and Paul Krüger, *Digesta. Corpus Iuris Civilis*, vol. I, 16<sup>a</sup> ed., Weidmann, Berlin, 1954).

<sup>60</sup> In this vein, cf. Theo Mayer-Maly, "Topic der *necessitas*", in *Études offertes à Jean Macqueron* (Faculté de droit et des sciences économiques d'Aix-en-Provence, 1970) pg. 478-486, esp. pg. 478: "Wenn Juristen von Notwendigkeit sprechen, so machen sie damit eine Anleihe bei der Umgangssprache."

<sup>61</sup> Cf. Modestinus, *Digest* 44.7.52 pr. (ed. Theodor Mommsen and Paul Krüger, *Digesta. Corpus Iuris Civilis*, vol. I, 16<sup>a</sup> ed., Weidmann, Berlin, 1954): "Obligamur aut re aut verbis aut simul utroque aut consensu aut lege aut iure honorario aut necessitate." [We are bound either real obligation, or by formal words, or by both of these at the same time, or by consent, or by statute, or by praetorian law, or by necessity, or by wrongdoing.]

<sup>62</sup> Modestinus, *Digest* 44.7.52.7 (ed. Theodor Mommsen and Paul Krüger, *Digesta. Corpus Iuris Civilis*, vol. I, 16<sup>a</sup> ed., Weidmann, Berlin, 1954): "Necessitate obligantur, quibus non licere aliud facere quam quod praeceptum est..."

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<sup>63</sup>, and thanks, in part, to the defense of customary international law promoted by some international scholars in recent years<sup>64</sup>. 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”<sup>65</sup>. The reason was already explained by Francisco de Vitoria, based on Aristotelian thought: necessary causes are final causes<sup>66</sup>.

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, 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.

There are other global issues, such as environmental stewardship, which reflect the necessity of preserving, protecting and caring for our planet as the home for human beings of all generations. In this case we can see how *necessitas* and *usus* are also connected. Indeed, this necessity to protect our planet requires joint action which cannot flourish within the current international framework. Therefore, the very existence of a global community becomes a legal necessity.

In a certain sense, we are dealing with a global community that (paraphrasing the Roman jurists) we could call “incidental” or spontaneous (*communio incidens*). Such a community arises not by an explicit prior agreement among its members, but by necessity. Even so, it is no less a real community and certainly no less worthy of being further developed as such. What humanity has to do is to legally organize the “global

---

<sup>63</sup> Indeed, in cases in which it is difficult to achieve an agreement between states due to the strong disagreement between them, custom could play an important role. For this and other areas in which customary law is developed, see Antonino Cassese, *International Law* (2nd ed. Oxford University Press, 2005) pg. 166.

<sup>64</sup> Cf. Amanda Perreau-Saussine and James B. Murphy (eds.), *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives* (Cambridge University Press, Cambridge, New York, 2007); Brian D. Lepard, *Customary International Law A Theory with Practical Applications* (Cambridge University Press, New York, Cambridge, 2010); David J. Bederman, *Custom as a Source of Law* (Cambridge University Press, New York, Cambridge, 2010).

<sup>65</sup> Tony Honoré, “The Human Community and Majority Rule” (1978), en Tony Honoré, *Making Law Bind. Essays Legal and Philosophical* (Clarendon Press, Oxford, 1987) pg. 237.

<sup>66</sup> Cf. Francisco de Vitoria, *On Civil Power* question 1, article 1, sections 3-6 (ed. Anthony Pagden and Jeremy Lawrence, *Francisco de Vitoria, Political Writings*, Cambridge University Press, Cambridge, 1991) pg. 6-10.

social contract”<sup>67</sup>, i.e. to create the constitutional framework which permits it to be ordered under a global rule of law<sup>68</sup>.

I agree with David Kennedy when he affirms that “it would be surprising if the new order were waiting to be found rather than made”<sup>69</sup>. The development of this new constitutional order begins with the recognition of a global human community as distinct from the current international community.

