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The Crisis of International Law

Rafael Domingo*

ABSTRACT

This Article delves into the reasons for the current crisis in the traditional international law system, considering how the system developed through the centuries in order to respond to the needs and circumstances of past historical epochs, as well as how the system is no longer capable of meeting the unique developments and needs of life in the Third Millennium. The Article considers the fundamental problems of a state-based system of international law that—rather than focusing on the prime actor and focus of the law, the human person, and his inherent dignity—concentrates on and gives enormous power to the artificial construct of the nation-state, and its animating principles of sovereignty and over-dependence on territoriality. This inborn defect in the system (i.e., the emphasis on the nation-state) was imported wholesale into the United Nations system, ultimately rendering it incapable of meeting the basic security, social, and economic needs of a world that longs for a true global community of persons. The nation-state paradigm, as well as the United Nations system, requires essential and profound reform. New institutions with real global power must be established to meet the demands of our globalized world, especially as regards defending human rights from the incessant assault from both state and non-state actors.

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I. INTRODUCTION

International law is in its death throes, and with it an outdated order will become extinct, giving way to a new paradigm—globalization.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

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

We are no longer dealing with the perennial questions of whether international law is closer to morality than to legal science or whether it is more or less dependent on legal orders—both of which are eminently interesting theoretical questions in their own right. Rather, we are faced with a crisis that stems from the very structure of international law, one that is based on political concepts that have become obsolete: those of sovereignty, territoriality, and the nation-state. For centuries, during which wars and conflicts persisted, these principles served to delineate the framework of existing relations

among certain states that had decided to exercise their power by way of recourse to various counterbalances of alliances and hegemonies.

Nevertheless, however much we try to apply such principles today with the same attitude through a consolidated bureaucracy—the United Nations (UN)—we accomplish little to nothing when faced with the complexity of this new global order and the great interdependence of postmodern global relations. Thus have the conceptual grounds of modern international law changed; reality does not and will not wait for theory. And if common sense compels us to redefine the law in light of the new phenomena that give rise to globalization, this eagerness for reform will not always be shared by the defenders of an outdated legal system that, going against the tide of history, prefers to anchor itself in nineteenth-century concepts that have failed to bring peace to the world.

The creation of an effective and powerful United Nations was the highest aspirational goal of the international law system, which was built according to the criteria of the Peace of Westphalia. The realization of that goal occurred over sixty years ago, at the end of the Second World War. Following the establishment of the UN, the spread of the legal order was intimately linked to the process of gradual expansion of that body. However, over half a century later, we have reached a crossroads. Either we continue on the familiar road or we follow a new path into the future. Traditional notions that support international law— notions that, in their time, were modern—do not help us to effectively respond to the issues arising from the new order. For a long time now, state-centered solutions have been inadequate. World problems have changed, giving way to the development of new and transformative trends.

The law cannot remain irrelevant to the needs of our time. Twenty-first-century jurists must embark on a new route, as the founders of so-called “classical international law” did in their own day. Only in this way can we establish a global legal system that is capable of overcoming the defects and gaps of the current one, promoting peace and the development of nations, and creating, above all, a style of “doing law” that firmly rejects any idealized, particularist, or biased notion that might in any way legitimize inequality among nations. Further, no matter the circumstances, we must always face this new challenge solidly from within the bounds of democracy.

II. INTERNATIONAL LAW AND THE GLOBALIZATION OF LAW

Though it may seem like a paradox, it is not. While the concept of international law is in crisis, an apparently irreversible process of internationalization is gaining momentum, thanks to the myriad facets of globalization. The phenomenon of globalization has so

transformed conditions around the world that some are beginning to speak of a third wave of global knowledge.¹ It is a genuine technological revolution that has had, and will continue to have, repercussions affecting all aspects of civilization and thus on the legal and democratic system.²

Hans Kelsen warned, with good reason, of the “increasing inclination to internationalize the law,” with international law determining the content of the norms of various national legal orders or, more generally, gradually replacing them.³ However, it has been globalization that has unleashed this process of law’s internationalization and not vice versa. Therefore, the legal ordering of globalization cannot be accomplished by the imposition of international treaties from above, which, as Kelsen explains,⁴ can cover any issue, thus giving international law a potentially unlimited sphere of application.⁵

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

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

What is more, since it appears impossible to continue along the path we are on, which would involve severely restricting our

1. See, e.g., Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, CORNELL INT’L L.J. 455, 457–58 (2007) (discussing the concept of globalization and explaining the characteristics of the third wave).

2. David Held provides a telling analysis on this score in, *Democracy and Globalization*, in RE-IMAGINING POLITICAL COMMUNITY. STUDIES IN COSMOPOLITAN DEMOCRACY 11–27 (Daniele Archibugi et al. eds., 1998); see also DANIELE ARCHIBUGI, THE GLOBAL COMMONWEALTH OF CITIZENS. TOWARD COSMOPOLITAN DEMOCRACY 54–55 (2008) (discussing the effect of increasing globalization on democracy).

3. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 301 (Robert W. Tucker ed., Holt, Rinehart & Winston 2d ed. 1966) (1952) [hereinafter KELSEN, PRINCIPLES] (“We may characterize this phenomenon as the increasing inclination to internationalize the law, to determine the content of the norms of national law by international law, or to replace national by international law created by treaties.”).

4. *Id.* at 300–01 (“There are no matters which cannot be regulated by international law, but there are matters which can be regulated only by international law, and not by national law, that is, the law of one state, the validity of which is limited to a certain territory and its population.”).

5. *Id.* at 300 (“The material sphere of validity of the international legal order is—potentially, at least—unlimited.”).

international community, we should move from a definition of international law as *ius inter nationes*—much less inclusive than Vitoria's notion of *ius inter gentes*—to a broader definition that looks beyond that mere segment of the law regulating international relations or the international community itself.⁶ Until the person (replacing the current centrality of the state) is recognized as the primary subject of international law, this will remain an impossible task. When that day comes, international law will cease to be what it is and will instead become global law.

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

Globalization has transformed the international sphere into another dimension of each *pars scientiae iuris*. Thus, we now have the areas of commercial, economic, and criminal international law, for example, along with more novel branches such as international mediation and arbitration, international environmental law, and international constitutional law.⁷ These make up only a dimension of several larger bodies of law. Thus, international law has become the legacy of all jurists—a new, much broader category called globalization (*sub specie globalizationis*)—and not just the internationalists.

Of course, strictly international areas also continue to exist—for example, the law of international treaties or the law of international relations—though the practical and theoretical significance of their role is diminishing. Basically, since it has been shown to be incapable of meeting the great challenge for which it was created—the establishment of a perpetual peace in keeping with the Kantian ideal or the Wilsonian dream—international law loses global relevance and merely becomes a laboratory of modern ideas or progressive desires. Its branches, on the other hand, become global, for the global unites the transnational, the international, the supranational, and even the anational. The *lex mercatoria*, for example, is a paradigm of *lex*

6. See 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW 9 (Elihu Lauterpacht ed., 1970) ("In that sense, international law may be defined, more briefly (though perhaps less usefully), as the law of the international community.")

7. Along these lines, see Thomas Giegerich, *The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law,"* 10.1 GERMAN L.J. 31, 31–62 (2009).

privata, but it is not less valid or binding than public law despite the fact that no sovereign state may intervene to ensure compliance with it.⁸

Lately, as in other golden ages of law, sovereignty has not extended its tentacles over certain legal phenomena. If globalization weakens the conceptual model of internationalism and strengthens the universalization of a series of principles, we must work to ensure that the law that arises from it does not cement asymmetrical or unbalanced relations between peoples, thus becoming a tool in the hands of a few closed oligarchies that seek temporary gain at the expense of the democratic interests of broader communities.⁹ This is one—perhaps the most important—of the pressing challenges of the emergent global law.

III. THE BASIC PRIMACY OF STATES AS SUBJECTS OF INTERNATIONAL LAW

For all the prestigious internationalists' recent efforts to address nuances of the issue in standard legal texts,¹⁰ international law continues to be mainly a law between states—one in which the person occupies a secondary, even peripheral, place. In the second edition of his *Theory of Pure Law*, Hans Kelsen, then at the end of his life, correctly synthesized the *status quaestionis* of the internationalist doctrine that he himself had revolutionized: "According to the

8. BLACK'S LAW DICTIONARY 966, 995–996 (9th ed. 2009).

9. In an interesting tome entitled *The Global Democracy Deficit: an Essay in International Law and its Limits*, James Crawford and Susan Marks express their skepticism about the role that international law can play in the process of consolidating democracies or even of the possibility of establishing a cosmopolitan democracy. James Crawford & Susan Marks, *The Global Democracy Deficit: an Essay in International Law and its Limits*, in RE-IMAGINING POLITICAL COMMUNITY, *supra* note 2, at 85 ("On the other hand, in so far as it has such a commitment, international law operates—we have noted—with a set of ideas about democracy that offers little support for efforts either to deepen democracy within nation-states or to extend democracy to transnational and global decision-making.").

10. See ANTONIO CASSESE, INTERNATIONAL LAW 71–72 (2d ed. 2005) (stating that there has been an emergence of new subjects in international law, but that the new subjects have a limited legal capacity in international law); see also MALCOLM N. SHAW, INTERNATIONAL LAW 175–246 (5th ed. 2003) (discussing the subjects of international law and how individuals may play a secondary role to states). Cf. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 58, 65 (7th ed. 2008) ("This basic primacy of the State as a subject of international relations and law would be substantially affected, and eventually superseded, only if national entities, as political and legal systems, were absorbed in a world state."). For the diminished role of the individual in international law system, see also *id.* at 65 ("There is no general rule that the individual cannot be a 'subject of international law,' and in particular context he appears as a legal person on the international plan."). Once again, Philip C. Jessup appears ahead of his time, in his reflections on this theme in PHILIP C. JESSUP, A MODERN LAW OF NATIONS 15–42 (1948).

traditional definition, international law is a complex of norms regulating the mutual behavior of states, the specific subjects of international law."¹¹ This state-centric character of the *ius inter nationes* has so far remained untouched by efforts to downplay its importance. The state-worship that has characterized international law hinders its development, as well as proper analysis and critique of its institutions, for it places at the center of the system something that should actually be secondary to the role of the person.

The world's nearly two hundred states¹² are effectively the primary subjects of international relations because they possess plenary legal capacity. Individuals, according to the well-known and familiar traditional theory, are nothing more than "objects" of such capacity subject to their power, however much (as an aside) it used to be said that the interests of persons were the supreme end of the law, including international law.¹³ Theorizing on this point, George Scelle was emphatic about the idea that the international community is a community of states.¹⁴ This makes state exclusivity a paralyzing abstraction of international law: "C'est une vue fausse, une abstraction anthropomorphique, historiquement responsable du caractère fictif et de la paralysie de la science traditionnelle du droit des gens."¹⁵ Scelle was right to note the deeply insensitive character of such a conception of international law.

What is clear is that today we are witnessing the emergence of a new category comprised of international organizations, national liberation movements, non-governmental organizations (NGOs), and transnational (or multinational) corporations of limited international legal capacities.¹⁶ As a result of the state-centeredness that continues to shape the law between nations, these new actors are not even considered subjects of international law in the strict sense.¹⁷ This nominal totalitarianism also extends to the realm of privileges completely opposed to the principle of equality. In the world of international law, to be a state and to be an organization or a "mere" human being is not the same. Witness the existence of the UN

11. HANS KELSEN, *PURE THEORY OF LAW* 320 (Max Knight trans., 1967) [hereinafter *KELSEN, PURE THEORY*]. *But see* KELSEN, *PRINCIPLES*, *supra* note 3, at 203-42 (discussing how individuals are subjects of international law). Still, the exception confirms the rule (*exceptio confirmat regulam*).

12. A list of states and analogous entities can be found in JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 727-40 (2d ed. 2006).

13. JESSUP, *supra* note 10, at 8-9.

14. George Scelle, *Règles générales du droit de la paix* [*The General Rules of the Law of Peace*], 46 *ACADÉMIE DE DROIT INTERNATIONAL. RECUEIL DE COURS* 331, 343 (1933).

15. *Id.*

16. *See* BROWNLIE, *supra* note 10, at 65-67 (discussing different agencies involved in the "international scene").

17. *Id.*

Security Council, which legitimates the theoretical superiority of states under international law, handing over the governance of the world and the preservation of peace to an exclusive club of sovereign powers, while excluding from power an entire group of global actors whom it condemns to the de facto ostracism of simple consultants.

The internationalization of human rights has changed the course of international law in a way that makes persons more central, although still in an insufficient and skewed manner that permits the excessive ideological manipulation of those entities that are meant to come to the person's defense. The development of humanitarian law (*ius in bello*)—especially beginning with the Geneva Conventions, which approved the regulations applicable to military personnel and civilians but mainly to those wounded, sick, and captured in times of conflict¹⁸—shows this renewed interest in the person, not just the state. It has also deeply influenced the extension of international private law's sphere of activities into liability for harmful products, the transportation of toxic materials, environmental protection efforts, the electronic transfer of funds, arms trafficking, child custody issues, and international trade matters, etc.¹⁹ Clearly, these are all relevant issues that directly affect both individuals and international law itself.

International law continues to consider persons, at best, as a sort of subject-matter,²⁰ without taking account of the fact that the person is both the origin and center of legal life, not a secondary end or a benchmark to be grudgingly taken into consideration on its ascending trajectory. Nationality is the point of contact between the state and the individual. For international purposes, nationality definitively links a person to a specific state, so much so that it is only a citizen's state that determines the rules to be applied to the individual under international law and that will be recognized by the other member-states of the world community.

Like Kelsen,²¹ this Article takes the view that the traditional doctrine, whereby international law imposes duties and responsibilities and confers rights only upon states, not individuals, is untenable. "The subjects of international law, too, are individuals,"

18. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

19. See SHAW, *supra* note 10, at 43 (discussing the scope of international law); Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 127 (2009) (discussing how the development of humanitarian law has impacted child custody issues); Michael Chertoff, *The Responsibility to Contain Subtitle: Protecting Sovereignty Under International Law*, FOREIGN AFFAIRS, Jan.-Feb. 2009, at 130 (discussing how the development of humanitarian law has impacted international trade matters).

