

The New Global Human Community

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Abstract

Under the impact of globalization, the international community is in the process of evolving into a new community made up of new members, inspired by new principles, and based on new ideas. The first part of this Article aims 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. The second part argues that the new global human community has four features: that it 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.

Table of Contents

I. Introduction.....	564
II. Four Arguments for the Existence of the New Global Human Community.....	568
A. <i>Dignitas</i>	568
B. <i>Usus</i>	571
C. <i>Necessitas</i>	575
D. <i>Bonum Commune</i>	578
III. Main Features of the Global Human Community.....	580
A. A Political Community.....	581
B. A Community of Persons, Not of Nation-States.....	582

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C. A Universal Community	583
D. A Community of Compulsory Membership	584
E. An Incomplete Community	585
F. A Complementary Community	586
IV. Conclusion.....	587

I. INTRODUCTION

For centuries, the ideal of a universal human community living in perpetual peace and happiness was a dream of many philosophers, jurists, and poets. The Stoic cosmopolitan vision,¹ the Roman aspiration toward an empire without end (*imperium sine die*),² the Christian ideal of a world united by charity,³ the Dantian longing for a universal monarchy,⁴ and the Kantian project of world peace,⁵ 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 fifteenth century, jurists and theologians alike, most notably members of the School of Salamanca,⁶ have been interested in the legal and moral implications of the

¹ See Seneca, *On Benefits (De beneficiis)*, in Seneca, 3 *Moral Essays* § 7.1.7 (Harvard 1935) (John W. Basore, trans) (“... si sociale animal et in commune genitus mundum ut unam omnium domum spectat” As translated by John W. Basore: “. . . that, social creature that it is and born for the common good, views the world as the universal home of mankind”); Seneca, *On Benefits* § 7.19.8, (“Quidquid erat, quo mihi cohaereret, intercisa iuris humani societas abscedit.” As translated by John W. Basore to: “For whatever the tie that bound him to me, it has been severed by his breach of the common bond of humanity.”).

² See Virgil, *Aeneid*, Book I, ll 278–79, in Virgil, *Eclagues, Georgics, Aeneid* 1–6 (Harvard 3d ed 1999) (H. Rushton Fairclough, trans) (“[H]is ego nec metas rerum nec tempora pono; / imperium sine fine dedi.” As translated by H. Rushton Fairclough: “For these I set no bounds in space or time; but have given empire without end.”).

³ See Tertullian, *Apology* § 38.3 (Harvard 6th ed 1984) (T.R. Glover, trans) (“Unam omnium rempublicam agnoscimus mundum.” As translated by T.R. Grover: “We acknowledge one all-embracing commonwealth: the world.”).

⁴ See Dante Alighieri, 1 *Monarchia* § 15.10 (Arnoldo Mondadori Editore 2004) (Nicoletta Marcelli, trans) (“Quod si omnes consequentie superiores vere sunt, quod sunt, necesse est ad optime se habere humanum genus esse in mundo Monarcham, et per consequens Monarchiam ad bene esse mundi.” As translated by Nicoletta Marcelli: “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.”).

⁵ See generally Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in Hans Reiss, ed, *Kant: Political Writings* 93 (Cambridge 2d enlarged ed 1991) (H.B. Nisbet, trans).

⁶ See, for example, Francisco de Vitoria, *On Civil Power*, in Anthony Pagden and Jeremy Lawrance, eds, *Francisco de Vitoria: Political Writings* 40 § 21 (Cambridge 1991); Francisco Suárez, *De legibus, ac Deo legislatore*, in 2 *Selections from Three Works of Francisco Suárez* 349 § 191 (Clarendon 1944) (Gwladys L. Williams, Ammi Brown, and John Waldron, trans).

potential development of such a global commonwealth. The collapse of international society after the tragic elimination of nearly sixty million people during the Second World War revealed the weaknesses of the international legal system born at Westphalia in 1648 and confirmed at Utrecht in 1713. The Westphalian international order was based on both 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, in 1948, was a turning point from Westphalian thought and gave prominence to the goal of establishing a community forged not only by national self-interest but in a “spirit of brotherhood.”⁷

By the end of the twentieth century, with the rapid rise in worldwide interdependence and the corresponding increase in mutual vulnerability—popularly referred to as “globalization”—old utopian ideals of human unity and perpetual peace had become political imperatives. In today’s globalized world, no existing political community, whether local, national, or supranational, can be considered fully self-sufficient or guarantee complete global justice. And without justice, there can be no peace,⁸ liberty, or happiness.⁹ These local, national, and supranational communities, being insufficient to provide global or international justice, therefore must be complemented by an international political community sufficient to provide global justice.

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.¹⁰ 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

⁷ See Universal Declaration of Human Rights, General Assembly Res No 217A (III), UN Doc A/810 at Art 1 (1948) (UDHR).

⁸ We find references to peace as a fruit of justice in Isaiah 32:17: “The fruit of righteousness will be peace.”

⁹ Perhaps this is why the Preamble of the US 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.” US Const, Preamble.

¹⁰ For a similar discussion, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* 432 (Oxford 2007).

have become obsolete. This Westphalian political system is facing one of its most profound crises since the end of the Cold War.