#### **d) *Bonum commune***

The fourth argument focuses on the existence of a common good (*bonum commune*) which calls for a global human association to advance and protect it<sup>70</sup>. I prefer the expression “common good” to “public interest”, “public good”, or “general welfare”, among others, for several reasons. First, it has a longstanding tradition<sup>71</sup> which, I think, should not be interrupted; second, it is broader than the other expressions since it better integrates the legal dimensions of private and public justice; and lastly, law, by nature, is more related to goods (*bona*)<sup>72</sup> than to public interest and welfare<sup>73</sup>.

---

<sup>67</sup> See, similarly, David Held, *Global Covenant, The Social Democratic Alternative to the Washington Consensus* (2004), at 161–169.

<sup>68</sup> For more on this concept, Rafael Domingo, “Gaius, Vattel, and the New Global Law Paradigm, in *European Journal of International Law* 42.3 (2011) (forthcoming). Cf. also Gianluigi Palombella, “The Rule of Law Beyond the State. Failures. Promises and Theory”, in *International Journal of Constitutional Law* 7 (2009) 442-467; Leonardo Morlino and Gianluigi Palombella (eds.), *Rule of Law and Democracy. Internal and External Issues* (Brill Publications, Leiden and Boston, 2010); Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law* (Hart Publishing, Oxford, Portland, Oregon, 2010).

<sup>69</sup> David Kennedy, “The Mystery of Global Governance”, in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, New York, Cambridge, 2009) pg. 39.

<sup>70</sup> Recently pope Benedict XVI, in his Encyclical Letter *Caritas in veritate* of 29 of June of 2009, no. 7 ([www.vatican.va](http://www.vatican.va)), referred to the global common good: “In an increasingly globalized society, the common good and the effort to obtain it cannot fail to assume the dimensions of the whole human family, that is to say, the community of peoples and nations.”

<sup>71</sup> For the development of the concept, see Herfried Münkler and Harald Bluhm (eds.), *Gemeinwohl und Gemeinsinn*, 4 vols. (Akademie Verlag, Berlin, 2001) esp. vol. I. entitled *Historische Semantiken politischer Leitbegriffe*.

<sup>72</sup> See in this vein the famous definition of law as “ars boni et aequi” by the Roman jurist Celsus, *Digest* 1.1.1 pr. (ed. Theodor Mommsen and Paul Krüger, *Digesta. Corpus Iuris Civilis*, vol. I, 16<sup>a</sup> ed., Weidmann, Berlin, 1954).

<sup>73</sup> In the same vein, David Hollenbach, *The Common Good and Christian Ethics* (Cambridge University Press, Cambridge, New York, 2002) pg. 7-9.

Indeed, rights and goods are complementary<sup>74</sup>. David Hollenbach is right to say that “the common good is an idea whose time has once again come.”<sup>75</sup>

The common good of the global human community cannot be fully identified with the so-called “universal common good” of humanity<sup>76</sup>. Indeed, the global human community, although it is made up of all human beings, does not embrace all goods, needs and aspirations of humanity as such. The *bonum commune* of the global human community would only be a part of the “universal common good”. As we shall soon see, the global human community is an incomplete community; its common good is, therefore, instrumental and limited.

This concept of common good never entails that all members of the community, in our case humanity, have to share the same values or the same ideals<sup>77</sup>. All citizens are free to have their own conception of the good. The common good is completely compatible with all those ideas that do not go against essential human sociability and global justice. Common good encourages pluralism but is not always totally neutral<sup>78</sup>, even if it has been derived from an “overlapping consensus”, to use the famous expression of John Rawls<sup>79</sup>.

The global common good is the added value derived from the formation of a global community to achieve the ends of global justice for the sake of all human beings. The whole is not simply greater than the sum of its parts. It is something essentially different. The sum of its parts is one way to describe what something truly is, but that is not all that it is<sup>80</sup>. How the parts are composed inherently affects the whole. So if the

---

<sup>74</sup> See the same argument in John Rawls, *Justice as Fairness. A Restatement* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2001) pg. 40: “The right and the good are complementary; any conception of justice, including a political conception, needs both, and the priority of right does not deny this.”

<sup>75</sup> In the same vein, David Hollenbach, *The Common Good and Christian Ethics* (Cambridge University Press, Cambridge, New York, 2002) pg. 243. And he continues with: “We need both a renewed understanding of the common good and a revitalized social commitment to it.”