20. SHAW, *supra* note 10, at 232.

21. KELSEN, PRINCIPLES, *supra* note 3, at 180.

the constitutionalist maintains with characteristic firmness.²² Effectively, Kelsen suggests that the subjects of international law are states as legal persons, but for him this does not mean that individuals cannot also be legal persons for the same reasons and in a similar capacity.²³ They are subjects of the law, but not in precisely the same way as they are in a national legal system.

Nonetheless, yielding to his excessively sovereignty-dependent legal framework, Kelsen becomes bogged down in an intermediate step as he tries to grant the person the capacity as an international subject through the use of a legal fiction, the classification of "legal person," which is not a reality in positive law or by nature.²⁴ Thus, alleged rights and duties of states would in fact be rights and duties that individuals enjoy in their capacity as agents or members of a community represented as a legal person.²⁵ However, there should be no significant difference between being a part of a national community and being a member of an international collective. We must recognize the actual capacity of persons to be subjects of international law without recourse to any intermediate means.

The person does not need legal fictions or empty bureaucracies to find his "place under the sun." The conception of international law that Kelsen relies on has been superseded by new global circumstances. When legal reasoning becomes disconnected from reality and creates fictions to define concrete situations, the result is a restricted one-dimensional law that is unsuitable for analysis because its creator has limited its tools. Herein lies the problem with Kelsenian positivism.

IV. THE DEATH THROES OF THE STATE

Adorned with the many trappings that restrained its attempts to achieve omnipresence—its nature as liberal, federal, social, rule-of-law-based, democratic, etc.—the sovereign, territorial, and coercive legal-political unit of the state is suffering an irremediable and prolonged agony. We are witnessing a slow death, for the decline of the world's preeminent institutions has been gradual. The death throes of the state are changing the distribution of world power, yielding to new political actors, all clamoring for a bigger role on the world stage. These new protagonists weaken the nineteenth century

22. *Id.*; KELSEN, *PURE THEORY*, *supra* note 11, at 325.

23. KELSEN, *PRINCIPLES*, *supra* note 3, at 180.

24. *Id.* at 181.

25. *Id.*

Leviathan and give rise to a variety of para-state means of effectively ordering the complex relations forged in the crucible of civil society.²⁶

The brainchild of Machiavelli and Bodin, the state was born with the purposes of transcending the religious wars that devastated Europe and centralizing the royal power that threatened to fragment under the pressures of the interminable privileges of feudalism.²⁷ Through the consolidation of sovereign monarchical absolutism, the state was imposed as the most prevalent governmental structure in the world, eventually linking its fate with that of the democratic model of government. However, the configuration of a new, more participatory and direct democracy carries with it the imperative to remake the state. That is, the twenty-first century model of democracy is no longer the same as that which Tocqueville brilliantly analyzed in the first half of the nineteenth century,²⁸ and the national state of the new millennium is not a modern entity capable of effectively responding to the challenges of globalization. Circumstances have fundamentally changed; the world is not the same. Without falling into legal "Gatopardism," if democracy is to remain faithful to its essence, it must evolve.²⁹ Of course, so should the state if it is to manage the process of social changes relevant to, and necessary for, postmodern civilization.

Thus the state, which shaped the *ordo orbis* until the rise of globalization and the events of September 11, 2001, has signed its own death certificate by blending with modernity. The clear world-paradigm shift requires new forms of political organization that transcend and complement public state bureaucracy. The crisis of the state is without doubt a crisis of modernity, the demise of an outdated model that cannot solve contemporary problems. In a postmodern world where new values and principles set the intellectual discourse and guide political praxis, the state finds itself at a peculiar juncture that demands tools and methods of implementation that national law lacks.

26. Sandra Braman defends the idea of a "change of State," the process by which a welfare state, characterized by a bureaucratic structure, gives way to an informational state in which control of information (both creation and use) becomes a more effective means of exercising power. But information—in all its forms—has always been a fundamental element of the state's operations, so we could speak of the permanent existence of an "informational state." SANDRA BRAMAN, CHANGE OF STATE. INFORMATION, POLICY, AND POWER 1–38 (2006).

27. Encyclopedia Britannica Online, <http://www.britannica.com/EBchecked/topic/563762/state/284350/Machiavelli-and-Bodin> (last visited Nov. 3, 2009) (entry for "State").

28. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 187–220 (Harvey C. Mansfield & Delba Winthrop eds., trans., Univ. of Chicago Press 2000) (1859).

29. STEPHEN D. MORRIS, POLITICAL CORRUPTION IN MEXICO: THE IMPACT OF DEMOCRATIZATION 2 (2009), available at <http://www.rienner.com/uploads/4a0b19b1192c4.pdf> (defining Gatopardism).

The reality of international politics far surpasses the lumbering consensus-based *modus operandi* created by the UN system. That internationalist utopia, in which the most powerful nations participate, was soon shattered by the reality of power.³⁰ Globalization has upset state hegemony, allowing for the development of a civil society that expands and enriches the base of the political *demos*. The imperialism of the state refuses to surrender its influence over supranational entities, and displays a stubborn reluctance to implement new forms of participation. This was, for example, the basic reason for the failure of the European constitution and of international tribunals, rejected time and again by hegemonic states, which have reduced the rest of the international community to a state of impotence.³¹ Bewildered defenders of state-worship refuse to accept the need to promote new institutional mechanisms to respond to the realities of this historical moment.³² For now, all hopes for cooperation and consensus are dashed by the state's efforts to maintain its influence, *aut concilio aut ense*.

The state has proven too small for global issues, yet too large for local ones. The most important decisions of our day—such as global security, elimination of poverty, defense of the environment, education of the masses, and the reduction and non-proliferation of nuclear arms—should be dealt with by structures that transcend the material and conceptual borders of the state because states are ultimately incapable of providing practical solutions. Moreover, with ever increasing force, civil society is demanding a more direct form of democracy, one that is concerned with taking real action in response to a host of smaller issues: *de minimis non curat res publica*.

The tension between that which is global and that which is local puts the modern state in an awkward position by requiring concessions of sovereignty through international treaties (as in the case of the European Union Constitution) or the yielding of decision-making powers to bodies capable of acting with greater efficiency.³³ Endorsements of sovereignty have often been rhetorical ploys rather than pragmatic proposals. Treaties have ceased to be a sure means of dealing with global issues, and international legality is often

30. See, e.g., SHAW, *supra* note 10, at 193 (noting that major states have a greater influence over the creation of international law than smaller states).

31. Adrian Toshev & Gregory Cheikhamegyaz, *The European Union and the Final Status for Kosovo*, 80 CHI.-KENT L. REV. 273, 302 (2005) (discussing the unwillingness of Poland and Spain to adopt the European Constitution due to its expected affect on state power).

32. Chertoff, *supra* note 19, at 130.

33. See, e.g., Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT'L L. 421, 421–22 (2008) (discussing the concessions power states have made to the World Trade Organization).

damaged by the political zeal of a handful of nations that hold most of the power.³⁴

Moreover, the legal equality of states required by international law is only *de jure*, not *de facto*. Does a country the size of Andorra have as much power in the international arena as one as large as Brazil? Whether in terms of population, opportunities for development, or international relations, one cannot make the comparison work, even by means of a legal fiction.³⁵ Equality between the *entia moralia* is not comparable to the equality between persons, for the latter is based on their profound and essential dignity. The highly touted equality among states is effectively conditioned on a given society's economic capacity, material power, importance on the world stage, and soft power. Hence the so-called independence of many states is more myth than reality. This does not imply, of course, that countries that, for whatever reason, assume regional or global leadership have *carte blanche* to do (and undo) as they please. Law is the art of balance and not the triumph of anomie.

The crisis of the state is caused by excessive bureaucratization (typical of state development), a general movement beyond the idea of borders, territorial compartmentalization, and the appearance of new players on the global stage—players that have more flexible and dynamic structures and heterogeneous interests.³⁶ Bureaucratization has made a dent in the framework of the UN, slowing its ability to respond to the many crises that have plagued humanity throughout the twentieth and twenty-first centuries. As heir to the state—that is, to its institutions—the UN has become a thick-skinned institution incapable of reducing the risk of conflict, a sort of secondary actor in the global events that shape the politics of the Third Millennium.

Bureaucracy undermines global governability because it has failed to become an adequate instrument for effectively negotiating

34. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940–41 (2002) (detailing the reasons why human rights treaties are often ineffective).

35. The analogy of States and persons is a constant feature of international law. In this vein, see CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 69 (2d ed. 1979).

The conception of international relations as a state of nature could be viewed as an application of this analogy. Another application is the idea that states, like persons, have a right to be respected as autonomous entities. This idea, which dates from the writings of Wolff, Pufendorf, and Vattel, is a main element of the morality of states and is appealed to in a variety of controversies concerning international politics.

Id.

36. See, e.g., Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 146 (2005) (acknowledging the bureaucratization of international law that has taken place in recent years).

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

On the other hand, international bodies and tribunals that shrink back in the face of the laxity and inertia of nation-states cannot count on the support of established powers and are forced to issue often toothless pronouncements of condemnation, refusal, or solidarity, as the case may be.³⁷ The decisive fact is that, despite legalist efforts, governance of the world is expanding outside the established bounds of international law and doing so against its theoretical assumptions. In reality, it is in active politics that we find evidence of the increasing gap between the theory brandished by international law and the policies that states actually apply in the face of concrete facts and situations. There is often an unbridgeable chasm between the two. This double standard, enshrined in international relations, has not been eliminated by the bureaucracy of the United Nations. It is not a matter of effectiveness but rather of power. On the international plane, power has ended up bending or contorting the law. And we know well that when the law is debilitated and manipulated by the powers that be, the *potestas*, it becomes a simulacrum, a mere semblance of justice, and an agent of the most mundane interests imaginable.

On the other hand, border policy and traditional territorialism have been subjected to intense debate over the last several years.³⁸ Territorial nationalism clearly continues to exist, as conflicts such as the recent armed fight between Georgia and Russia confirm the ongoing vitality of national sentiments and the virulent animosity of expansive chauvinism, which can be understood only through the lens of sovereignty.³⁹ It is ultimately this variable that we must isolate in order to eliminate warmongering or the asymmetry in positions

37. See, e.g., George S. Yacoubian Jr, *The Efficacy of International Criminal Justice*, WORLD AFF., Mar. 22, 1999, at 186 (highlighting the ineffectiveness of the International Criminal Tribunal for Rwanda in prosecuting charges of genocide).

38. See, e.g., Edmund Sanders, *Panel Draws Line in Sudan; Ruling Issued in Contentious North-South Border Dispute*, CHI. TRIB., July 23, 2009, at 20 (referencing the border dispute between Northern and Southern Sudan); *Decades-Old Russian Border Feud Settled*, CHI. TRIB., Oct. 15, 2004, at 8 (referencing the border dispute between Russia and China).

39. See Noelle M. Shanahan Cutts, Note, *Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict*, 40 CASE W. RES. J. INT'L L. 281, 298–99 (2008) (discussing the effect of sovereignty on the dispute between Russia and Georgia).

governing international relations. Only nationalism explains such disparate phenomena as Indianism and anti-Americanism.

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

Clearly, the debacle of the state is intimately linked to the crisis of sovereignty, to that of territoriality—at least on the theoretical plane—and to the reform of the concept of the nation (in its most political sense). This Part shall address each of these issues.

A. *Sovereignty and the Sovereign People*

Sovereignty is the pillar of the state. Unless we take into consideration its successes and cruelties (e.g., cases of genocide), the evolution of the state would be incomprehensible.⁴⁰ This is not a reference to the so-called “international sovereignty” that justifies and underpins the mutual recognition of states or independent territories, nor to that domestic sovereignty that regulates internal state action. Nor does this allude to independent sovereignty, which allows the government of a country to control the flow of information and the operations that are carried out beyond its borders.⁴¹ These meanings of sovereignty are new and flattering versions of that “organized hypocrisy,” as Stephen Krasner⁴² described, which revitalized and extolled modern international law beginning with the Treaty of Westphalia. It substantially altered the subjects of international law and allowed the law of peoples to become, in time, a law between states.⁴³ Sovereignty in this way became an instrument of reform, modernity, and development. Today, however, it has

40. See ALAN CRANSTON, *THE SOVEREIGNTY REVOLUTION* 9 (Kim Cranston ed., 2004) (discussing sovereignty and its political effects).

41. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 70–71 (1999); see also STEPHEN D. KRASNER, *PROBLEMATIC SOVEREIGNTY. CONTESTED RULES AND POLITICAL POSSIBILITIES* 6 (Stephen D. Krasner ed., 2001).

42. *Id.* (discussing how the term sovereignty is used in at least four different ways).

43. See JESSUP, *supra* note 10, at 8 (discussing how international law is considered to be a law between states).

become a hindrance that must be roused out of its lethargy or risk disappearing altogether.⁴⁴

The concept of sovereignty—which replaced the Roman concept of *majestas*, a quality attributed to the Roman people—definitively closed the doors to a harmoniously ordered international regime, instead artificially standardizing a system of states having plenary powers in their respective territories, enclosed by borders. Thus, sovereignty is to the state what the will is to the person: its master and its slave.

Sovereignty is thus a property inherent to any state, which gives it supreme power in its territory, control of its legal system, and the right to recognize external bodies or entities that establish contact with it. Its usefulness is seriously in doubt in this era of globalization, in which communications, commerce, and daily life have been globalized, creating a dense web of human interaction and an interdependence of relations incompatible with its theoretical assumptions. The indispensable pluralism of a global society clashes with the nation state's pretense of exclusivity. Numerous declarations of the universality of human rights and various historical milestones such as the birth of the European Union or the establishment of international tribunals call into question the reach and the future of the concept of sovereignty, despite certain efforts to re-conceptualize it.⁴⁵ Rather, an open society requires new mechanisms for articulating and meeting the needs of civil societies, needs that cannot always be met via the bureaucratic structures of sovereign power, which are ultimately based on obsolete doctrine.⁴⁶

Sovereignty appeared for the first time in Jean Bodin's *Les six livres de la République*.⁴⁷ This French thinker understood it as the absolute and permanent power that a republic exercises in a determinate context: "la puissance absolue *et* perpetuelle d'une

44. See BEITZ, *supra* note 35, at 69 ("While the idea of state autonomy is widely held to be a fundamental constitutive element of international relations, I shall argue that it brings a spurious order to complex and conflicting moral considerations.").