Since the international community lacks both the ability to take common action and universal awareness of common interests, it could be said to be more like a partnership than a community in the strict sense.¹¹ In a partnership, “authority would never be needed except on account of some fault or accident.”¹² 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.¹³ This community requires 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 “post-national constellation”¹⁴ of transnational, supranational, and global actors. Global interdependence is not compatible with complete national sovereignty. As global interdependence grows, a new pluralistic and global human community made up of all human beings and based on the dignity of each person emerges. This Article argues that this global human community should be organized according to a global rule of law.¹⁵

The current international community is undergoing a process of constitutionalization, which is transforming it into a global human community. During this process, certain constitutional standards are being elevated to the status of global legal “first principles” or “primary truths.”¹⁶ That does not mean, however, that this new global human community would need a formal

¹¹ This famous distinction comes from Yves R. Simon, *A General Theory of Authority* 29 (Notre Dame 1962).

¹² Id at 31.

¹³ For a discussion in the same vein, but using the term “society” and not “community,” see John Rawls, *Justice as Fairness: A Restatement* 95–96 (Belknap 2001). In this paper, I do not differentiate, as Rawls does, community from society. I use the term “community” and not “society” because it is the term legal thinkers employ to refer to the international community. For the Rawlsian difference between society and community, see id at 20–21, 198–200, and John Rawls, *Political Liberalism* 40–43 (Columbia 1993).

¹⁴ See generally Jürgen Habermas, *Die Postnationale Konstellation: Politische Essays* (Suhrkamp 1998). For more on the legal implications of this postnational constellation, see generally Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford 2010).

¹⁵ For more on this concept, see Rafael Domingo, *Gains, Vattel, and the New Global Law Paradigm*, 42 *Eur J Intl L* 627, 640–46 (2011). See also Gianluigi Palombella, *The Rule of Law Beyond the State: Failures, Promises, and Theory*, 7 *Intl J Const L* 442 (2009). See generally Leonardo Morlino and Gianluigi Palombella, eds, *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill 2010); Gianluigi Palombella and Neil Walker, eds, *Relocating the Rule of Law* (Hart 2009).

¹⁶ See the expressions at the beginning of Federalist 31 (Hamilton), in *The Federalist Papers* 193 (Wesleyan 1961) (Jacob E. Cooke, ed) (“In disquisitions of every kind there are certain primary truths or first principles upon which all subsequent reasonings must depend.”).

written constitution, nor that it would have to be consolidated into one comprehensive structure that thoroughly embraces all existing legal relations. The same principles that inspired the constitutional nation-state cannot be applied to this emerging community. The new constitutionalism is very far from the idea of a single, global world-state.¹⁷ There is at its core no formal constitution, no sovereign constituent power, but a certain “mindset,”¹⁸ a “particular cognitive frame for the construction of legitimate authority,”¹⁹ or “authoritative standards of legitimacy for the exercise of public power wherever it is located.”²⁰ Insofar as this Article argues that the new global human community, like any community, needs a legitimate and dispersed global authority, it works from the same assumptions as cosmopolitan constitutionalism,²¹ although not exactly using the same tools, as the reader will soon note. These approaches—global communitarianism and cosmopolitan constitutionalism—are climbing different sides of the same mountain.

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.²² 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 international law.²³

¹⁷ For a general discussion, see generally J.H.H. Weiler and Marlene Wind, eds, *European Constitutionalism Beyond the State* (Cambridge 2003).

¹⁸ See Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 *Theoretical Inquiries L* 9, 12 (2007).

¹⁹ Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On The Relationship between Constitutionalism in and beyond the State*, in Jeffrey L. Dunoff and Joel P. Trachtman, eds, *Ruling the World? Constitutionalism, International Law, and Global Governance* 321 (Cambridge 2009).

²⁰ Martin Loughlin, *What is Constitutionalisation?*, in Petra Dobner and Martin Loughlin, eds, *The Twilight of Constitutionalism?* 47, 61 (Oxford 2010).

²¹ For an overview of the different dimensions of global constitutionalism, see Christine E.J. Schwöbel, *Situating the Debate on Global Constitutionalism*, 8 *Intl J Const L* 611, 634 (2010).

²² For the differences between ideals and ideology, see J.H.H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* 239–40 (Cambridge 1999).

²³ Indeed, public law proceeds from private law and not vice versa (*ex privato iure publicum*). See Rafael Domingo, *The New Global Law* 147–53, 187–88 (Cambridge 2010). For a different approach to public law, see generally Martin Loughlin, *Foundations of Public Law* (Oxford 2010).

II. FOUR ARGUMENTS FOR THE EXISTENCE OF THE NEW GLOBAL HUMAN COMMUNITY

This Article makes four arguments for the existence of a global human community. These arguments, even though they are normative, are not merely normative in the sense of a philosophical account (I do not provide and do not claim to provide a *prima philosophia*). They are normative in the more legally relevant way of articulating the normative foundations for the reconstruction, interpretation, and progressive development of the existing global order. Because the four arguments are rooted in the Western legal tradition, I use Latin terms to refer to them: *dignitas*, *usus*, *necessitas*, and *bonum commune*. Each argument 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 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, then 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 common good as a constituent element of the global human community.²⁴ This Article starts with the *dignitas* argument because it supports not only the existence of the global human community, but also the very idea of law itself.

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*) of international law. The dignity of the person has become the primary source of all law, even international law.²⁵ The reason is clear: without sovereign states, there can still be law. 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*). Thus, law must emanate from the person (*ex persona ius*

²⁴ This Article does not distinguish between normative ideas and positive ideas. This omission is due to the interdisciplinary nature of this Article, which extends an international juridical approach to philosophical, political, and social thought. Since the terminology of “normative” and “positive” contains different connotations in each discipline, this Article instead addresses both normative law and positive law simultaneously.