<sup>76</sup> Cf. Pastoral Constitution *Gaudium et Spes* of Second Vatican Council of 7 December 1965 nos. 68 y 84. For an overview of this expression in various Vatican documents, see Paolo Carozza, “The Universal Common Good and the Authority of International Law”, in *Logos. A Journal of Catholic Thought and Culture* 9.1 (2006) 28-55, with an extensive bibliography.

<sup>77</sup> In the same vein, see John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) pg. 156.

<sup>78</sup> For a different approach, see John Rawls, *Justice as Fairness. A Restatement* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2001) pg. 21.

<sup>79</sup> For the relation between good and overlapping consensus, see John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993) pgs. 101-106, and *Justice as Fairness. A Restatement* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2001) pgs. 32-38 and 140-145.

<sup>80</sup> Cf. Thomas Aquinas, *Summa Theologiae* II-II quaestio 58, article 7 ad 2 (ed. Enrique Alarcón, *Corpus Thomisticum*, University of Navarra, 2000, on line: [www.corpusthomicum.org](http://www.corpusthomicum.org)): “bonum commune civitatis et bonum singulare unius personae non differunt solum secundum multum et paucum, sed

common good is considered only from the standpoint of a mathematical construct, it would only concern quantitative results. In that case, there would be no such thing as the “fair distribution” of wealth. However, if we do not limit ourselves to such a constraint, then the fair distribution of wealth appears to be a significant issue for the common good, to the extent that this distribution impacts global justice, which is a constitutive element of common good.<sup>81</sup>

Thanks to the common good, the global human community thrives. It is the global community’s lifeblood. The global community would disintegrate if it failed to bring global justice to bear in the defense of human dignity and the preservation of the earth. The common good is the final justification of the existence of the global human community (as distinct from humanity) since it embraces the three previous arguments. If there is a global human community, it is because there is a need to establish such a community to protect human dignity and preserve the earth, which can only be achieved in a global context. And if such a necessity exists, there arises a legal obligation (*necessité oblige*).

### **3. Main features of the global human community**

The nature of the global community determines both the structure of its legal system and its legal authority. In this section, I will argue that the new global human community is a political community of persons not of nation-states, is universal in nature, of compulsory membership, 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 (Grotian, Hobbesian, Kantian) and new paradigms coexist<sup>82</sup>.

*a) A political community.* As a jurist, my approach to the global human community aims to be legal, not political. That does not mean that the global human community is not a political community, nor that our globalized world requires merely a sort of global

---

secundum formalem differentiam, alia enim est ratio boni communis et boni singularis, sicut et alia est ratio totius et partis.” [The common good of the city and the particular good of each individual differ not only with respect to the many and the few, but also in a formal aspect. Just as the aspect of the common good differs from the aspect of the individual good, so to does the aspect of the whole differ from that of the part.]

<sup>81</sup> For a development of this argument, see Antonio Millán Puelles, *Persona humana y justicia social* (5<sup>a</sup> ed, Rialp, Madrid 1982) pgs. 41-57.

<sup>82</sup> In the same vein, see Antonio Cassese, *International Law* (2nd ed., Oxford University Press, Oxford, New York, 2005) pg. 21.

legal public authority and not a political one. Of course, if we were to identify “political community” with the Aristotelian concept of *polis* as the paradigm of a complete community<sup>83</sup>, we would have to say that today the term “political community” would be exclusively yet improperly a concept reserved for the sovereign state, and not for the nascent global human community. Indeed, the global human community is not a self-sufficient community, as we shall soon see, but an incomplete one.

If we were to think within the paradigm of political community in the narrow sense used by John Rawls, which is that of a “political society united on one (partially or fully) comprehensive religious, philosophical, or moral doctrine”<sup>84</sup>, we would also say that the global human community is not a “political community”, but a “political society”. Yet if we understand a political community as an institutional system of social cooperation governed by a legal authority under the rule of law, as we do here, we must also affirm that the global human community is (or should be regarded as) a political community in the strictest sense, and that managing the global order is quintessentially a political problem<sup>85</sup>.