45. See Khadine L. Ritter, Note, *The Russian Death Penalty: Square Pegs and Round Holes*, 32 CASE W. RES. J. INT'L L. 129, 132 (2000) (describing the history and role of the European Union and the European Council); Daniel Rothenberg, Commentary, "What We Have Seen Has Been Terrible" *Public Presentational Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 485 (2003) (acknowledging the Universal Declaration of Human Rights as the foundational document of international human rights discourse and practice).

46. See KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: I SPELL OF PLATO* 124 (5th ed. 1966) ("[T]he theory of sovereignty is in a weak position, both empirically and logically. The least that can be demanded is that it must not be adopted without careful consideration of other possibilities.").

47. The Medieval antecedents, beginning with the formula *rex superiorem non recognoscens in regno suo est imperator*, can be found in FRANCESCO CALASSO, *I GLOSSATORI E LA TEORIA DELLA SOVRANITÀ: STUDIO DI DIRITTO COMUNE PUBBLICO* 22 (3d ed. 1957) (Italy). The theory, though, needs revision.

République.”⁴⁸ In the Latin version of Bodin’s work, the definition appears clarified and loosely translated, inspired in part by Ulpian’s phrase, *princeps legibus solutus*.⁴⁹ Bodin therein states that “maiestas est summa in cives ac subditos legibusque soluta potestas.”⁵⁰ It was thus an exclusive and excluding power that lay in the hands of the prince, who was able to impose laws on his subjects without their consent and without himself being bound by them. This conception of sovereignty implied an absolute indivisibility of power. The sovereign, by definition, ceased to exist as soon as another like him existed in his territory. Such power left no room for solidarity, as was the case among the Roman consuls; it was an all-encompassing, radically absolutist entitlement.

Hardly a century had passed when Thomas Hobbes also defended the sovereign nature of the monarch⁵¹ and the indivisibility of power⁵² in *Leviathan*. The essential indivisibility of sovereignty was considered by Jean Jacques Rousseau in *Du contrat social*, but he did so from a very different perspective.⁵³ Effectively, the transfer of the title of sovereignty from the monarch to the “volonté générale” also required the former to be indivisible, for otherwise it would cease to be the general will of the people, becoming instead the wish of only a portion of the population.⁵⁴ Moreover, the British Parliament had been charged with limiting the king’s power, as reflected in the expression, “King in Parliament,” which synthesizes the English constitution’s principle of parliamentary sovereignty.⁵⁵

Reflection on the concept of sovereignty has been a constant in the thought of all state theorists: from Kant to Hegel, Locke,

48. JEAN BODIN, 1 LES SIX LIVRES DE LA RÉPUBLIQUE [THE SIX BOOKS OF THE REPUBLIC] 179 (Librairie Arthème Fayard 1986) (Fr.). Bodin uses the Latin term *majestas* as a synonym of sovereignty. Thus, for example, in chapter ten of the first book, which addresses “Des vrayes marques de souveraineté,” *id.* at 245–341, he speaks of “la première marque de la souveraineté,” *Id.* at 306, but of “la seconde marque de majesté.” *Id.* at 310.

49. Ulpian *Digests of Justinian* 1.3.31, apropos of his commentary on the expired legislation of Augustus.

50. JEAN BODIN, *supra* note 48, at 79.

51. See THOMAS HOBBS, *LEVIATHAN PARTS I AND II* 130–38 (A.P. Martinich ed., Broadview Press 2005) (1651) (discussing the power of the sovereign).

52. *Id.* at 139. At the beginning of chapter nineteen of his masterpiece, Hobbes noted that this indivisibility is predicated upon the three forms of government: monarchy, democracy, and aristocracy. *Id.* “Other kind of commonwealth there can be none: for either one, or more, or all, must have the sovereign power (which I have shown to be indivisible) entire.” *Id.*

53. Jean Jacques Rousseau, *Du contrat social*, in *OEUVRES COMPLÈTES* II 515–85 (Éditions Gallimard, Paris, 1964).

54. *Id.* at 369–71 (“la souveraineté est indivisible”).

55. Compare in this regard, ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 37 (MacMillan 8th ed. 1915) and all of Chapter 2 addressing *The Nature of the Parliamentary Sovereignty*.

Bentham and Austin, Montesquieu and Tocqueville.⁵⁶ It has also occupied the political action of statesmen such as the founding fathers of the United States of America.⁵⁷ Clearly, the various uses of sovereignty have had immeasurable political consequences. Developed in English thought,⁵⁸ it played a central role in the formation and consolidation of the United States under the banner of federalism, at the time of the Constitution of 1787 (which ultimately, however, did not incorporate the principle).⁵⁹

With characteristic ardor, James Madison defended the need to admit the divisibility of sovereignty with a view to the future of the Union.⁶⁰ Thus, “[t]he act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act,”⁶¹ and speaking of “a

56. See TOCQUEVILLE, *supra* note 28, at 53–55 (describing the principle of sovereignty); see also ALAN NORRIE, *LAW AND THE BEAUTIFUL SOUL* 21–23 (2005).

This is the moving intellectual force of modern classical natural law, from Hobbes to Locke, to Kant, to Hegel: to establish an adequate methodology for the comprehension and rationalization of law in terms that extend beyond its phenomenal appearance and practical self-understanding.

NORRIE, *supra*, at 21–23 (2005)

57. A history of this concept in Germany and France between the thirteenth century and the fall of the Holy Roman Empire can be found in HELMUT QUARITSCH, *SOVERÄNITÄT: ENTSTEHUNG UND ENTWICKLUNG DES BEGRIFFS IN FRANKREICH UND DEUTSCHLAND VOM 13 JAHRHUNDERT BIS 1806* (1986) (F.R.G.). Interesting, too, is the view of CHARLES EDWARD MERRIAM, JR., *HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU* (1900). For a study of sovereignty in the common law realm, see EDMUND S. MORGAN, *INVENTING THE PEOPLE* (1988). For the relationship of sovereignty and natural law, see *NATURAL LAW AND CIVIL SOVEREIGNTY: MORAL RIGHT AND STATE AUTHORITY IN EARLY MODERN POLITICAL THOUGHT* (Ian Hunter & David Saunders eds., 2002).

58. Thus we can dispose of the commentary of Joseph Story, which finds support in the work of William Blackstone and, to a lesser extent, Henry Wheaton. See JOSEPH STORY, *I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES* §§ 362–63, at 261–64, §§ 940–48, at 693–99 (Little & Brown, 2d ed. 2004) (1851).

59. The word “sovereignty” appears in the Declaration of Independence, the Articles of Confederation of March 1781 (article one states “each state retains sovereignty, freedom and independence”), and the Northwest Ordinance of 13 July 1787 (“Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth”)—all of these foundational texts in American constitutionalism, but not in the federal Constitution. An interesting commentary on this theme can be found in JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 45–47 (2005), where the author defends certain ideas completely opposed to those advanced in this Article.

60. See *THE FEDERALIST* No. 39 (James Madison), available at http://avalon.law.yale.edu/18th_century/fed39.asp (discussing that each state will be considered a sovereign body).

61. *Id.*

sovereignty over sovereigns” was, in his view, destructive.⁶² However, his was not the only opinion.⁶³

Still, the genius of the American Revolution lies in its having overcome the sovereignty conflict by appealing to the people. In the case of *Martin v. Hunter's Lessee*, the Supreme Court, through Justice Joseph Story, focused the force of the Revolution on the issue of sovereignty and appealed to the citizenry: “The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’”⁶⁴ It was, as we shall see, a notion closer to the Roman idea of *majestas*, for it recognizes the direct intervention of the nation without creating a legal fiction from which powers could then be appropriated.⁶⁵

Beginning with the gradual demise of the Ottoman Empire (starting with the recognition of Greece as a state in 1832),⁶⁶ and in the course of Latin American independence,⁶⁷ sovereignty came to occupy a central place in the birth of new states. In the European context, without sovereignty we cannot understand the violent Teutonic political history of the nineteenth century: the fall of the Holy Roman Empire (1806), the German Confederation (1815), the Revolution of 1848, and finally the unification of Germany (1871) after the Proclamation of the German Empire.

Essentially, the birth of the new German federal state required jurists to modernize the concept of sovereignty, substantially changing Bodin's view. Prominent men including Georg Jellinek, Hugo Preuss, Georg Meyer, Paul Laband, and Otto Gierke focused their attention on that view, analyzing it from the fresh perspective

62. THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton), available at http://avalon.law.yale.edu/18th_century/fed20.asp.

63. Compare JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, reprinted in I THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 63–67 (Jonathan Elliot ed., J. B. Lippincott 2d ed. 1941) (1776) (providing the opinion of Justice Joseph Story) and JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (1851), reprinted in XXVIII THE PAPERS OF JOHN C. CALHOUN, 1, 1–67 (Univ. of South Carolina Press 2003), to which Daniel Webster, among others, was opposed.

64. 14 U.S. 304, 324 (1816).

65. See JEAN BETHKE ELSHTAIN, SOVEREIGNTY: GOD, STATE, AND SELF 54 (2008) (describing the Roman idea of *majestas*).

66. Treaty of Constantinople, July 31, 1832, available at http://www.mfa.gr/NR/rdonlyres/2201071A-B2D4-4360-A8A3-6C4C324DA136/0/1832_constantinople_treaty.doc (ending the Greek War for Independence and granting Greece status as an independent state).

67. See PAUL W. DRAKE, BETWEEN TYRANNY AND ANARCHY; A HISTORY OF DEMOCRACY IN LATIN AMERICA, 1800–2006, at 52–87 (2009) (describing the Latin America struggle for independence).

born of new political imperatives.⁶⁸ It has even been maintained that Bodin's concept of the sovereign state could not apply generally to all peoples, as if it were built on the foundations of political science. Hugo Preuss⁶⁹ rightly explains that the meaning of a technical expression (*eine technische Ausdruck*) in a specific science must first be shaped by the science itself and cannot depend exclusively on philosophical considerations or carry with it negative consequences, for then one would have to eliminate the technical aspects.⁷⁰ Bodin's concept of sovereignty refers to an absolute state and has little to do with the modern constitutional state of law (*Rechtsstaat*), which was embodied by the German state (or which it tried to represent).⁷¹ Clearly, sovereignty's legal makeover facilitated its survival in the new order of things in the same way that other institutions have evolved through the centuries by appealing to modernity and evidencing a willingness to yield and adapt to the historical moment. However, the reform was such that sovereignty would end up becoming a concept bound closer to political utilitarianism than to jurisprudential reflection.

On the other hand, in Georg Jellinek's view, sovereignty is "the quality of a state in virtue of which it alone can be linked legally with its own will."⁷² Precisely for this reason, acts in which the state exercises its will are acts of self-obligation (*Selbstverpflichtung*).⁷³ At stake here is an exclusive power of self-determination, which can also determine or set its own limits. For Jellinek, this is not a power that lacks limits (*Schrankenlosigkeit*), but rather one that includes the possibility of limiting itself (*die Möglichkeit der Selbstbeschränkung*).⁷⁴

Among notable twentieth century attempts to make sovereignty a technical legal concept⁷⁵ is Hans Kelsen's⁷⁶ effort, which was

68. GEORG JELLINEK, *DIE LEHRE VON DEN STAATENVERBINDUNGEN* (1882); PAUL LABAND, *DAS STAATSRECHT DES DEUTSCHEN REICHES* (5th ed. 1911); HUGO PREUSS, *GEMEINDE, STAAT, REICH ALS GEBIETSKÖRPERSCHAFTEN: VERSUCH EINER DEUTSCHEN STAATSKONSTRUKTION AUF GRUNDLAGE DER GENOSSENSCHAFTSTHEORIE* (Scientia Verlag, Aalen 1964) (1889); OTTO FRIEDRICH VON GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* (Graz, Akademische Druck-u. Verlagsanstalt 1954).

69. PREUSS, *supra* note 68, at 106; *see also id.* at 135 (noting that in recent literature even writers who formally hold on to the term "sovereignty" are abandoning it substantively). For a larger overview of Preuss' analysis of the concept of sovereignty, see *id.* at 100-36.

70. *Id.* at 135.

71. *Id.* at 136.

72. JELLINEK, *supra* note 68, at 34 ("Souveränität ist demnach die Eigenschaft eines Staates, kraftwelcher er nur durch eigenen Willen rechtlich gebunden werden kann").

73. *Id.*

74. *Id.* at 36.

75. Interesting in this regard is the work of HYMEN EZRA COHEN, *RECENT THEORIES OF SOVEREIGNTY* (The University of Chicago Press, 1937) on the important conceptual discussion in Europe at the turn of the 20th century.

harshly criticized by Hermann Heller⁷⁷ and discredited by Carl Schmitt.⁷⁸ The father of constitutional courts believed that sovereignty is one of the focal points (*Brennpunkte*)⁷⁹ of the Theory of Law and the State, which would have to be stripped of its political ties and given legal content and characteristics: more specifically, “[s]overeignty as a [q]uality of a [n]ormative [o]rder.”⁸⁰ Clearly, though, stripping sovereignty of its political dress is well nigh impossible.

Rather, the history of peoples since sovereignty became salient in the modern world has been marked by the instrumentalization of sovereignty for power. The most illustrious—or perhaps infamous—demagogues of the modern era have appealed to sovereignty to bolster their position in the state or to give free rein to their megalomaniacal dreams.⁸¹ It has been used as the basis to justify the most disparate events, from the independence of all imperial colonies⁸² to the most aberrant and bloody genocidal massacres.⁸³ The old battle between cosmopolitans and champions of sovereignty seems unaffected by the passage of years or the enormous international changes that September 11 wrought.