²⁵ UDHR, Preamble, Art 1 (cited in note 7).

oritur), from the inherent dignity of each person, and not from the state.²⁶ This reasoning discredits the prior, Westphalian belief that law emanates from the nation-state and instead supports the current mode of thought. However, this does not mean that nation-states do not play an important role as principal guarantors of dignity nor that they are irrelevant. 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.²⁷ 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 *raison d’être* 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, that is, in accordance with justice.

If law emanates from the person, the human being has to be the center of any legal order, whether local, national, transnational, supranational, or global. The current crisis of 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.²⁸ The law, as the Roman jurist Hermogenian indicated, has been constituted for the sake of human beings (*hominum causa*).²⁹ Therefore, the law ought to be 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.³⁰ This argument

²⁶ For more on human dignity, see Domingo, *The New Global Law* at 131–36 (cited in note 23).

²⁷ See Jeremy Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley* *3 (New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper No 09-50 Sept 2009), online at <http://ssrn.com/abstract=1461220> (visited Oct 2, 2011). Although it is true, as Waldron recently affirms, that *dignitas* was historically considered 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 study of law in the twentieth century has been the effective legal consideration of dignity as an absolute concept. See Domingo, *The New Global Law* at 131–36 (cited in note 23).

²⁸ For more about this argument, see generally Rafael Domingo, *The Crisis of International Law*, 42 *Vand J Transnatl L* 1543 (2009).

²⁹ See Hermogenian, *Codex Hermogenianus* § 1.5.2 (Adolphum Marcum 1842) (Gustavus Haenel, ed) (“Cum igitur hominum causa omneius constitutum sit.” As translated by Kirsti Miller and Joseph Miller: “Since all law has been established for the sake of human beings.”).

³⁰ See, for example, International Covenant on Civil and Political Rights (1966), 999 UN Treaty Ser 171, 173 (1976) (ICCPR) (recognizing that the rights contained in the covenant “derive from the inherent dignity of the human person”).

helps explain the development of universal 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.³¹

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.³² 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. It does mean that dignity must be protected in all provinces of law, including the global legal domain.³³ This protection of human dignity at a global level has to begin, empirically speaking, with the so-called “basic human rights,” that is, rights whose “enjoyment is essential to the enjoyment of all other rights.”³⁴

The centrality of the person in the legal arena allows for the establishment of an open constitutional global framework derived from a plurality of constitutional sources, and not limited by a written constitution.³⁵ 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.³⁶

³¹ See Tony Honoré, *The Human Community and Majority Rule*, in *Making Law Bind: Essays Legal and Philosophical* 227, 228 (Clarendon 1987).

³² For a similar argument, see *id.* (“If, therefore, there is no human community, there are no human rights.”).

³³ See Charles R. Beitz, *The Idea of Human Rights* 209–11 (Oxford 2009).

³⁴ Charles R. Beitz and Robert E. Goodin, *Introduction: Basic Rights and Beyond*, in Charles R. Beitz and Robert E. Goodin, eds, *Global Basic Rights* 1, 3–4 (Oxford 2009).

³⁵ See Mattias Kumm, *The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia*, in Dobner and Loughlin, eds, *The Twilight of Constitutionalism?* 201, 203–04 (cited in note 20).

³⁶ 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. See Loughlin, *What is Constitutionalisation?* at 59 (cited in note 20). See also Anne Peters, *Membership in the Global Constitutional Community*, in Jan Klabbers, Anne Peters, and Geir Ulfstein, eds, *The Constitutionalization of International Law* 155, 179 (Oxford 2009).

B. *Usus*

The second argument for the existence of a global human community is the peculiar juridical relationship that links humanity with its home: the earth. This relationship, “*usus* of the earth,”³⁷ 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 relationship by increasing territorial interdependence. On the other hand, expanding scientific knowledge of the planet affects this juridical relationship by clarifying its content, since the rights of a holder depend on the nature of the thing (*res*) held.³⁸

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.³⁹ 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*.⁴⁰

³⁷ The expression brings to mind Schmittian connotations. This Section constitutes a critique of the doctrinal exegesis articulated by Carl Schmitt in *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot 4th ed 1997).

³⁸ It is very different to be the owner of a car, which is very short-lived, than to be the owner of a painting by Picasso, called to endure for centuries and forever attributed to Picasso.

³⁹ See, for example, Hugo Grotius, 1 *De Jure Belli et Pacis Libri Tres* § 2.3.3 (John W. Parker 1853) (William Whewell, trans) (referring to the Paulus enumeration of the modes of acquisition). In any case, the same Grotius recognizes that this Roman *ius gentium* is not immutable. See *id* at § 2.8.26 (“Haec ideo annotavimus, ne quis reperta juris gentium voce apud Romani juris auctores statim id jus intelligat quod mutari non possit.” As translated by William Whewell: “We have noted these things, in order that when anyone finds the term *juris gentium* in the Roman jurists, he may not, as a matter of course, understand that *jus* which is immutable.”). For an additional reference, see also Alberico Gentili, 1 *De Jure Belli Libri Tres* § 1.1 (Clarendon 1933) (James Brown Scott, ed). For an exploration of the influence of Roman law in the law of nations, see Benedict Kingsbury and Benjamin Straumann, *Introduction: The Roman Foundations of 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* 1, 1 (Oxford 2010).