The global human community cannot be defined only in terms of horizontal interaction between different social actors through global public-private networks and common policies, nor simply as a vertical community based on coercive hierarchical control. It is a *sui generis* political community requiring a dispersed authority, distributed across different global institutions and based on the rule *quod omnis tangit ab omnibus approbetur*: “what affects humanity must be approved by humanity”<sup>86</sup>. This rule would be, using Hart’s terminology, the rule of recognition of the legal system of the global human community<sup>87</sup>.

**b) 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<sup>88</sup>.

---

<sup>83</sup> Aristotle, *Politics* 1.1 (ed. and transl. H. Rackham, Harvard University Press, Cambridge, MA, London, 1990).

<sup>84</sup> Cf. John Rawls, *Political Liberalism* (Columbia University Press, New York, 1993) pgs. 40-43 and 201, and *Justice as Fairness. A Restatement* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2001) pgs. 20 and 199.

<sup>85</sup> Cf. Andrew Hurrell, *On Global Order. Power, Values, and the Constitution of International Society* (Oxford University Press, Oxford, New York, 2007) pg. 2.

<sup>86</sup> For a commentary on this important rule, see Rafael Domingo, *The New Global Law* (Cambridge University Press, New York, Cambridge, 2010) pg. 144-145.

<sup>87</sup> H. A. L. Hart, *The Concept of Law* (Oxford University Press, Oxford, New York, 1997) pgs. 94-110.

<sup>88</sup> Thomas Hobbes, *Leviathan* part 2, chap. 22, section 29, no 122 (ed. J. C. A. Gaskin, Oxford University Press, Oxford, New York, 1996).

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.”<sup>89</sup> 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<sup>90</sup> 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. The person is the key which opens the door to a new constitutionalism beyond the state.

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<sup>91</sup>. We can see why Francisco de Vitoria believed 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.”<sup>92</sup>

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<sup>93</sup>. 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.

---

<sup>89</sup> Cf. Jean Monnet, *Memoirs* (Librarie Arthème Fayard, Paris, 1976) pg. 9: “Nous ne coalisons pas des États, nous unissons des hommes.”

<sup>90</sup> For more on these new actors, see Anne Peters, Lucy Koechlin, Till Förster and Gretta Fenner Zinkernagel (eds.), *Non-state Actors as Standard Setters* (Cambridge University Press, New York, Cambridge, 2009), esp. pgs. 1-32 in the the editor’s introduction.

<sup>91</sup> See this argument in Hugo Grotius *De jure belli ac pacis*, book 2, chapter 5, section 17 (ed. William Whewell, Cambridge University Press, John W. Parker, London, 1853) pg. 324 (with references to different authors of Antiquity. Cf. also John Locke, *Second Treatise*, sections 95-98., esp. 97 (ed. Peter Laslett, *Two Treatises of Government*, Cambridge University Press, Cambridge, New York, 1988) pg. 332: “And thus every man, by consenting with others to make a body politic under one government, puts himself under an obligation to every one of that society, to submit to the determination of the majority, and to be concluded by it.”

<sup>92</sup> Francisco de Vitoria, *On Civil Power*, question 2, article 1, section 14 (ed. Anthony Pagden and Jeremy Lawrence, *Francisco de Vitoria, Political Writings*, Cambridge University Press, Cambridge, 1991) pg. 32.

<sup>93</sup> In this vein, see Tony Honoré, “The Human Community and Majority Rule”, in Tony Honoré, *Making Law Binding. Essays Legal and Philosophical* (Clarendon Press, Oxford, 1987) pg. 232: “If the so-called world society is no more than an association of states the case for majority rule is weakened.”

c) *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 as it has been traditionally conceived. The international community is the sum of particular totalities (sovereign states). The global human community, however, is a universal but incomplete (not total) community that embraces humanity.

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<sup>94</sup>. 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”<sup>95</sup>.

One of the goals of this global human community would be 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”<sup>96</sup>, 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<sup>97</sup>.

---

<sup>94</sup> This argument was firmly defended by Hermann Heller, *Die Souveranität. Ein Beitrag zur Theorie des Staats- und Völkerrechts* (Walter de Gruyter & Co., Berlin and Leipzig, 1927) pgs. 20-23.