For Kelsen, without sovereignty there are no states, and without states there is no law, as the state is nothing but the legal order.⁸⁴

76. See HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* 124 (Bonnie Litschewski Paulson & Stanley J. Paulson trans., Clarendon Press 1992) (1934) (describing sovereignty under the Pure Theory of Law).

77. HERMANN HELLER, *DIE SOUVERÄNITÄT: EIN BEITRAG ZUR THEORIE DES STAATS UND VÖLKERRECHTS* [SOVEREIGNTY: A CONTRIBUTION TO THE THEORY OF THE STATE AND INTERNATIONAL LAW] 20–23 (1927) (F.R.G.).

78. For Schmitt, a sovereign is he “who decides upon the exception.” Therefore, sovereignty cannot correspond to an abstract entity like the state. See CARL SCHMITT, *POLITISCHE THEOLOGIE II: DIE LEGENDE VON DER ERLEDIGUNG JEDER POLITISCHEN THEOLOGIE* [POLITICAL THEOLOGY III: THE LEGEND OF THE COMPLETION OF EACH POLITICAL THEOLOGY] (4th ed., 1996). For a complementary work, see CARL SCHMITT, *DIE DIKTATUR: VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF* [THE DICTATORSHIP: ON THE BEGINNINGS OF MODERN SOVEREIGNTY THOUGHT UP TO THE PROLETARIAN CLASS WARFARE] 148 n.2 (Duncker & Humblot, Munich, Leipzig, 2nd ed. 1928) (1921) (mentioning Kelsen).

79. HANS KELSEN, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* (J. C. B. Mohr, Tübingen, 1920) (“Die Souveränität des Staates ist einer der Brennpunkte der juristischen Konstruktion.”).

80. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 383 (Anders Wedberg trans., Harvard Univ. Press 1945).

81. ROUSSEAU AND LIBERTY 89 (Robert Workler ed., 1995) (discussing how modern demagogues use the concept of sovereignty to promote legitimate tyrannies).

82. See THE FEDERALIST NO. 39, *supra* note 60 (discussing sovereignty as a basis for creating the U.S. Constitution).

83. CRANSTON, *supra* note 40, at 9.

84. KELSEN, *supra* note 80, at 255

The State is thought of as an aggregate of individuals, a people, living within a certain limited part of the earth's surface and subject to a certain powerSovereignty is said to be the defining characteristic of this power. . . .

Hence the sovereignty of the state (*Souveränität des Staates*) is identified with the positivity of law (*Positivität des Rechts*).⁸⁵ This makes sovereignty supreme, independent, and capable of limiting itself by means of the legal order.⁸⁶ The result is a sovereignty-based determinism that distorts the legal framework, hijacking it by tying the existence of the law to the survival of sovereignty.

Clearly, though, the law existed prior to the political rise of sovereignty (i.e., law is prior to and superior to it), and although it is influenced by sovereignty, it should not fall completely within its sphere of action. If that happens, if sovereignty ends up seizing the jurisdiction of the law, then justice will be politicized, and a whole series of actors and institutions that undermine judicial independence and limit the autonomous development of the judiciary will effectively be incorporated into the organic legal framework. This is a real and often-resisted danger that emerges more often than is acknowledged by theorists who proclaim that the various powers of the state are truly independent.⁸⁷ In effect, concrete areas are encroached upon by sovereignty, in the name of people's interests, weakening the ability to govern and undermining the *auctoritas* of certain institutions.

Though the concept of sovereignty has been redefined—from a more political perspective in American thought and a more legal angle in European thought—it has clearly fulfilled its function as a theoretical supposition. It is now difficult, if not impossible, to make it compatible with new forms of organization in harmony with globalization, even if we recast it, yet again, using more modern formulations. In the end, sovereignty and universality are irreconcilable concepts, as are universality and totality. Globalization is universal. This is not true of the national-international pairing, which has governed modernity and is fighting to survive, and thus inadvertently reforming sovereignty in the process. Universality reclaims the idea of the person as its centerpiece, and then immediately turns to the notion of people, once more, *publicum ex privato*.⁸⁸

The 'power' of the State must be the validity and efficacy of the national legal order

Id.

85. *Id.* at 393 ("Positive law. . . displays the inherent tendency from a coercive order into a specific coercive 'organization.' This coercive order, especially when it becomes an organization, is identical with the State. Thus, it can be said that the State is the perfect form of positive law.").

86. KELSEN, *PRINCIPLES*, *supra* note 3, at 247–50, 331, 446–48, 581–85.

87. See, e.g., Judith A. Best, *Fundamental Rights and the Structure of the Government*, reprinted in *THE FRAMERS; FUNDAMENTAL RIGHTS* 37, 47 (Robert A. Licht ed., 1992) (describing how separation of powers creates an internal control).

88. MARTIN SHAW, *THEORY OF THE GLOBAL STATE* 231 (2000) ("Ideas of worldwide commonality, involving a universalism which refers primarily to people rather than states, are becoming increasingly powerful.").

If we continue to risk strengthening the state over all other political entities that do not share its structure, then sovereignty, stretched to its limits, may well transform the inter-state system and the organization of nations into a world super-state of which the titleholder is humanity as a whole (*domina mundi*). Thus, the old aspiration of medieval emperors, dominion over the world, would be fulfilled. This pursuit of absolute power, criticized by Vitoria, is based on a failure to acknowledge a superior entity (*superiorem non recognoscere*).⁸⁹ Martin Shaw, for example, defends precisely this path of evolution in his book, *Theory of the Global State*.⁹⁰

For Shaw, the formation of a “global state” is an inevitable fact,⁹¹ and its culmination will shape the triumph of a global democratic revolution that must necessarily be led by the West. It began in the middle of the last century with the crisis of the national empires and continued at the end of the twentieth century with the fall of the power blocs that divided the planet between them. This leads us to a dangerous, complex, and tangled accumulation of *potestas* in the hands of a cryptocracy that envisions perfectly consolidated command. However, the world crisis that we are now experiencing requires well-integrated global institutions that can respond to civil society’s demands for a greater role and efficacy. A global state will not necessarily meet the needs of a global demos. To the contrary, a polyarchy may well raise the specter of a Big Brother mega-state and other forms of worldwide tyranny. Could democracy survive in such a state? It would be difficult—especially if the super-state is based on a model of sovereignty in which, though factions may exist, the ability to express dissent is seriously curtailed or eliminated.

Undoubtedly, the world must be globally ordered. Now, taking into account the perspective of sovereignty, the creation of a global state is a *contradiction in terminis*. Sovereignty entails plurality, by nature territorial and exclusive, and it acknowledges the existence of other sovereign communities susceptible of being excluded from its territorial area of application.⁹² The same may be said of the state. There cannot be a single global state, for territorial borders necessarily demarcate one state from another. Thus, a state without borders—a state, that is, without territory—would cease to be a state, at least conceptually. A planetary state would set aside exclusion, making legal inclusion essential: one state, one law, one power and, of course, the threat of universal totalitarianism. We would go from

89. CHARLES COVELL, *THE LAW OF NATIONS IN POLITICAL THOUGHT: A CRITICAL SURVEY FROM VITORIA TO HEGEL* (2009).

90. See SHAW, *supra* note 88, at 173 (exploring the meaning of state “in the context of global transformation”).

91. *Id.* at 265.

92. *Id.* at 185 (“A state is a state when it is recognized by its citizens and/or by other states as a sovereign, i.e. supreme, authority within a given territory.”).

state totalitarianism to global absolutism, without the possibility of turning back.

In this respect the state is akin to the term “sibling”: for one to exist, there must be another. Hence the existence of a state entity leads us inexorably to a law between sovereign states, and these, in turn, lead to international law. The idea of sovereignty is fully crystallized in international law, which is simply its most evident consequence. History shows us that national sovereignty is incompatible with international anarchy. Herman Heller refers precisely to this aspect.⁹³ There is international law, he declares, “to the extent that there are at least two universal and effective units of territorial decision.”⁹⁴ That is, when two states begin a dialogue.

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

Let us not forget that former President George W. Bush occasionally defended the invasion of Iraq by citing his wish to return sovereignty to the Iraqi people, who had been oppressed by Saddam Hussein’s tyranny: “[W]e restored sovereignty to the Iraqi people.”⁹⁵ Is it possible to support armed action by invoking the restoration of sovereignty as a panacea for a country’s evils? It has been done time and again, and it is a practice that will continue. As a result, when the instrument becomes an end in itself, the world becomes a less secure place and laws legitimizing such actions are little more than a legal farce.

93. See HELLER, *supra* note 77, at 121 (arguing that national sovereignty is necessary for international law because a single dominating power will lose gradually lose its command and a “soulless despotism will eradicate all good” before drifting into anarchy).

94. *Id.* at 118 (“Völkerrecht gibt es nur, solange es wenigstens zwei universale und wirksame Gebietsentscheidungseinheiten gibt.”).

95. George Bush, U.S. President, President Addresses Nation, Discusses Iraq, War on Terror (June 28, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/06/20050628-7.html>

B. *The Crisis of Territoriality*

There is no international law without states, sovereignty, and territory. This is one of the essential dogmas of international law.⁹⁶ In effect, a territory is the geographic stage on which a state exercises its powers and a precisely defined population seeks to develop itself fully. Thus, the principle of territoriality has had a special, and to a certain extent, undeserved place in political science and in international praxis ever since the Treaty of Westphalia.⁹⁷ With the goal of protecting states' territorial integrity, international law has developed a set of rules meant to restrain any sort of aggression that might impair sovereign territory.⁹⁸

All of this was evident leading up to the final decades of the twentieth century. In May 2000, when a young Filipino hacker from Manila managed to spread the "I love you" virus in cyberspace, causing serious problems for governments and companies around the world and provoking a global emergency, territoriality suffered a catastrophic blow.⁹⁹ The Philippines, at that time, lacked legislation regarding the use of computers.¹⁰⁰ More recently, the deficiencies of the principle of territoriality were apparent in the case of the Guantánamo Bay Naval Base, when the United States government cited the base's territorial status in order to avoid having to fulfill

96. See LASSA OPPENHEIM, *I INTERNATIONAL LAW: PEACE* 563 (Hersch Lauterpacht ed., 8th ed. 1955) (discussing how the power that assumes sovereignty over a territory is responsible for any events of international significance); SHAW, *supra* note 10, at 409 ("Without a territory a legal person cannot be a state.").

97. Treaty of Westphalia, Fr.-Holy Roman Empire, Oct. 24, 1648, available at http://avalon.law.yale.edu/17th_century/westphal.asp.

98. See U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id. para. 7. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 121, U.N. Doc. A/RES/2625 (Oct. 24, 1970); G.A. Res. 3314 (XXIX), art. 1, U.N. Doc. A/RES/3314 (Dec 14, 1974) ("[T]he use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.").

99. Wayne Arnold, *Technology; Phillipines to Drop Charges on E-mail Virus*, N.Y. TIMES, Aug. 22, 2000, at C6, available at <http://www.nytimes.com/2000/08/22/business/technology-philippines-to-drop-charges-on-e-mail-virus.html>.

100. *Id.*

international regulations in force regarding human rights.¹⁰¹ In this way, sovereignty has become a sort of *carte blanche*, justifying many an outrage in specific areas.

The principle of territoriality is above all an organizing principle and, therefore, secondary in nature.¹⁰² Its mission is comparable to that of an automobile's emergency handbrake. It provides security and solves concrete problems. Yet it can impede progress, and its abuse actually paralyzes. This auxiliary sense of the principle of territoriality can be partially understood by the practice of solving crises by, say, separating two employees who have had a falling out (principle of territoriality)—which does not necessarily mean that they will reconcile. Although this is a quick and easy solution, it is not the most adequate one from the point of view of pacific interpersonal relationships. Rather, the better outcome would be for the company's personnel office to try and bring together the workers (according to the principle of personhood) by attempting to foster a fruitful dialogue between them, forcefully mediating, and, if appropriate, temporarily separating the parties. Thus, the principle of territoriality is a complement to the principle of personhood—not an ideal replacement for it, as the modern state assumes in practice. Clearly, personhood should not be displaced from its central position in the realm of the law by the principle of territoriality or any other principle, for that matter.

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

101. A history of the issue can be found in JANA K. LIPMAN, *GUANTÁNAMO. A WORKING-CLASS HISTORY BETWEEN EMPIRE AND REVOLUTION* (2009).

102. See KELSEN, *PRINCIPLES*, *supra* note 3, at 307 ("For the territory of a state is legally nothing but the territorial sphere of validity of the national legal order called a state.").

violations.¹⁰³ On the other hand, we remain wrapped in a nescient ignorance of the pressing reality that confronts us daily, that of immigration.¹⁰⁴

Effectively, immigration is intimately linked to an exacerbation of the principle of territoriality. Birth and nationality impose life-long boundaries on a person, and territoriality seals this condition. An overextended territorialism, protected by an exclusive sovereign law, could end up choking the healthy aspirations of hundreds of thousands of citizens—each possessing inherent dignity and certain inalienable rights—who find immigration the only real solution to their problems. Physical walls reinforcing borders, legally protected by concrete laws, can end up steering masses of people towards illegal conduct. A territorialism that actively excludes provokes a chain reaction of actions falling outside the law. Only when it is too late is legal engineering employed to try and remedy the harmful effects of a legal system that privileges territory over actual persons. An overflow of people on a global scale is already a reality.¹⁰⁵ Entire masses of people are displaced and illegally cross borders in the hope of finding a better life. Territorialism runs the risk of becoming a dead letter at this point or, worse, a nebulous theory disconnected from reality.