⁴⁰ This Roman doctrine can be found in Gaius, 1 *The Institutes of Gaius* 66–91 (Clarendon 1946) (Francis de Zulueta, trans). It is very well explained in Francis de Zulueta, 2 *The Institutes of Gaius: Commentary* 55–82 (Clarendon 1946). See also W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 204–58 (Cambridge 3d ed 1966).

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 law⁴¹ and the theories of Bodin, to whom he referred as "clarissimus jurisconsultus terrae Galliae."⁴² Based on a famous fragment from the *Institutes* of Justinian,⁴³ for instance, Gentili defended the permissibility of a king's disposing of a territory without the people's permission.⁴⁴

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*). They argued against the doctrine, proposed by Hugo Grotius in his treatise *Mare liberum* (1609) and in his subsequent work *De Jure Belli et Pacis Libri Tres* (1625), that the sea cannot be owned. The prevailing view among modern scholars, first established by Cornelius van Bynkershoek in his work *De Dominio Maris* (1702), allows that certain portions of the sea in close proximity to the land (*mare terrae proximum*)

⁴¹ See Gentili, 1 *De Iure Belli Libri Tres* at § 1.3 (cited in note 39) ("[I]hat 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.").

⁴² See id at § 1.1 ("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 Schröder, *Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations*, in Kingsbury and Straumann, eds, *The Roman Foundations of the Law of Nations* at 169–81 (Oxford 2010) (cited in note 39).

⁴³ See Paul Krueger, *Institutiones* § 1.2.6, in Paul Krueger and Theodor Mommsen, eds, 1 *Corpus iuris civilis* (Apud Weidmann 16th ed 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." As translated by Kirsti Miller and Joseph Miller: "But that which has pleased the prince, has the force of law, since by the royal law, which was made concerning his power, the people have granted to him and lodged in him all their power and authority."); Theodor Mommsen, *Digesta* § 1.4.1, in Krueger and Mommsen, eds, 1 *Corpus iuris civilis* ("Quod principi placuit, legis habet, vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat." As translated by Kirsti Miller and Joseph Miller: "That which has pleased the prince, has the force of law: since by royal law, which was made concerning his power, the people confer on him and lodge in him all their power and authority.").

⁴⁴ Gentili, 1 *De Iure Belli Libri Tres* at § 3.15 (cited in note 39) ("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.'").

are susceptible of exclusive dominion, but the open sea is a common possession of all people (*res communis omnium*) because no settlement can be formed on it.⁴⁵

Under the application of the doctrine of *dominium* to international law, 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 as far as the stars (*usque ad sidera*), was considered the result of the partition of the earth as such, with the capacity for different absolute owners—that is, the nation-states—to own the part of the earth that was their territory as an independent partitioned entity. Under the theory of *dominium*, these nation-states, as absolute and full owners of their respective territories, have the power to dispose of it. Emer de Vattel is radical on this point: “Those who think otherwise[] cannot allege any solid reason for their opinion.”⁴⁶

The land of the earth has been divided into a multitude of territories that we call sovereign states, breaking up the *communio* of humanity. Beginning with Gentili,⁴⁷ the international community was considered a community of equal nation-states ruled by private law standards.⁴⁸ The idea of a global and public commonwealth *de iure*, so present in Francisco de Vitoria’s prior work,⁴⁹ 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.

But *dominium*’s doctrine of ownership and fragmentation of the earth does not reflect humanity’s real relationship with it. The role of the earth is unique, since humanity needs it to survive as a species. It is for this reason that the earth is sometimes called “Mother Earth.” The earth is an indivisible unit that allows for solidary exploitation and preferential rights of possession but not for a

⁴⁵ For further information, see Henry Wheaton, *History of the Law of Nations in Europe and America; from the Earliest Times to the Treaty of Washington, 1842* 152–58 (Gould, Banks 1845).

⁴⁶ Emer de Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* § 1.21.257 (T & J.W. Johnson 1861) (Joseph Chitty, ed).

⁴⁷ See generally Gentili, 1 *De Iure Belli Libri Tres* at § 1.21 (cited in note 39).

⁴⁸ See id. For a contrast between the two different conceptions of the global legal community in Vitoria and Gentili, see Andreas Wagner, *Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth*, 31 *Oxford J Legal Studies* 565 (2011). For a more general discussion, see also Anthony Pagden, *Gentili, Vitoria, and the Fabrication of a “Natural Law of Nations,”* in Kingsbury and Straumann, eds, *Roman Foundations* 340 (cited in note 39).

⁴⁹ See, for example, Vitoria, *On Civil Power* at § 21 (cited in note 6) (“The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men.”).

permanent or absolute division among owners. Indivisibility among several owners presupposes solidarity and common responsibility. An indivisible thing can only be governed either by a single owner or an indivisible community; therefore, humanity must be construed as a community.

The Roman term *usus* is the best term to express the combined ideas of solidarity and indivisibility. Over the centuries the meaning of the Roman term *usus* has evolved along with the concept of ownership.⁵⁰ 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 possession (*possessio*) in its more general sense, is a part of *usus*.⁵¹ So *usus* excludes only those acts that imply an absolute ownership over the earth (*dominium*), such as acts of disposal (*habere*), and, of course, of abuse (*abusus*).

Therefore, as I use the term herein, *usus* of the earth means that humanity has the rights and derivative duties of long-term use—that is, it has *usus* in the strictest sense: rights to 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 fact, throughout the world, there is no such thing as absolute ownership of the earth.⁵² 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

⁵⁰ For an explanation of the word *usus* in Roman law, see Buckland, *A Text-Book of Roman Law* at 120–21, 273–74 (cited in note 40); Max Kaser, 1 *Das römische Privatrecht* § 106 (Oscar Beck 2d ed 1971).