<sup>95</sup> Carl Schmitt, *The Concept of the Political* (trans. by G. Schwab, University of Chicago Press, Chicago, 2007) pg. 36.

<sup>96</sup> Hannah Arendt, “Karl Jaspers: Citizen of the World?”, in *Men in Dark Times* (A Harvest Book, Harcourt Brace & Company, San Diego, New York, London, 1995) pg. 81. At 82 she insists on the same idea: “[t]he establishment of one sovereign world state, far from being the prerequisite for world citizenship, would be the end of all citizenship. It would not be the climax of world politics, but quite literally its end.”

<sup>97</sup> Perhaps an analogy to the English language will help. English is the most universal language, but it cannot become total, unique, absolute, exclusive of the other languages in such a way that it alone is used

*d) A community of compulsory membership:* The most important consequence of universality is that the global human community is a non-voluntary community<sup>98</sup>. As such, consent is not a requirement for becoming a member and indeed is not possible: no human being could ever leave this community. So its legal authority would be able to impose obligations without the express consent of all its members. This kind of non-voluntary membership is only possible in an incomplete community, like the family for example, not in a complete community, like the nation-state, which would require voluntary membership, if not always with respect to becoming a member<sup>99</sup>, then at least with respect to leaving the community. Compulsory membership has to be balanced by a high degree of citizen participation in the decision-making process. Hence my advocacy of a Global Parliament at the heart of the global human community. This parliament would be the global democratic institution par excellence, with authority to decide which subject matters would come under the global legal domain and to what extent<sup>100</sup>.

This strong non-voluntary membership is the polar opposite of the essentially voluntary membership of free and equal nation-states in the international community, born at Westphalia and based on the principle of free recognition of independent states as the highest expression of sovereignty. Nonetheless, over the past few decades the international community has been moving from a voluntary membership paradigm based on nation-state consent, to an involuntary one, closer to the paradigm of the global human community. The key to this shift has been the growing realization that the act of recognition of a state is a mere declaratory and political act, independent of its existence as a full subject of international law<sup>101</sup>.

Yet a society of states would never be fully considered a non-voluntary membership community that is different from the global human community. Indeed,

---

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 neither total nor absolute.

<sup>98</sup> For the legal consequences of compulsory membership in communities, see Tony Honoré, "Nécessité Obligée", in Tony Honoré, *Making Law Bind* (Clarendon Press, Oxford, 1987) pgs. 120-121.

<sup>99</sup> Most national legal orders provide that individuals become subjects of law by birth or even at conception, i.e., without consent. Cf. for instance Fourteenth Amendment of the US Constitution (section 1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

<sup>100</sup> Cf. Rafael Domingo, *The New Global Law* (Cambridge University Press, New York, Cambridge, 2010) pgs. 145-147.

<sup>101</sup> Cf. James Crawford, *The Creation of States in International Law* (2nd ed., Oxford University Press, Oxford, New York, 2007) chapter I, section 4. For a history of the concept and a defense of the de facto theory of recognition, see Mikulas Fabry, *Recognizing States. International Society and the Establishment of New States Since 1776* (Oxford University Press, Oxford, New York, 2010).

each human being has the right to be recognized as a member of the global human community. A nation-state, however, has no right to be recognized as such by other members of the international community, even though we regard the act of recognition itself as having no legal bearing on the international status of a sovereign state.

*e) An incomplete community.* The global human community is incomplete because, although it embraces all humanity, its point would not be the ultimate fulfillment of all human needs but only those global needs that affect humanity as a whole. I agree with Aristotle and Aquinas in seeing the *polis*<sup>102</sup> or *civitas*<sup>103</sup> as the only complete and self-sufficient community, even though their views were based on “a premature generalization from incomplete empirical data.”<sup>104</sup> Globalization does not require the establishment of a universal complete community (*communitas perfectissima*). The end purpose of the global human community would be to serve human beings living within the existing complete communities (*polis, civitas, res publica*, commonwealth, nation-states, and so on) to the extent that they cannot achieve global fulfillment of certain needs on their own.