The principle of territoriality is an elementary principle, like a person's sense of touch. Even though it is easily surpassed in importance by sight and hearing, it remains useful and sometimes indispensable. Territoriality is to the law what occupation is to property—its first link. However, it is not the only, nor the most important, link in the chain. The problem with the state is that its survival is conditioned on territory. Thus, international law, being a law between states, was staked first on the totalitarian hegemony of the principle of territoriality, thus weakening the principle of the

103. See, e.g., Richard M. Ebeling, *In Pursuit of Sustainable Development: Political Planning Versus the Free Market*, FREEDOM DAILY, Jan. 2003, available at <http://www.fff.org/freedom/fd0301b.asp> (explaining how a free marketplace would help the developing world).

104. The Author does not at all share the groundless fears of Samuel P. Huntington, as outlined in his book *WHO WE ARE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004), especially rejecting the reductionist policy expressed in the following passage: "There is no *Americano* dream. There is only the American dream created by the Anglo-Protestant society. Mexican-Americans will share in that dream and in that society only if they dream in English." *Id.* at 256 (emphasis added). Immigration will transform societies, reshaping the dreams and aspirations of the receptive community. To oppose a tangible fact is not scientific.

105. See UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, *TRENDS IN INTERNATIONAL MIGRANT STOCK: THE 2008 REVISION* (2009), http://www.un.org/esa/population/migration/UN_MigStock_2008.pdf ("In 2010, the total number of international migrants in the world is expected to reach 214 million. From 2005 to 2010, the global number of international migrants is projected to increase by 10 per cent.").

person. What has obviously never been established is the minimum territory necessary to constitute a state (there are tiny ones like Malta, San Marino, Liechtenstein, Vatican City, etc.) or the necessary contiguity of such. The requirement of territory, on the other hand, has been settled: "Sovereignty comes in all shapes and sizes," according to Crawford's conclusive phrase.¹⁰⁶

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

Thus, if we want to perpetuate its mission, the principle of territoriality must be loosened in the civil law, as well as in the common law—perhaps more so in the latter since common law, especially the law of the United States, forcefully deploys the principle of territoriality for a variety of historical reasons.¹⁰⁷ In the realm of jurisdiction, territoriality must be made a principle of suitability or opportunity, not the decisive criterion of justice, much less a demand of state sovereignty or an impulse that leads ultimately to secession.¹⁰⁸

This Article suggests that the key is to separate territoriality and sovereignty—to "de-sovereignize" the territory, as the principle of territoriality preceded that of sovereignty and managed to survive for centuries without it.¹⁰⁹ For example, the emperor Diocletian used it on a wide scale at the end of the third century, when he decided to divide the Roman Empire into twelve dioceses, a method that the

106. CRAWFORD, *supra* note 12, at 47.

107. Posting of Mary L. Dudziak to Legal History Blog, Raustialia on the Evolution of Territoriality in American Law, <http://legalhistoryblog.blogspot.com/2009/09/raustiala-on-evolution-of.html> (Sept. 21, 2009, 17:04 EST).

108. In this vein, ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION. MORAL FOUNDATIONS FOR INTERNATIONAL LAW 378 (2004), resists the electoral argument of a postmodern secessionism: "It is a mistake to think that the commitment to democracy requires recognition of a plebiscitary unilateral right to secede, because the chief *justifications* for democratic governance within given political boundaries do *not* support the thesis that boundaries may be redrawn by majority vote." *Id.*

109. See Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/sovereignty/> (last visited Nov. 4, 2009) (entry for "Sovereignty") (describing the history of sovereignty).

Catholic Church would later adopt.¹¹⁰ The major problem with the principle of territoriality is that, as it is linked to state sovereignty, it is inseparably bound to the theory that a state has dominion over a territory.

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

As yet, international law avoids a fundamental principle that has emerged in our time, thanks to immigration and to new spaces—that the earth belongs to everyone. It belongs to humanity. It is not an object that can be used for spurious reasons or immediate gratification. Nor is it something co-owned by all the states, but rather by all men and women, without the mediation of artificial entities or unscrupulous bodies. In this vein, the dissemination and establishment of the term “common heritage of mankind”—first used by the United Nations General Assembly in 1970 in its Declaration of Principles Governing the Sea-Bed and Ocean Floor—has been of great interest for the science of international law.¹¹¹

In a certain sense, the earth represents the common patrimony of humanity by antonomasia. It is the only patrimony that we have. However, sometimes that which belongs to everyone ends up in reality belonging to the strongest. Thus, because of the Sword of Damocles hanging over our heads, which is capable of perverting the noble ideal of solidarity, the law should struggle to establish an equitable system in which the prerogatives of the inhabitants of a specific territory are respected. Certainly, invoking the notion of humanity's common patrimony has clear legal consequences. That which belongs to everyone can be administered by everyone or by a delegation representative of the group. Such administration can be carried out in many ways, and territorialism should not necessarily intervene in all cases. The transcending of borders—which are

110. For more on this topic, see Rafael Domingo, *Los principios de territorialidad y personalidad en el concepto de diócesis*, in ACTAS DEL IX SIMPOSIO INTERNACIONAL DE TEOLOGÍA 273-78 (Servicio de Publicaciones de la Universidad de Navarra 1989).

111. G.A. Res. 2749 (XXV), U.N. Doc. A/RES/2749 (Dec. 17, 1970). Afterwards, it was repeated in G.A. Res. 34/68, art. 11, U.N. Doc. A/RES/34/68 (Dec. 5, 1979), which governs states' activities on the moon, and in United Nations Convention on the Law of the Sea, art. 136, 139, 1833 U.N.T.S. 397 (Dec. 10, 1982) available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm, which declares the Zone, that is, the sea-bed and ocean floor, including their subsoils, as beyond the limits of national jurisdiction, *id.* art. 1.1, and their resources as the common patrimony of humanity.

ultimately legal-political creations—is one of the challenges of a modern territorialism that allows for the existence of global spaces in which it is possible to interact without being subject to the ties of sovereignty.

C. *Jurisdiction: Does it Belong to the State?*

By appropriating territory, sovereignty takes over jurisdiction, which is simply the power of applying the law coercively within a determinate setting. In the modern age, it is intimately bound to the idea of state sovereignty. Jurisdiction, as it was conceived in enlightened laboratories of ideas, is a function of state character, owing to the importance of the legal order for the state.¹¹² While the two are often confused, this legal power of coercion, without which the law becomes mere science, has not always been united to that of sovereignty. Jurisdiction preexisted sovereignty. It dates back to the Roman legal temper and, therefore, is distinct from the state.

The word jurisdiction comes from the Latin *ius dicere*, which expresses the coercive declaration of the law by he who holds power, mainly the magistrate, to order or command.¹¹³ Adjudication, from the term *ius dicare*, is different. It refers to the legal declaration by the individual vested with authority to adjudicate a matter, principally by judges themselves.¹¹⁴ *Dicere* and *dicare*,¹¹⁵ from the same Greek root, *deik* (show, indicate), are, thus, the two main activities that allow the development of law (*ius*). *Dicare* makes reference to reasoned legal declarations (in the same vein, consider *indicare*, *iudicare*; *adiudicare*, *abdicare*),¹¹⁶ whilst *dicere*, on the other hand, to coercive acts or commands (therefore giving us *ius dicere*, *addicere*, *edicere*, *interdicere*).¹¹⁷

The difference between *ius dicere* and *ius dicare* is at the very heart of Roman classical civil procedure, and, to a great extent, it facilitated the prodigious legal developments following the first

112. See Federal Court Concepts, Jurisdiction of the Federal Courts, <http://www.catea.gatech.edu/grade/legal/juris.html> (last visited Nov. 3, 2009) (providing a description of jurisdiction).

113. ADOLF BERGER, 43 ENCYCLOPEDIA DICTIONARY OF ROMAN LAW 527 (American Philosophical Society 1991) (1953).

114. *Id.*

115. Cf. VARRO, ON THE LATIN LANGUAGE I, VI.61 (Roland G. Kent trans., Harvard University Press 1999) (“Hinc Ennius: ‘Dico qui hunc dicare’. Hinc iudicare, quod tunc ius dicatur.”). For more on this distinction, see Álvaro d’Ors, *Las declaraciones jurídicas en Derecho romano*, 34 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 565-73 (1964), and Rafael Domingo, *Jurisdicción y Judicación*, 9 LA LEY 1-3 (19 98) (Spain), and Rafael Domingo, *¿Poder judicial?* 516 NUESTRO TIEMPO (Pamplona, Spain) 1997 at 106-16.

116. MyEtymology, Etymology of the Latin Word ‘Dicare,’ <http://www.myetymology.com/latin/dicare.html> (last visited Nov. 3, 2009).

117. BERGER, *supra* note 113, at 434.

century B.C.¹¹⁸ Because of its focus on the importance of case law, this distinction is reflected more in the common law (jurisdiction and adjudication) than in the civil law. Particularly beginning with the French Revolution, the latter preferred to make written laws (*leges*) the main source of law (*ius*), relegating the judge to the secondary position of "the law's dead mouth," as the classical saying goes.

The application of jurisdictional criteria to the realm of international law suffers from all the drawbacks of sovereignty. Since jurisdiction is a sovereign concept, states must respect it as an integral part of their own constitution through the principle of non-intervention in the internal or domestic affairs of other states. However, the dynamics of international relations forced the state to meddle in the sovereignty of other states to carry out its own acts (executive jurisdiction), resolve cases with a foreign element (judicial jurisdiction), or apply laws affected by a foreign element (legislative jurisdiction).¹¹⁹ Thus, international jurisdiction departed from its roots in sovereignty whenever the latter crossed its own boundaries. For this reason, private international law established rules applicable in cases of conflict of laws between states.

The growth of transnational commercial relations and the existence of problems common to all humanity, such as international crime, terrorism, the regulation of cyberspace, and the protection of the environment, require an immediate review of the concept of jurisdiction, which in light of this new landscape must be separated from sovereignty. Sufficient advances have been made in this area with the signing of all manner of international treaties that, among other things, establish suitable jurisdiction, as in the International Court of Justice at the Hague; grant jurisdiction to supranational organizations, as in the case of the European Union; or, more recently, provide for complementary jurisdiction to that of national jurisdictions, as with the International Criminal Court.¹²⁰

118. The classical formulary procedure consists of two phases: one *in iure*, before the *praetor*, who could perform acts proper to his jurisdiction—that is, make coercive declarations to make the process develop according to *ius*—and a phase of adjudication or *apud iudicem*, in which the judge, a Roman citizen, pronounced his judgment (*sententia*) on the case, namely either the plaintiff would be dismissed or the defendant condemned (*ius dicare*). Cf. MAX KASER & KARL HACKL, *DAS RÖMISCHE ZIVILPROZESSRECHT, ZWEITER ABSCHNITT* (2nd. ed. 1996) (offering an overview of the Roman formulary system).

119. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (describing the types of jurisdiction for which a state is limited under international law: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce).

120. See U.N. Charter arts. 92–96 (establishing the International Court of Justice); Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) (establishing the jurisdiction of the European Court of Justice); Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (established the International Criminal Court).

Restoration of the autonomy of jurisdiction is fundamental to carve out global spaces that are independent of sovereignty.

The legal tools used for global conflicts resolution that have managed to introduce a new way of doing law apart from jurisdictional organs of the state (international arbitration and mediation) deserve a chapter of their own. This is significant and, yet, not so, for the underlying principle remains the same: jurisdiction continues being essentially state-based to the extent that greater decision-making capacity is not ceded or assigned to international bodies. Why is this? It is clearly a case of political obstacles leading to and having legal consequences. Does yielding jurisdiction imply a weakening of state sovereignty? Not necessarily. As we have seen, jurisdiction exists prior to sovereignty and can recover its identity separately from it.

Relativizing sovereignty in favor of increased powers in the hands of international bodies—or new global institutions—is the only viable way to maintain peace and justice.¹²¹ The failure of the United Nations is a concrete example of this point. Sovereignty has effectively obstructed the General Assembly's various attempts at efficaciously channeling peace efforts.¹²² Unfortunately, there is a sort of *entente cordiale* between the great powers that hinders consensus at the heart of the Assembly. The Security Council is the embodiment of hegemonic powers' sovereignty. This is the dialectic confrontation between sovereignty and consensus, between power and authority, or more frequently, between war and peace. The inertia now characteristic of the UN is closely linked to the excessive power and deference that we have given to sovereign decision making. The sphere of actions in which the United Nations is able to intervene is limited, with decisions always subject to the risk of rejection at the slightest hint of a potential "violation" of state sovereignty. On the other hand, the areas in which hegemonic states directly intervene in their spheres of influence have grown.

The cases of the United States and Iraq, or Russia and Georgia, are concrete examples of interventionism among the great powers. The economic union of several multi-state blocs around the world has relativized certain aspects of sovereignty, but it has not relegated it to a secondary role, much less destroyed it. Quite to the contrary, in a sort of sovereigntist reaction compounded by nationalism, it has retained various spheres of influence essential for the shaping of international relations. For example, national armies are

121. See BEITZ, *supra* note 35, at 69 ("While the idea of state autonomy is widely held to be a fundamental constitutive element of international relations, I shall argue that it brings a spurious order to complex and conflicting moral considerations.").

122. See S.C. Res. 1706, para. 1, U.N. Doc. S/RES/1706 (Aug. 31, 2006) (UN Security Council invited consent of the Sudanese government in order to deploy peacekeeping troops).

maintained, legislative capacity is practically untouched, policy continues to be formed in territorial terms, and the bureaucracies created by new global institutions are more decorative than effective. Everywhere, advisory bodies abound, and although many courts with sophisticated ambitions have been created, global powers are slow to provide them very much support. Sovereignty counteracts and tries to limit or obstruct the work of these courts instead defending national forums of justice. The United Nations has proven incapable of remedying the situation and, over time, increasingly exhibits a worrying passivity in relation thereto. The revitalization of the UN or the creation of new global institutions would necessarily involve a redefining of the limits of sovereignty and the scope of a jurisdiction free from the heavy baggage of the state.