⁵¹ Historically, the term *usus* can also embrace both aspects. For more on this dichotomy, see Giuseppe Grosso, *Usufrutto e Figure Affini nel Diritto Romano* 85–87, 313–40 (G. Giappichelli 2d ed 1958); Max Kaser, *Eigentum und Besitz im Älteren Römischen Recht* 87–88, 313–40 (Böhlau 2d ed 1956) (“Es ist wohl unbestritten, daß ‘usus’ ein alter Ausdruck für den Besitz ist.” As translated by Kirsti Miller and Joseph Miller: “It is quite uncontested that ‘usus’ is an old usage for possession.”).

⁵² See also Álvaro d’Ors, *La Posesión del Espacio* 14 (Civitas 1998) (arguing that with respect to space—conceived of as the “totality of the perceptible environment”—and thus with respect to any specific instance of it, there is possession but not ownership, as translated by Rafael Domingo).

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*,⁵³ and humanity does not have this right.

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.

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 wedges⁵⁴ to fix fast the decrees of Fate.⁵⁵ Opposed to free will (*libera voluntas*), *necessitas* is a force or influence that compels an unwilling person or a group of persons to act.⁵⁶

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. An example is the doctrine of necessity in international law, which is based on the rule that the law does not apply when

⁵³ See Buckland, *A Text-Book of Roman Law* at 188 (cited in note 40) (“*signoria*” is Italian for “lordship” and was the form of government in medieval and Renaissance city-states in Italy).

⁵⁴ See Horace, *Odes and Epodes* §§ 1.35.17–20 (Harvard 2004) (Niall Rudd, trans) (“[T]e semper anteit saeva Necessitas, / clavos trabalis et cuneos manu / gestans aena, nec severus / uncus abest liquidumque plumbum.” As translated by Niall Rudd: “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.”).

⁵⁵ See Wagner, *Necessitas*, in W.H. Roscher, ed, 3:1 *Ausführliches Lexikon der Griechischen und Römischen Mythologie* columns 70–72 (B.G. Teubner 1902).

⁵⁶ See *Black’s Law Dictionary* 1053 (West 7th ed 1999).

necessity comes into play (*cessat lex ubi venit necessitas*).⁵⁷ Sometimes, however, necessity *creates* law by grounding legal obligations and duties. This is reflected in the well-known legal French aphorism: *nécessité oblige*.⁵⁸ 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 inherently interconnected: anything with power to suspend laws 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*,⁵⁹ 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 (*necessitate adstringimur*). This definition of *obligation* entered the Anglo-American common law tradition in the thirteenth century through the work of Henry de Bracton's *De legibus et consuetudinibus Angliae*, who adapts the first part of the wording used in Justinian's *Institutes*: "iuris vinculum quo necessitate adstringimur."⁶⁰

In the Roman jurist Modestinus's first book of legal rules, he aptly expressed the concept of necessity, saying, "Ergo omne ius aut consensus fecit aut necessitas constituit aut firmavit consuetudo": "Thus, all law has been made either by consent, or established by necessity, or confirmed by custom."⁶¹ As used by Modestinus, the term "necessity" has its ordinary, non-technical meaning: an imperative need or desire, a pressure of circumstances, a physical or

⁵⁷ Accursius, *Digestum Vetus seu Pandectarum Iuris Civilis* § 1.10.1 note o (Editio Postrema 1575). For a commentary on this rule and other similar rules, see Rafael Domingo, ed, *Principios de Derecho Global: 1000 Reglas, Principios y Aforismos Jurídicos Comentados* 146 (Thomson Aranzadi 2d ed 2006). There is a similar meaning in the well-known statement by Cicero that applies to war: "[S]ilent enim leges inter arma." As translated by N.H. Watts: "When arms speak, the laws are silent." Cicero, *Pro Milone* § 4.11 (Harvard 2d ed 1953) (N.H. Watts, trans).

⁵⁸ *Nécessité oblige* means that when a need exists, a concomitant legal obligation arises. As Honoré puts it: "[I]n the last resort necessity makes law: *nécessité oblige*." Tony Honoré, *Nécessité Oblige*, in *Making Law Bind: Essays Legal and Philosophical* 129 (Clarendon 1987). 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* 82–91 (Oxford 2d ed 1997).

⁵⁹ Krueger, *Institutiones* at § 3.13 (cited in note 43) ("[O]bligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura." As translated by Kirsti Miller and Joseph Miller: "An obligation is a legal binding whereby we are bound by a necessity of performing some act according to the laws of our community.").

⁶⁰ Henry de Bracton, 2 *On the Laws and Customs of England* 283 (Belknap 1968) (George E. Woodbine, ed) (Samuel E. Thorne, trans) ("Et sciendum quod obligatio est iuris vinculum quo necessitate astringimur ad aliquid dandum vel faciendum." As translated by Samuel E. Thorne: "An obligation is a legal bond whereby we are constrained, whether we wish to or not, to give or do something.").