Addressing the needs arising from globalization creates a paradox, namely that the so-called *perfectae communitates* require the support of an incomplete community: the global human community. Therefore, complete communities as such are no longer such in fact but as an aspiration. The existing complete communities aspire to be complete, but in reality they are not. They need the support of the global human community, which is an incomplete community.

Since the members of the *communitas perfecta* are also members of the global human community, this community is, in some ways, inherently integrated into each national political community (*in quibus*), and the national community manifests itself at the global level through its members, who are also members of the global human community (*ex quibus*). This is possible because the global human community is not a community of communities but a community of all human beings, who live primarily in a complete political community.

---

<sup>102</sup> Aristotle, *Politics* 1.1.1252a (ed. and transl. H. Rackham, Harvard University Press, Cambridge Mass, London, 1990).

<sup>103</sup> Cf. Thomas Aquinas, *Summa Theologiae* I-II, q. 90 a. 3 ad 3; *Summa Theologiae* II-II, q. 65 a. 2 ad 2, and *Sententia libri Politicorum* 1.1.23 (ed. Enrique Alarcón, *Corpus Thomisticum*, University of Navarra, 2000, on line: [www.corpusthomisticum.org](http://www.corpusthomisticum.org)). For more on the concept of “*communitas perfecta*” in Thomas Aquinas, see, John Finnis, *Aquinas. Moral, Political, and Legal Theory* (Oxford University Press, Oxford, New York, 1998) pgs. 52, 114, 122, 219, 221 n. 10, 226 and 307.

<sup>104</sup> John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) pg. 148.

It would be a serious mistake to try to govern the global human community as a complete community. The nature and competencies of any global authority should approximate the ideal of global governance under the rule of law rather than a world government<sup>105</sup>.

*f) A complementary community:* The global human community is incomplete because it is complementary in nature. The complete and incomplete must coexist to address world needs. This complementarity is based on the principles of solidarity and subsidiarity. These two interrelated principles are the pillars of the new emerging global human community insofar as it is a community of persons, not of nation-states. In the current international community, these societal principles can only be applied with great difficulty due to their fundamental incompatibility with sovereignty in its original sense. Solidarity is an expression of the social nature of human beings; while subsidiarity is an implication of personal human freedom. Solidarity, on the one hand, promotes personal responsibility for discharging common duties and fulfilling social needs; subsidiarity, on the other hand, promotes universal assistance and cooperation with respect for human dignity, international reciprocity and standards of global coordination. Solidarity and subsidiarity are two sides of the same coin. Without subsidiarity, solidarity becomes imperialistic; without solidarity, subsidiarity becomes inefficient.

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.

#### **4. Conclusion**

A new global human community is emerging, different from the current international community, made up of all human beings and based on the dignity of each

---

<sup>105</sup> Cf. Rafael Domingo, *The New Global Law* (Cambridge University Press, New York, Cambridge, 2010) pgs. 145-147.

person, not on the sovereignty of each nation-state. The implications of moving the primary subject of international law from the nation-state to the human person are so profound that they will change the very legal foundations of public law.

I have put forward four arguments for the existence of this global human community. Each in and of itself could justify the existence 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 human tool to order 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 has been used to defend the common good as a constituent element of the global human community.

This new global human community is a political community of persons, not of nation-states, is universal in nature, of compulsory membership, incomplete and complementary. These key features of the new global human community would ultimately determine both the structure of its legal system and its legal authority. We are defining the global human community as a political community in the sense of a system of global governance and social cooperation made up of institutions and administered by a legal authority under the rule of law. The global human community is universal because it includes each and every human being without exception. But universality is not totality. Indeed, in the realm of the global law paradigm, for the sake of freedom and pluralism, total legal structures like the nation-state cannot be universalized. A necessary consequence of universality is that the global human community is a non-voluntary community. Rather it is incomplete and complementary because, although it embraces all humanity, its end would not be the ultimate fulfillment of all human needs but only those global needs that affect humanity as a whole.

Indeed, addressing the needs of globalization does not require the establishment of a universal complete community (*communitas perfectissima*). To do so would lead to a totalitarian global community and a monstrous world empire (*imperium totius orbis*). What is required in my opinion is a more modest but efficient global human community of the sort described above, as an appropriate way to manage globalization and resolve the problems of humanity as a whole.