Traditionally, and with some reluctance, universal jurisdiction was applied to cases of piracy.¹²³ At the end of the Second World War, the Allies relied on universal jurisdiction to judge war crimes and crimes against humanity in the Nuremberg and Tokyo trials.¹²⁴ It was also invoked in the Geneva Conventions of 1949, which impose the principle of extradition or judgment (*aut dedere aut iudicare*), as well as other more recent legal instruments.¹²⁵ Currently, the idea of universal justice has been revitalized thanks to the case of Chilean dictator, General Augusto Pinochet, who was detained in London in 1998 by order of Spanish judge, Baltasar Garzón.¹²⁶ Garzón sought support for the application of universal jurisdiction so that political repression carried out years earlier by the government of Pinochet's military junta would not go unpunished. However, the recent case of Somali pirates has shown how much a lack of coordination on this issue can endanger citizens who are not protected in a timely manner by the joint forces of the United Nations.

Universal justice makes it possible for a state to try certain crimes—usually crimes against humanity—without any of the traditional jurisdictional bases such as the fact that they were

123. See M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39, 47–49 (Stephen Macedo ed., 2004) (outlining the history of universal jurisdiction as applied to piracy).

124. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 664 (May 7, 1997) (“The concept that an individual actor can be held personally responsible and punished for violations of international humanitarian law was first enunciated by the Nürnberg and Tokyo trials after the Second World War.”).

125. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 2, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984) (providing that each state party take effective measures to prevent torture); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III)(A), art. 5, U.N. Doc. A/810 (Dec. 9, 1948) (establishing universal jurisdiction to create penalties for those guilty of genocide);

126. Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L.Q. 1583, 1593 (2000).

committed in its national territory or by national citizens.¹²⁷ In these cases, the international community is arguably affected by such crimes, and this allows any court in the world *ratione materiae* to try them. It is in a certain sense an indirect application of the theory of chaos: the flapping of a butterfly's wings may well eventually give rise to a hurricane. Similarly, a legal act carried out in one place has clear repercussions throughout the global order of human rights. This in and of itself changes the lens through which we analyze jurisdiction.

Jurisdiction is the patrimony of the political community, sovereign or not. Thus there are as many different levels of jurisdiction as there are distinct overlapping political communities. Crimes against humanity are universal in nature, and they should be resolved in a universal way. This is not a matter of yielding sovereignty. Rather, it is about organization, namely the management of the global society, which functions poorly if it is artificially compartmentalized.¹²⁸ Sovereignty produces this compartmentalization, which, instead of integrating, seeks rather to sever and hinder the living synthesis of cultures and civilizations.

The Spanish Constitutional Court (Second Chamber) defended universal jurisdiction in its groundbreaking decision of 26 September (STC 237/2005), in relation to indigenous peoples' leader Rigoberta Menchú Tum's appeal in the Guatemala Generals case.¹²⁹ The Spanish Constitutional Court ruled that Spanish Courts have jurisdiction over crimes of international importance—crimes prosecutable in any jurisdiction as prescribed by international treaties, including the Geneva Conventions—regardless of the

127. HUMAN RIGHTS WATCH, 18 UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART 1 (2006), available at <http://hrw.org/reports/2006/ij0606/ij0606web.pdf> (citing LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003)).

128. Cf. ÁNGEL SÁNCHEZ LEGIDO, JURISDICCION UNIVERSAL PENAL Y DERECHO INTERNACIONAL (Tirant lo Blanch, Valencia, 2004); UNIVERSAL JURISDICTION. NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, *supra* note 123 (including a proposal of fourteen principles of universal criminal jurisdiction based on the nature of the crime, drawn up in the framework of the *Princeton Project on Universal Jurisdiction*, led by Stephen Macedo); PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 26 (Stephen Macedo ed., 2001), available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (discussing the purpose of the Principles of Universal Jurisdiction set out in this report); INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES (Wolfgang Kaleck et al. eds., 2007) (a collection of articles that discuss extraterritorial jurisdiction and the future of universal jurisdiction).

129. S.T.C., Sept. 26, 2005 (S.T.C., No. 237) (Spain), available at <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2372005.aspx>; see also The Center for Justice & Accountability, Guatemala: Efraín Ríos Montt, Donaldo Álvarez Ruiz and Others, <http://www.cja.org/cases/guatemala.shtml> (last visited Nov. 3, 2009) (this site describes the history of the Guatemala Genocide case that was filed by Rigoberta Menchú Tum).

nationality of the victims and perpetrators.¹³⁰ For the exercise of universal jurisdiction by Spanish courts, no direct link is required between Spain and the alleged international crime, its authors, or its victims.¹³¹ It thus confirmed the principle that universal jurisdiction comes above national interests. However, this is only the first step toward a global jurisdiction based on permanent courts with jurisdiction *ratione materiae* and coercively binding resolutions issued by executive bodies set up for that purpose.

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

Ever since international law became a law between states, state and nation have been linked in international relations, forming an *unum indivisibile*: the nation-state. But this was not always the case. The nation preceded the state and can even exist alongside the state (consider the phenomenon of secessionism). Thanks to the French Revolution, both realities set out on their joint political and historical adventure, a sort of politico-legal venture whose decline is gaining notice by the most eminent political observers. Having traced the outlines of the modern state, we must still sketch out the conceptual development of the nation, which was duped into marrying the state for the political, economic, and ethnic gains associated with the latter.

Nascio or *Natio* (from *nascor*, to be born) was the name of the Roman goddess who protected births. Cicero refers to her in his *Natura deorum* in 45 B.C.: “quia partus matronarum tueatur, a nascentibus Natio nominata est.”¹³² A year later, in his tenth philippic against Marc Antony, the Roman statesman again uses the term to indicate that all nations can endure slavery, except Rome.¹³³ Titus Livius¹³⁴ also uses the word “nation” in his famous *Ab Urbe condita* to refer to *nationes Histrorum et Illyiorum*, as does Aulus Gellius a century later, in his *Attic Nights*,¹³⁵ along with many other classical authors. Bestriding the ancient world and the Middle Ages, Isidore of Seville in his *Etymologies* regards nations as groups of

130. S.T.C., Sept. 26, 2005 (S.T.C., No. 237) at §2, para 7; (Spain), available at <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2372005.aspx>.

131. *Id.* para 9. Unfortunately, as this Article was going to press the Spanish legislature was engaged in a process of restrictive reform of universal jurisdiction.

132. CICERO, THE NATURE OF THE GODS 124 (P.G. Walsh trans., Oxford Univ. Press 1997) (45 B.C.).

133. CICERO, SECOND PHILIPPIC ORATION 153–155 (W.K. Lacey trans., ed., Aris & Phillips 1986) (44 B.C.).

134. TITUS LIVIUS, THE HISTORY OF ROME (Henry Bettenson trans., Penguin 1976) (15).

135. AULUS GELIUS, 2 THE ATTIC NIGHTS OF AULUS GELLIUS 16 (E. Capps et al. eds., John C. Rolfe trans., William Heinemann 1927) (165 A.D.) (“Sed non Rodienses modo id noluere, sed multos populos atque multas nationes idem noluisse arbitror . . .”).

people having the same ancestral origins.¹³⁶ At the end of the first millennium of Christian history, it still had the same meaning; for example, Lambert of Cremona,¹³⁷ the sharp bishop and historian of the tenth century to whom we owe much information about that relatively unknown period, used the word on eight occasions. Incipient medieval universities, especially those of Paris, were organized by nations even before the creation of departments or faculties. Thus, it should come as no surprise that César-Egasse Du Boulay would subtitle his *Historia Universitatis Parisiensis* with the heading: *Nationes, Facultates, Magistratus, Decreta*.¹³⁸ Following this academic tradition, the Council of Constance (1414–1418) also organized its assembly by nations.¹³⁹

During the modern age, the fathers of the state continued to use the term nation in the generic sense. Jean Bodin did so in *Les six livre de la République* (1576), although in a very limited manner.¹⁴⁰ Thomas Hobbes used it more frequently in his *Leviathan* (1651), tackling the question of the Jewish nation,¹⁴¹ and John Locke used

136. ISIDORE OF SEVILLE, *THE ETYMOLOGIAES OF ISIDORE OF SEVILLE* 192 (Stephen A. Barney et al. eds., W. J. Lewis trans., Cambridge Univ. Press 2006) (1472) (“[a] definitione certorum prognatorum, ut nationes . . .”).

137. In his *antapodosis*, he refers, for example, to “ceterae vero, quae sunt sub eodem climate nationes, Armeni scilicet, Perses, Chaldei, Avasgi,” LIUDPRAND OF CREMONA, *Retribution*, in *THE COMPLETE WORKS OF LIUDPRAND OF CREMONA* 41, 47 (Paolo Squatriti trans., Tomas F.X. Noble et al., eds., The Catholic Univ. of America Press 2007) (962 A.D.), and later in book VI “ad graecas nationes,” *id.* at 196. In his famous *Relatio*, he deals with the Italians, Saxons, Franks, Bavarians, and Sueves: “indignos vos omnesque Italos, Saxones, Francos, Bagoarios, Suevos, immo cunctas nationes.” LIUDPRAND OF CREMONA, *The Embassy of Liudprand the Cremonese Bishop to the Constantinopolitan Emperor Nicephoros Phocas on Behalf of the August Ottos & Adelheid*, in *THE COMPLETE WORKS OF LIUDPRAND OF CREMONA*, *supra*, at 138, 271–72.

138. CÉSAR ÉGASSE DU BOULAY, *I HISTORIA UNIVERSITATIS PARIENSIS* (Minerva 1966) (1665). Nations were a very natural and primitive way of organizing persons, one that paid no attention to sciences (*omnes artes indiscriminatum*), which little by little gave way to division by departments, based on areas of knowledge: “a longe facilius est homines dividere per nationes, quam per facultates.” *Id.* at 250–51. In the famous bull *Parens Scientiarum* of Gregorio IX, the admission of unworthy teachers is prohibited but without reference to persons or origins: “nec admittet indignos, personarum et nationum acceptatione summota.” Statutes of Gregory IX for the University of Paris 1231, in 2 *STATUTES OF GREGORY IX* 7–11 (Dana C. Munro trans., Univ. of Pennsylvania Press 1897), available at <http://www.fordham.edu/halsall/source/UParis-stats1231.html>.

139. At first, there were four nations (Italic, Gallic, Germanic and Anglo), but later the Hispanic nation was added. In the council minutes, one can follow the *congregationes nationum*. 27 JOANNES DOMINICUS MANSI, *SACRORUM CONCILIORUM NOVA ET AMPLISSIMA COLLECTIO* (Akademische Druck und Verlagsanstalt 1961). Thus, for example: “Die Jovis 19. mensis Decembris [1415] praedicti, fuerunt congregati Deputati omnium Nationum in loco Nationis Germanicae. . .” *Id.* at 809.

140. BODIN, *supra* note 48.

141. HOBBS, *supra* note 51, at 271–75.

the term in his *Second Treatise of Government* (1690).¹⁴² Still, the idea of nation underwent a profound metamorphosis during the French Revolution, with its aims of dethroning the royal absolutism of *l'État c'est moi* and democratizing society. By then, the nation became the *ipso iure* holder of constituent power, that is, the heart of the state's structure.

In the pamphlet published by Emmanuel Joseph Sieyès in January 1789 on *Qu'est-ce que le Tiers État?*, the priest was asked about the scope of the concept of nation: "Qu'est-ce qu'une nation? Un corps d'associés vivant sous une loi commune et représentés par la même legislature."¹⁴³ Months later, his reflections were recalled in Article 3 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789, which proclaimed national sovereignty as follows: "The nation is essentially the source of all sovereignty."¹⁴⁴ George Washington spoke of national existence in his letter of 17 September 1787, in which he sent the Constitution of the United States to the President of the Congress.¹⁴⁵ The constitutional text, however, never calls the United States a nation, but a people.¹⁴⁶ The nation becomes a political entity in the heat of revolution and becomes the legitimating concept of the new legal order.

The new doctrine quickly spread throughout Europe. In his eighth *Rede an die deutsche Nation*, given in the winter of 1807-1808 during the Napoleonic occupation of Berlin, Fichte transfers the revolutionary principles of freedom and justice that Bonaparte was desecrating throughout that period all along the Danube to the German nation. He thus overturned the concept of nation, which has since been more cultural (without ever losing entirely its political tint).¹⁴⁷

142. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 101 (Barnes & Noble Books 2004) (1690).

143. Cf. Emmanuel Joseph Sieyès, *Qu'est-ce que le Tiers État?* Chapter I, Paragraph 5, available at http://fr.wikisource.org/wiki/Qu%E2%80%99est-ce_que_le_tiers_%C3%A9tat_%3F.

144. 1789 DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 3.

145. Letter from George Washington, U.S. President, Federal Convention, to Arthur St. Clair, President, Congress (Sept. 7, 1787), available at http://avalon.law.yale.edu/18th_century/translet.asp#2.

146. See the well-known preamble: "We, the People of the United States." U.S. CONST. pmb. The word "nation" is used on two occasions, once to make reference to trade with other nations ("foreign nations") and another time to refer to the "law of nations." U.S. CONST. art. 1, § 8.

147. Fichte asked himself in his eighth speech what a people is, concluding that this question led inevitably to another question, about what an individual's love for his nation entails. Johann Gottlieb Fichte, What a People is in the Higher Sense of the Word and What is Love of Fatherland (Speech No. 8, 1808), in *ADDRESSES TO THE GERMAN NATION* 100 (Gregory Moore ed., Cambridge Univ. Press 2008) (1806) ("[W]as ist ein Volk? welche letztere Frage gleich ist einer andern und zugleich mitbeantwortet diese andere, oft aufgeworfene und auf sehr verschiedene Weisen beantwortete Frage,

Twentieth century constitutionalism—a child of the French Enlightenment and German idealism—made the nation a distinct, territorially indivisible, and legally solitary entity. It was sustained by the principle of nationality—incorporating a person into the national scheme, something the state had not sought to achieve—and the principle of self-determination of peoples, which equated the nation with the state and thereby transformed it into the *ratio constituendi* of new sovereign territorial entities. Thus, each nation was the embryo of a state. In this way, the merger of nation and state was made a concrete reality and legitimized by the new legal order. The words of Ernest Renan in 1882 at the Sorbonne clearly express the thinking of the age: “[T]he existence of a nation is—forgive the metaphor—a daily plebiscite, just as the existence of an individual is a permanent affirmation of life.”¹⁴⁸ Renan voluntarism clearly had a legal correlate. From then on, sovereignty—based on the nation—would become the philosopher’s stone of the legal framework. On it rested legislative praxis, the work of the executive branch, and judicial primacy.