⁶¹ Mommsen, *Digesta* at § 1.3.40 (cited in note 43).

moral compulsion, which excuses the non-fulfillment of an existing obligation or creates a new one.⁶²

In his second book of rules, Modestinus again refers to necessity as a source of legal obligation (*obligamur necessitate*).⁶³ 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.”⁶⁴ He cites the example of the necessary heirs (*necessarii heredes*), that is, 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 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,⁶⁵ and thanks, in part, to the defense of customary international law promoted by some international scholars in recent years.⁶⁶ But we still need to recover the concept of necessity in order to develop the 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.”⁶⁷ The reason was already explained by Francisco de Vitoria, based on Aristotelian thought: necessary causes are final causes.⁶⁸

Because of globalization, relationships between and among human beings have become necessary for humanity to manage its global needs well. Some of

⁶² In this vein, see Theo Mayer-Maly, *Topik der Necessitas*, in *Études offertes à Jean Macqueron* 477, 477 (Faculté de Droit et des Sciences Économiques 1970) (“Wenn Juristen von Notwendigkeit sprechen, so machen sie damit eine *Anleihe bei der Umgangssprache*.” As translated by Kirsti Miller and Joseph Miller: “When jurists speak of necessity, they speak colloquially.”).

⁶³ See Mommsen, *Digesta* at § 44.7.52 (cited in note 43) (“*Obligamur aut re aut verbis aut simul utroque aut consensu aut lege aut iure honorario aut necessitate aut ex peccato*.” As translated by Rafael Domingo: “We are bound either by 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.”).

⁶⁴ Id (“*Necessitate obligantur, quibus non licet aliud facere quam quod praeceptum est*.”) (Translation in text by Rafael Domingo).

⁶⁵ 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 Antonio Cassese, *International Law* 166 (Oxford 2d ed 2005).

⁶⁶ See generally Amanda Perreau-Saussine and James B. Murphy, eds, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge 2007); Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge 2010); David J. Bederman, *Custom as a Source of Law* (Cambridge 2010).

⁶⁷ Honoré, *The Human Community and Majority Rule* at 237 (cited in note 31).

⁶⁸ See Vitoria, *On Civil Power* at §§ 2–6 (cited in note 6).

those needs derive directly from human dignity (for example, eradicating poverty and combating international terrorism). Thus, *necessitas* and *dignitas* are intertwined. The necessity of protecting 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, *necessitas* and *usus* are also connected. This necessity to protect our planet requires joint action that cannot flourish within the current international framework. Therefore, the very existence of a global community becomes a legal necessity.

In a certain sense, this global community (paraphrasing the Roman jurists) could be called “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. 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.”⁶⁹ What humanity has to do is to organize legally the *global social contract*,⁷⁰ that is, to create the constitutional framework that permits it to be ordered under a global rule of law.⁷¹ By doing this, the global human community would meet the legal obligations arising out of the necessities of protecting human dignity and preserving the planet.

D. *Bonum Commune*

The fourth argument focuses on the existence of a common good (*bonum commune*) that calls for a global human association to advance and protect it.⁷² I prefer the expression “common good” to “public interest,” “public good,” or “general welfare,” among others, for several reasons. First, it has a longstanding

⁶⁹ 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* 37, 39 (Cambridge 2009).

⁷⁰ See also David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* 161–69 (Polity 2004) (discussing “global social democracy”).

⁷¹ For more on this concept, see generally Domingo, 42 *Eur J Intl L* at 627 (cited in note 15). See also Palombella, 7 *Intl J Const L* at 442 (cited in note 15); Morlino and Palombella, eds, *Rule of Law and Democracy* (cited in note 15); and Palombella and Walker, eds, *Relocating the Rule of Law* (cited in note 15).

⁷² Pope Benedict XVI referred to the global common good in an encyclical letter: “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.” Pope Benedict XVI, *Charity in Truth*, § 7 (Vatican June 29, 2009).

tradition⁷³ that should not be interrupted; second, it is broader than the other expressions since it better integrates the legal dimensions of both private and public justice; and lastly, law, by nature, is more related to the good (*bona*)⁷⁴ than to public interest and welfare.⁷⁵ Indeed, the right and the good are complementary.⁷⁶ David Hollenbach is right to say that “[t]he idea of the common good is an idea whose time has once again come.”⁷⁷

The global common good is the added value resulting from the formation of a global community to achieve the ends of global justice for the sake of all human beings. The common good of the global human community cannot be fully identified with the so-called “universal common good” of humanity.⁷⁸ The global human community, although it is made up of all human beings, does not embrace all goods, needs, and aspirations of humanity. The *bonum commune* of the global human community is only a part of the “universal common good.”

The concept of the global common good does not entail that all members of the community, in our case, humanity, must share the same values or the same ideals.⁷⁹ 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. The common good encourages pluralism but is not always totally neutral,⁸⁰ even if it has been derived from an “overlapping consensus,” to use the famous expression of John Rawls.⁸¹

The whole of the global common good is not simply greater than the sum of its parts. It is something essentially different. The sum of its parts is one way

⁷³ For the development of the concept, see generally Herfried Münkler and Harald Bluhm, eds, 1 *Gemeinwohl und Gemeinsinn: Historische Semantiken Politischer Leitbegriffe* (Akademie Verlag 2001).

⁷⁴ The Roman jurist Celsus famously defined law as “*ars boni et aequi*,” or the art of goodness and justice, as translated by Kristi and Joseph Miller. Mommsen, *Digesta* at § 1.1.1 (cited in note 43).

⁷⁵ See also David Hollenbach, *The Common Good and Christian Ethics* 7–9 (Cambridge 2002).

⁷⁶ See the same argument in Rawls, *Justice as Fairness* at 140 (cited in note 13) (“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.”).

⁷⁷ Hollenbach, *The Common Good* at 243 (cited in note 75) (“[W]e need both a renewed understanding of the common good and a revitalized social commitment to it.”).

⁷⁸ See Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium Et Spes*, § 2.3.68, § 2.5.84 (Vatican Dec 7, 1965). For an overview of this expression in various Vatican documents, see Paolo G. Carozza, *The Universal Common Good and the Authority of International Law*, 9 *Logos: A Journal of Catholic Thought and Culture* 28, 31–41 (2006), with an extensive bibliography.

⁷⁹ See also John Finnis, *Natural Law and Natural Rights* 156 (Clarendon 1980).

⁸⁰ For a different approach, see Rawls, *Justice as Fairness* at 21 (cited in note 13).

⁸¹ For the relation between good and overlapping consensus, see Rawls, *Political Liberalism* at 150–54 (cited in note 13) and Rawls, *Justice as Fairness* at 32–38, 140–45 (cited in note 13).

to describe what something truly is, but that is not all that it is.⁸² How the parts are composed inherently affects the whole. For example, if the common good were considered only from the standpoint of a mathematical construct, it would concern only quantitative results. In that case, there would be no such thing as the “fair distribution” of wealth because fairness is not a mathematical concept. However, if we do not limit ourselves to such a constraint, then the fair distribution of wealth is a significant issue for the common good, to the extent that this distribution affects global justice, which is a constitutive element of the common good.⁸³

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 for 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 concomitant legal obligation (*nécessité oblige*). In short, the global common good is the driving force in protecting human dignity and preserving the planet, and the necessity of achieving those aims creates legal obligations to the global human community.

III. 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, this Article argues that the new global human community has six defining attributes. It is (A) a political community; (B) composed of persons, not of nation-states; (C) universal in nature; (D) of compulsory membership; (E) incomplete; and (F) complementary. These key features are intrinsically intertwined and serve to highlight the differences between the global human community and the international

⁸² See Thomas Aquinas, 37 *Summa Theologiae* 2a2æ Question 58.7 (Blackfriars 1975) (“[B]onum commune civitatis et bonum singulare unius personae non differunt solum secundum multum et paucum, sed secundum formalem differentiam. Alia enim est ratio boni communis et boni singularis, sicut alia est ratio totius et partis.” As translated by Rafael Domingo: “The common good of the State and the particular good of the individual person differ, not just quantitatively as the large and the little, but in kind; the meaning of the common good is other than that of an individual good, as the meaning of a whole is not that of a part.”).

⁸³ For a development of this argument, see Antonio Millán Puelles, *Persona Humana y Justicia Social* 41–57 (Ediciones Rialp 1962).

community in which the old (Grotian, Hobbesian, Kantian) and new paradigms coexist.⁸⁴

A. A Political Community

This Article takes a juridical perspective, thus its 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 or that our globalized world requires merely a sort of global legal public authority and not a political one. If the term “political community” is identified with the Aristotelian concept of *polis* as the paradigm of a complete community,⁸⁵ then 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. If the term is used 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,”⁸⁶ then the global human community is not a “political community,” but a “political society.” However, if we understand a political community as an institutional system of social cooperation governed by a legal authority under the rule of law, as I do here, we must also affirm that the global human community is a political community in the strictest sense, and that managing the global order is quintessentially a political problem.⁸⁷

Managing the global order requires an understanding of the nature of the global polity. The global human community can neither 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 omnes tangit, ab omnibus approbetur*. “[W]hat affects everyone must be approved by everyone.”⁸⁸ This rule would be, using H.L.A. Hart’s terminology, the rule of recognition of the legal system of the global human community.⁸⁹ Thus, the nature of authority in the global human community is both legal and political.

⁸⁴ See Cassese, *International Law* at 21 (cited in note 65).

⁸⁵ Aristotle, *Politics* § 1.1 (Harvard 1959) (H. Rackham, trans).

⁸⁶ See Rawls, *Political Liberalism* at 40–43, 201 (cited in note 13) and Rawls, *Justice as Fairness* at 20, 199–200 (cited in note 13).

⁸⁷ See Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* 2–8 (Oxford 2007).

⁸⁸ For a commentary on this rule, see Domingo, *The New Global Law* at 144–45 (cited in note 23).

⁸⁹ Hart, *The Concept of Law* at 94–110 (cited in note 58).

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 Thomas Hobbes, among others, argued.⁹⁰ 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.”⁹¹ The only way for persons to work together in a global context would be through different global institutions, supranational entities, nations, transnational corporations, NGOs, and other non-state actors⁹² that integrate the global human community. However, 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 that opens the door to a new constitutionalism beyond the state.

One consequence of recognizing 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.⁹³ We can see why Francisco de Vitoria believed that this rule could be applied to the world community and that a majority of Christians could appoint a monarch over the whole of Christendom. 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.”⁹⁴

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

⁹⁰ Thomas Hobbes, *Leviathan* § 2.22.29 (Oxford 1996) (J.C.A. Gaskin, ed).

⁹¹ Jean Monnet, *Mémoires* 9 (Fayard 1976) (“Nous ne coalisons pas des États, nous unissons des hommes.”) (Translation in text by Raphael Domingo).

⁹² For more on these new actors, see Anne Peters, Lucy Koechlin, and Gretta Fenner Zinkernagel, *Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion*, in Anne Peters, Lucy Koechlin, and Gretta Fenner Zinkernagel, eds, *Non-State Actors as Standard Setters* 1, 1–32 (Cambridge 2009).