This point has given rise to significant tensions between the need to maintain the status quo, as determined by state sovereignty, and the natural freedom of all peoples to govern themselves and occupy a defined portion of the earth on which their societies may develop without facing serious obstacles. Thus, international law incrementally strengthened the principle of self-determination of peoples. It conceived self-determination as a right of nations—possessing, at least potentially, sovereignty—to present themselves as states, that is, to be plenary subjects of international law.¹⁴⁹ The concern was clearly to give centrality to the sovereign people in the decisions that affected them: that which affects the people should be approved by the people. The nation thus became the center of international law because it alone was the entity charged with bringing the state to life.

By shifting the political paradigm and enthroning the state as the subject by *antonomasia*, international law unintentionally favored colonies’ desire for independence and the statist longings of various communities. Sovereignty is only satisfied when it is able to feast upon the banquet of the state. So many communities around

diese: was ist Vaterlandsliebe, oder, wie man sich richtiger ausdrücken würde, was ist Liebe des Einzelnen zu seiner Nation?”).

148. Ernest Renan, *What is a Nation?*, Lecture at the Sorbonne University (Mar. 11, 1882), *reprinted in* BECOMING NATIONAL: A READER 41–55 (Geoff Eley & Ronald Grigor Suny eds., Martin Thom trans., 1996), *available at* <http://www.tamilnation.org/selfdetermination/nation/renan.htm> (“A nation’s existence is, if you will pardon the metaphor, a daily plebiscite, just as an individual’s existence is a perpetual affirmation of life.”).

149. See U.N. Charter art. 1, para. 2 (basing the relationship between nations on the self-determination of peoples).

the world clamoring for more autonomy view the state as the final utopian destination on the road to self-expression and development. Without the nation, there is no state, and without states, international law loses its *raison d'être*. That is why international codes never give rise to a sort of globalism that would permit unrestricted yielding of sovereignty to bodies that could escape state-based theory in order to penetrate the real world of politics. If sovereignty is surrendered, the state is weakened. If the state decays, international law loses its main actors. It is a vicious cycle.

The right of self-determination of peoples is memorialized in the American Declaration of Independence (1776) and has been the legal instrument through which many peoples of the earth have gained their independence, providing support to a widespread decolonization movement that unfortunately has not yet been fully realized.¹⁵⁰ On the other hand, it has also served as a legal incitement to nationalist imperialism and a wave of armed separatism that has little to nothing to do with true self-determination. We must be careful: Bolivar and Lenin, Wilson and Hitler, and Gandhi and Castro have all been inspired by the possibilities offered by the principle of self-determination of peoples.¹⁵¹ It has formed political communities and created an international order, but this does not mean that the concept will always be properly utilized.

Sovereignty—along with the concept of territorial jurisdiction—has run its course and done so successfully. Once an interdependent international community, states and their respective legal systems, and an inter-state organization with a professionalized bureaucracy have been established, we must then take the next step—a legal leap forward. The new global order and the paradigm shift in international relations require a new legal framework, built on a series of global principles¹⁵² that go beyond the mold and limitations of the state-based model. Once this is in place, the self-determination

150. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[W]henver any form of government becomes destructive . . . it is the right of the people to alter or to abolish it, and to institute new government . . .”).

151. See, e.g., Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 113 (2006) (citing Letter from Adolf Hitler, Reich Chancellor, Germany, to Neville Chamberlin, Prime Minister, U. K. (Sept. 23, 1938), in *The Crisis in Czechoslovakia, April 24–October 13, 1938*, 19 INT’L CONCILIATION 433, 433–35 (1938)) (“Hitler justified his military objectives in the Sudetenland on the grounds that the ‘Germans [have been denied] the right of nations to self-determination.’”).

152. On the one hand, I share Allen Buchanan’s sense of the need to morally evaluate the institutions and principles of international law. On the other, if international law’s attempts at progress have fallen on deaf ears for the past several decades, it is precisely because of the dangerous instrumentalization of morality on the part of political operatives. The morality of the majority has frequently ended up clashing head on with the pragmatism of the minority. See ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2004), for a deeper analysis of the moral foundations of international law.

of peoples can no longer be considered an absolute principle that does not permit exceptions to its application.

Rather than an exaggerated form of self-determination that ultimately seeks a federation of self-ruled entities, the aim should be a confederation of peoples marked by a profound sense of solidarity who fight for and achieve real peace. Only in this way will solidarity become a tangible characteristic of a legal framework that, until now, has been propped up by the crutch of egotistical and self-serving sovereignty. A change of this magnitude would thereby infinitely expand the possibilities for the law in the Third Millennium, above all, making it possible to build an energized and determined global consensus capable of responding in a timely and efficient manner to attacks on human rights. One must not forget that irrational anxiety regarding sovereignty is at the root of arguments that dictators and demagogues constantly invoke in order to avoid protecting human rights in territories falling under their jurisdiction. An instrument that was created to serve the needs of a specific historical moment ends up becoming an insurmountable barrier that imprisons populations—a legal device that at times leaves people at the mercy of tyrants. The Cuban regime,¹⁵³ Chávez's Venezuela,¹⁵⁴ and the

153. United Nations Treaty Collection, Cuba Declarations and Reservations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited Nov. 3, 2009) (follow link for "Chapter IV," then follow "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984" hyperlink) (stating that Cuba signed the Convention with a declaration that "the provisions of paragraphs 1, 2 and 3 of article 20 of the Convention will have to be invoked in strict compliance with the principle of the sovereignty of States and implemented with the prior consent of the States Parties.").

154. Very telling is the expulsion of the two directors of Human Rights Watch by the Chávez government. The Bolivarian regime's attitude reveals increasing intolerance of any criticism. On September 18, 2008, hours after a press conference in Caracas that released the report "A Decade of Chávez: Political Intolerance and Lost Opportunities for the Progress of Human Rights in Venezuela," the Chávez government expelled José Miguel Vivanco, director of the Americas division of Human Rights Watch, and Daniel Wilkinson, subdirector of the division. Human Rights Watch *Venezuela: Human Rights Watch Delegation Expelled*, Sept. 19, 2008, <http://www.hrw.org/en/news/2008/09/19/venezuela-human-rights-watch-delegation-expelled> (last visited Nov. 3, 2009). The note from the Venezuelan chancellery invoked, of course, the concept of sovereignty:

It is the policy of the Venezuelan state, fond of the values of the most advanced and democratic constitution that our country has had in its history, to make national sovereignty respected and to guarantee institutions and the people its defense in the face of aggressions from international factors. . . . It is for this reason that, in the full exercise of sovereignty and in the name of the Venezuelan people, we notify the referenced citizens of the obligation to leave immediately the fatherland of the liberator, Simon Bolivar.

Eastern despotism of Kim Jong-il¹⁵⁵ are a few cases in which appeals to sovereignty have been utilized in order to avoid or, in the case of Chávez, reverse a society's democratization and the reign of fundamental human rights.

Once sovereignty, state, nation, and territory have been removed, there is no longer a middle course under the precepts of international law. The balance is upset—either a region is a state or it lacks any designation at all. Thus, pursuant to this artificial imperative, a nation is called upon, in fact compelled, to become a state, whether by secession or by creation, since only the nation is the possessor of sovereignty, as a people possess a territorial state. From this perspective, a nation that becomes a state is like a frustrated, incomplete entity—a halfway house en route to the Promised Land. The road leading to the desired destination is self-determination, for nationalism is out of focus. Only in light of the deification of the concept of the nation-state can we possibly understand the desire for sovereignty held by so many peoples bound together by varying degrees of ethnic ties.

Self-determination is not necessarily equivalent to independence or the absolute right to a sovereign territory.¹⁵⁶ Rather, self-determination is self-government, the right to elect leadership without external influence or internal impositions. With self-government, it becomes feasible to establish one's own legal order and to develop a specific region culturally, socially, and economically.¹⁵⁷ Self-government also consists of the right to be recognized by the international order. However, in a global era, we must move beyond the dependence/independence dichotomy, for its basis in sovereignty distorts its purpose—the development of solidarity among a society's peoples and inhabitants. The communities comprising the great family of humanity are dependent, or at least interdependent—never truly independent. No national community is an island; there is no pure self-rule. Not even the United States, which, at least for now, enjoys undisputed hegemony, is free from external influences. In the globalized world, a new balance becomes apparent in which cooperation takes the place of asymmetry.

155. Cf. Choe Sang-Hun & David E. Sanger, *North Korea Reveals Second Path to N. Clear Bomb*, N.Y. TIMES, Sept. 4, 2009 (“North Korea on Friday reiterated that it quit six-nation talks because they were used for ‘wanton violation’ of its ‘sovereignty and right for peaceful development . . .’”).

156. See IRIS MARION YOUNG, *GLOBAL CHALLENGES: WAR, SELF-DETERMINATION AND RESPONSIBILITY FOR JUSTICE* 13–76 (2007) (explaining the concept of self-determination).

157. See Michael Keating, *Europeanism and Regionalism*, in *THE EUROPEAN UNION AND THE REGIONS* 1–22 (Barry Jones & Michael Keating eds., 1995) (discussing the benefits of regionalization and its importance in government and democratic policy).

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

V. THE FUTURE OF THE U.N.

Since its founding in San Francisco on October 24, 1945,¹⁵⁸ the UN has fulfilled an important mission. Surprisingly, its work has been more fruitful in matters that were secondary in the view of its founders than in matters involving its main priorities, both then and now.¹⁵⁹ Successor to the League of Nations, the UN rose up from the ashes of the Second World War, which gravely upset the entire world with its massively lethal impact on humanity and a focus on arms that has endured.

Initially comprised of 51 states, today UN membership numbers 192 states (the latest addition being Montenegro, on June 28, 2006).¹⁶⁰ In theory—but unsuccessful in practice—the members of the United Nations stand ready to achieve the body's goals of maintaining peace and security in the world, increasing international cooperation and peaceable relations among peoples, and harmonizing forces in pursuit of common goals.¹⁶¹ The UN was, of course, an international organization created with the desire of eliminating wars, resolving controversies between states in a peaceful way, and avoiding the use of unilateral force, except in cases of legitimate defense.¹⁶² The organization, in a novel move, reserved the right to intervene militarily against aggressor states that threatened the

158. U.N. Charter Introductory Note.

159. CASSESE, *supra* note 10, at 323.

160. Press Release, Department of Public Information, United Nations Member States, U.N. Doc. ORG/1469 (July 3, 2006), available at <http://un.org/News/Press/docs/2006/org1469.doc.htm>.

161. U.N. Charter art. 1.

162. *See id.* at pmbl (constructing the United Nations around the ideals of diplomatic resolution of controversies).

peace.¹⁶³ However, the essentials of that foundational dream have not been realized.

However, the UN does boast several major successes. One need only consider its very foundation—a great world event—or the fact that practically all the world's recognized sovereign states are members. Other successes include the Universal Declaration of Human Rights, the UN's promotion of democracy around the world through the provision of electoral and logistical assistance, its distinguished role in the process of decolonization (upholding the will of communities through the holding of plebiscites and referenda), and its promotion of international law.

However, many serious deficiencies weigh the UN down, mostly owing to the expansive power held by the Security Council,¹⁶⁴ its executive body. China, France, the United Kingdom, Russia, and the United States are permanent members (each with a veto right) of the Security Council.¹⁶⁵ In effect, through this body, the UN became an instrument in the hands of the Second World War victors. The countries played to win, masking their interests at the beginning with unity of intentions and using ten other countries from around the world (elected as temporary members for two-year intervals by the General Assembly) to gain legitimacy. The Security Council soon became an exclusive political clique in which the fate of the world was decided.

This is understandable, for despite the patina of legality on the United Nations international system, politics continues to be the driving force of the UN. If the General Assembly is itself an eminently political forum, the Council soon became the executive—no longer of the Assembly but of the many coexisting ideological blocs that share in the bureaucratic spoils of the UN agencies. Thus, in this prosaic and illegal way, politics has effectively dominated not only its natural jurisdiction, but also the broader legal realm, instrumentalizing the legitimacy of UN bodies and, in the process, utilizing their bureaucratic framework.¹⁶⁶ The UN has become a

163. See *id.* arts. 39–49 (describing actions that can be taken with respect to threats to peace, breaches of peace and acts of aggression).

164. See, e.g., JOCHEN PRANTL, *THE UN SECURITY COUNCIL AND INFORMAL GROUPS OF STATES: COMPLEMENTING OR COMPETING FOR GOVERNANCE?* 7 (2006) (discussing the decision making authority of the council and how informal groups may or may not affect this authority); JÜRGEN DREDING, *THE UNITED NATIONS SECURITY COUNCIL IN THE 1990S: RESURGENCE AND RENEWAL* vii–xi (2008) (describing the authority of the Security Council and how it operates).

165. U.N. Charter arts. 23; *id.* art. 27, para. 3.

166. The Council of Human Rights is a good example. The fact that China, Saudi Arabia, and Cuba are part of the Council shows how it is possible to comply with bureaucratic rules and at the same time achieve political objectives. U.N. Human Rights Council, *Membership of the Human Rights Council*, <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> (last visited Nov. 3,

hierarchical and dysfunctional organization, with more than 40% of its financing (based on 2006 official data) coming from the United States and Japan.¹⁶⁷ It is incapable of confronting or challenging the great powers in moments of crisis—Russia and the United States during the Cold War (1945–1989) and the hegemony of the North American colossus that followed (bent on instating a *pax Americana*, much like the *pax Romana* that Caesar Augustus imposed in the ancient world). However, while the economic burden weighs on UN decisions, in recent years its management shows evidence of having become seriously compromised. Not only does the organization merely react formally, if at all, when faced with serious threats to the peace—as in the case of the Georgian–Russian conflict—but it has completely lost the will to take real action when needed. Economic dependence has become political subjugation that damages its prestige and its capacity to coordinate effectively.