⁹³ See this argument in Grotius, *De Jure Belli et Pacis Libri Tres* at § 2.5.17 (cited in note 39) (including references to different authors of antiquity). See also John Locke, *Second Treatise*, in Peter Laslett, ed, *John Locke: Two Treatises of Government* § 97 (Cambridge student ed 1988) (“And thus every Man, by consenting with others to make one Body Politick 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.”).

⁹⁴ Vitoria, *On Civil Power* at § 14 (cited in note 6).

sovereignty of each state.⁹⁵ The fact that some international actors have recently tried to apply this rule in the international arena signals the ongoing transformation of the international law paradigm into a new global law paradigm.

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, that is, specific to a group of persons or communities. Whatever is total, however, is comprehensive and 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, that is, 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.⁹⁶ The concept of the state requires otherness: in order to exist, there must be at least two of its kind. One is not enough.⁹⁷

One of the goals of this global human community would be to prevent the creation of a world government that holds all the powers of a state, which would be, in the words of Hannah Arendt, “the end of all political life as we know it”⁹⁸—the end of liberty itself. The founding of a global, state-like government 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 worldwide imperialism would present mankind with its greatest

⁹⁵ In this vein, see Honoré, *The Human Community and Majority Rule* at 232 (cited in note 31) (“If the so-called world society is no more than an association of states the case for majority rule is weakened.”).

⁹⁶ This argument was firmly defended by Hermann Heller. See Hermann Heller, *Die Souveränität: Ein Beitrag zur Theorie des Staats- und Völkerrechts* 20–23 (Walter de Gruyter 1927).

⁹⁷ According to the famous Schmittian view, which I do not share, the reason for this is the essentially antagonistic nature of politics, expressed in the dualism of “friend and enemy.” Carl Schmitt, *The Concept of the Political* 36 (Chicago expanded ed 2007) (George Schwab, trans).

⁹⁸ Hannah Arendt, *Karl Jaspers: Citizen of the World?*, in Hannah Arendt, ed, *Men in Dark Times* 81 (Harvest 1995). Later she insists on the same idea: “The 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.” Id at 82.

threat. 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 the legal-political structures that govern it should not be. Therefore, the human global community must be, by definition, universal, but not total.⁹⁹

D. A Community of Compulsory Membership

The most important consequence of universality is that the global human community is a non-voluntary community.¹⁰⁰ Consent is not a requirement for becoming a member and indeed is impossible: no human being could ever leave this community. Therefore, the global human community has the legal authority 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,¹⁰¹ then at least with respect to leaving the community. Compulsory membership must be balanced by a high degree of citizen participation in the decision-making process.

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 merely declaratory and political act, independent of the state's existence as a full subject of international law.¹⁰²

⁹⁹ 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 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.

¹⁰⁰ For the legal consequences of compulsory membership in communities, see Honoré, *Nécessité Oblige* at 120–21 (cited in note 58).

¹⁰¹ Most national legal orders provide that individuals become subjects of law by birth or even at conception, that is, without consent. See, for example, US Const, Amend XIV (“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.”).

¹⁰² See James Crawford, *The Creation of States in International Law* § 1.4 (Clarendon 2d ed 2006). For a history of the concept and a defense of the de facto theory of recognition, see Mikulas Fabry,

Although we regard the act of recognition itself as having no legal bearing on the international status of a sovereign state, a society of states could never be fully considered a non-voluntary membership community that is different from the global human community. 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.¹⁰³ Therefore, compulsory membership is a feature of the global human community that applies uniquely to individual human beings and never to nation-states.

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*¹⁰⁴ or *civitas*¹⁰⁵ as the only complete and self-sufficient community, even though their views were based on “a premature generalization from incomplete empirical data.”¹⁰⁶ Globalization does not require the establishment of a universal and complete community (*communitas perfectissima*). The end purpose of the global human community would be to serve human beings living within the existing complete communities, such as the *polis*, *civitas*, *res publica*, commonwealth, nation-states, and so on, to the extent that these communities 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 like those no longer exist in fact but as aspirations. 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.

Recognizing States: International Society and the Establishment of New States Since 1776 219–26 (Oxford 2010).

¹⁰³ See Section II.A.

¹⁰⁴ Aristotle, *Politics* at §§ 1.1.1–4 (cited in note 85).

¹⁰⁵ See Aquinas, 28 *Summa Theologiae* at 1a2ae Question 90.3 (cited in note 82); Aquinas, 38 *Summa Theologiae* at 2a2ae Question 65.2 (cited in note 82); Thomas Aquinas, *Commentary on Aristotle's Politics* § 1.1.23 (Hackett 2007) (Richard J. Regan, trans). For more on the concept of “*communitas perfecta*” in Thomas Aquinas, see John Finnis, *Aquinas: Moral, Political, and Legal Theory* 52, 114, 122, 219, 221 & n 10, 226, 307 (Oxford 1998).

¹⁰⁶ Finnis, *Natural Law* at 148 (cited in note 79).

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 complete political communities.

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.¹⁰⁷

F. A Complementary Community

The global human community is complementary in nature—the incomplete global human community complements complete national political communities. 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; 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 ineffective.

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 complementary 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

¹⁰⁷ See Domingo, *The New Global Law* at 145–47 (cited in note 23).

decisionmaking according to global law and the principles of solidarity and subsidiarity.

IV. 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 person rather than 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; consists of compulsory membership; and is incomplete and complementary. These key features of the new global human community ultimately determine both the structure of its legal system and its legal authority. I define 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. Additionally, 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.

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.