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

In his book *Law without Nations?*, Jeremy A. Rabkin is clear in his reading of September 11: “The international community offered condolences. America then had to summon its own resources to defend itself.”¹⁶⁸ He goes on to present an argument that finds wide support among a large portion of the American populace and even more so among Pentagon hawks: The Declaration of Independence of the United States was more than an effective instrument for gaining independence from the British Empire; it is a valid defense against meddling by any power that would keep the United States from taking its place of honor in the order of nations.¹⁶⁹

2009). To be both judge and interested party in the delicate arena of human rights issues does not help to establish the rule of the law. On the contrary, it perverts it.

167. See U.N. Secretariat, *Assessment of Member States' Advances to the Working Capital Fund for the Biennium 2006–2007 and Contributions to the United Nations Regular Budget for 2006*, U.N. Doc. ST/ADM/SER.B/668 (Dec. 22, 2005) (listing the percentage contributions of the United States and Japan).

168. RABKIN, *supra* note 59, at 1.

169. *Id.* at 233. In effect, the Declaration explains the causes of independence out of “a decent respect to the opinion of mankind,” but this deference in no way implies submission to, nor any duty to take into account humanity’s opinion on subjects that affect the United States. *Id.* However, as I understand it, “independence”—properly speaking—no longer exists, so we must interpret the Declaration of 1776, and the American Constitution of 1787, in light of new developments, which does not of

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

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

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

The UN has not been able to determine how to meet its fundamental goal of effectuating world peace. One need only to reflect upon the following less than effective efforts, some of which were abject failures: the Korean War; the Cuban missile crisis; the Vietnam War; the war in Sudan; the Soviet invasion of Afghanistan; the Gulf War; the civil wars of Nigeria, Lebanon, Angola, Algeria,

course mean interpreting it frivolously. Originalism is at odds with the changing character of every people, who cannot be constrained by decisions taken by legislators centuries earlier.

Somalia, or El Salvador; the killings in Rwanda and Kosovo; the massacre in Srebrenica; the Congolese genocide; the Anglo-Argentine war in the Malvinas (Falkland Islands), the Balkans, Chechnya, the conflict between Ethiopia and Eritrea, in Iraq; and the recent armed conflict in the Gaza Strip. This is just a partial list of events highlighting the powerlessness of the UN at times of conflict. It has not been an effective instrument in the struggle against international terrorism. It has not managed to contain or resolve international disputes, although not for a lack of attempts to stop each of the above-mentioned crises. The problem is not one of good faith or preparation on the part of its professional bureaucracy. Limitations are ultimately the problem, and the root of the problem is one of borders. The UN acts to the extent that it is authorized, but it always ends up coming up against the behemoth of sovereignty or the national interests of a particular country.

Much thought has been given to reform of the UN. International experts of all stripes have suggested reforms in reports presented to the Secretary General.¹⁷⁰ However, it is not a matter of changes or restructurings. The UN is an organization of states with conflicting and selfish interests. Those who should take it seriously—especially Russia, China, and the United States—do not. Thus, a revision of the Charter will not resolve the problem. The United Nations, as the League of Nations did on April 18, 1946, should dissolve and transfer its rights and powers to a new world organization, born not of battlefields devastated by destructive weapons, nor of peace treaties between conqueror and conquered—as with past attempts at similar organizations—but of the irrepressible human desire to finally organize global community. Additionally, it must not have its headquarters in the United States.

This new organization must have at its disposal its own armed forces created *ex professo* to ensure compliance with its goals, otherwise it will remain at the mercy of material assistance from the great powers, which will not always be generous with their resources. The time has come to establish a global military academy, a universal militia, and global institutions to permit swift and effective action in the face of any threat to peace. Forming this set of auxiliary organizations is a basic requirement for the effective functioning of

170. See, e.g., U.N. Dev. Group, Joint Inspect'n Unit, UN Reform and Coherence, <http://www.undg.org/index.cfm?P=20> (last visited Nov. 3, 2009). The report on the reform of the administration of justice characterizes the current system as "dysfunctional and ineffective and . . . lack[ing] independence." U.N. Gen. Assembly, *Report of the Redesign Panel on the United Nations System of Administrative Justice*, U.N. Doc. A/61/205 (July 28, 2006). Simon Caney proposes a reform of the U.N. incorporating "a democratically elected second assembly." SIMON CANEY, JUSTICES BEYOND BORDERS 264 (Oxford Univ. Press 2005); see also *id.* at 184 n.19 (noting a proposal to reform the United Nations and make it more democratic).

any organization having serious worldwide goals. This is the only means of ensuring that collective decisions taken within these new organizations do not fall on deaf ears but instead have real effects and consequences. This point, going to the validity of legal decisions, is vital for strengthening the credibility and prestige of a new global system.

One of the most serious problems with the UN is its lack of credibility. As the United States has become more unilateral, the United Nations has been increasingly undermined in recent decades. However, it has also been undermined by the creation of other international forums in which a common space was created for effective action on so many fronts—the European Union, for instance, has changed the lives of hundreds of millions of citizens. Any attempt to globally regulate societies in the Third Millennium must take into account this modernizing pragmatism. The legal framework exists. Of course, the establishment of a series of organs capable of acting outside of the political debates of a limited forum (such as the United Nations Security Council) remains necessary and requires the yielding of sovereignty. In this way, what now exists only on paper will be brought to life.

These reforms must be structural, as this is clearly not a matter of sprucing up existing configurations. The great mistake of the current system is its blind determinism, embodied in a professional bureaucracy incapable of acting in the face of concrete problems and challenges. Speed is the great characteristic of globalization—speed in communications, commercial transactions, and technological development. The law must not live in a vacuum disconnected from reality; otherwise, it is phased out, and jurists are left clinging to the past on issues such as world peace. The tools created by the great powers to maintain a strategic balance between them became obsolete at the end of the Cold War. Globalization has imposed a new model of armed conflict, a series of conventions for acting in the face of aggression and threats that before were only part of certain peripheral preserves. The effects of globalization have been swift and far-reaching; indeed, almost everything has been globalized. This fact is as undeniable as it is pressing. If we immerse ourselves in a legal determinism that eliminates variables as important as politics, economics, and sociology from the equation, proposed responses will be mere palliatives for the global crisis, not effective remedies.

As jurists, it is our job to analyze and interpret the effects of globalization and identify the legal institutions that will allow humanity to enter a new era. However, as men and women of learning, we must recognize that our discipline is concerned with only one concrete aspect of knowledge—a fundamental one, to be sure, but no more so than one of the other fundamental disciplines in a universal education. When we fall into a rigorous positivism that approaches reality without leaving room for other types of

interpretation or sources of inspiration, the law disappears, giving way instead to a straightjacket, full of restrictive norms and regulations lacking a real connection to the needs of society.

It is necessary, therefore, to recognize the importance of other disciplines in addressing the problems of our times. Close multi-disciplinary collaboration will allow the law to address the problems presented by post-modernity through a wider and clearer lens. The case of the UN is an example. Despite pressures from the great powers, the organization represents a perfectly well-oiled system, at least on the legal plane. It consists of an impressive framework of norms and regulations that function to effectively resolve long-term problems. In spite of this, the new millennium has produced, more frequently than in the past century, conflicts that require a new resolution framework and entail greater urgency of response—largely thanks to the enormous destructive capabilities of modern weapons technology.

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

Political deception has consequences in the legal world. It is deplorable how power, *potestas*, tries to impose itself—frequently with success—on authority, overpowering it. To ignore this fact is to take a walk in a pitch-black night along the edge of very-high cliffs. Meddling by power slows down the capacity of the law to respond. The UN may be legally prepared for a crisis, but without real capacity to act, it is overwhelmed and reacts slowly and poorly.¹⁷¹ There is, moreover, a sort of inscrutability surrounding the decisions of the Security Council—a precarious balance of powerful wills that try to impose themselves independently of whether they represent a majority view in the General Assembly. This inscrutability is largely

171. Of course, the two conditions intelligently outlined by Fernando R. Tesón should also be met. FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 59–65 (1998) (“Two conditions apply to the potential intervenor: its cause has to be just and its government has to be legitimate.”). Though he is referring to a state, it is possible to extrapolate these requirements to an effective global body’s use of force.

due to the ineffectiveness of the Assembly itself, which is frequently divided on the most important issues or neutralized by the controlling Security Council, even when the General Assembly actually reaches a majority view.

The great American democracy—the most advanced in the world—has given the world a historic lesson in equality of opportunity. Barack Hussein Obama is the new President of the global superpower.¹⁷² His electoral triumph bolsters the idea that every individual is capable of developing our talents to the fullest. What is important, ultimately, is the person; an institutional framework must be developed around the person that fully respects and does not rob him of his central social role. In light of this objective truth, the extent to which the United Nations is out of step with the reality of the situation is clear. By systematically giving preeminence to states, it becomes a significant roadblock to a legally organized global community.¹⁷³

In effect, a globalized democratic system is possible only within a legal regime that recognizes and promotes the primacy of the person. Thus, the United States, the standard-bearer for the struggle for democracy that recognizes the importance of the individual in the structuring of its freedoms, should also lead the transformation of the United Nations into a new body that better represents the indissoluble union between the law and the person,¹⁷⁴ not between the state and its regulations. The empowerment of individuals is tied to the effective functioning of global institutions. If the United States has broken new ground by electing the first African-American President in its history to the oval office, it can also demonstrate the maturity to drive a serious process of reforms at the heart of the international community. The success of this process will require the United States to suppress—as it has done before, to everyone's benefit—its inclination toward unilateralism. The presidency of Barack Obama is, in this sense, a unique opportunity. It must not be wasted.

172. Adam Nagourney, *Obama Wins Election; McCain Loses as Bush Legacy is Rejected*, N.Y. TIMES, Nov. 4, 2008.

173. See, e.g., *supra* note 122 and accompanying text (inviting consent of the Sudanese government in order to deploy peacekeeping troops).

174. As Henry Kissinger rightly observes, America's global leadership has not kept its own population from accepting this role with certain indifference. However, this deeply harmful tendency has slowly changed over the last several years, thanks in part to the implosion of the old order and to the direct attacks that the United States suffered at the hands of radical Islamists. In Kissinger's words, this leadership is indisputable: "At the dawn of the new millennium, the United States is enjoying a pre-eminence unrivaled by even the greatest empires of the past. From weaponry to entrepreneurship, from science to technology, from higher education to popular culture, America exercises an unparalleled ascendancy around the globe." HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY 17 (2001).

Faced, as we are, with several types of totalitarianism equaling or surpassing the threats of the twentieth century, the peoples of the world should reconsider the mechanisms of control that were established throughout the twentieth century. Some of these are manifestly obsolete now and must give way to strikingly new institutions. However, this is not about throwing hundreds of years of experience and collective know-how overboard, nor is it about comparing numerous attempts and failures. Rather, we have an inspiring opportunity to establish new parameters for global cooperation between peoples, carefully identifying what deserves to remain as part of our tradition of peace and solidarity. The transformation of the UN into a new entity will entail discarding the significant liabilities that have accumulated over the decades since its founding.

In a world in which the main powers have begun to reform capitalism in order to better guarantee global financial stability, we might ask ourselves why this process of profound economic introspection is not occurring within the framework of the United Nations. Though American unilateralism has hindered effective responses to the challenges of the new order, it is also clear that this zeal for a central international role is not only the purview of American leaders. The G-20 is seeking to rejuvenate the economic system because of the crisis that has upset the foundations of the global economy. Still, however, not all of the nations currently suffering the consequences of our economic excesses were invited to this reformist conclave, nor were those countries which are drowning in misery due to certain shortcomings of globalization.

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

The reformation of capitalism—frequently discussed in recent times, especially since Barack Obama's election—cannot be accomplished overnight by a summit of powers or even following high-level diplomatic debate in which all members of the global community are represented. Redefining the scope of the debacle of

the financial system may be a long-term process, and the mechanisms of the United Nations relevant to the process have gone unused. Such mechanisms are ignored because beyond the empty rhetoric and the stringent analysis, the resulting conclusions and recommendations are incapable of exerting any influence, as they are unable to unite force and law. The UN has thus been unable to deal effectively with humanity's demands in the economic realm largely because of its Byzantine slowness, among other limitations.

The global crisis threatens to worsen and weaken already weak polygarchies in developing countries. To date, fruitless attempts to mitigate its negative consequences have not materialized from the spacious New York offices of the UN. The United States welcomed the G-20 to Washington and showed that leadership and the ability to respond to difficult situations exist in other forums. APEC, the G-20, and even the summit organized by the European Union have greater convocational capacities and more effective real-world *potestas* than the UN. Moreover, on a symbolic level, the meeting of those international clubs focusing on the economy is more palatable than any forum organized in the United Nations on the same issue.

Why has the UN yielded its central role? Despite representing the international community more fully than any other body, its loss of primacy as a forum for major international issues results from more than just the post-Cold War paradigm shift. It is also, unfortunately, the case that the body's own defects contributed to staining its image. Not only is there a great and dangerous ambivalence on the eminently delicate issue of human rights—as seen in relation to the Council on Human Rights—that further diminishes its already weakening authority, there is also an increase in the bourgeois passivity of its elites who have not managed to assemble an effective pressure group to act as a counterbalance to those other forums that wield authentic power.

In order to change the situation, we must re-establish the United Nations. Its original limitations have become unmanageable. Our current international situation makes this suggested transformation possible. The election of Barack Obama will not only redefine the internal dynamics of American politics, but it will also change the country's international goals and policies.¹⁷⁵ It is urgent to

175. Cf. President Barack Obama, Inaugural Address (Jan. 20, 2009), available at http://www.whitehouse.gov/the_press_office/President_Barack_Obamas_Inaugural_Address/.

What is required of us now is a new era of responsibility—a recognition on the part of every American that we have duties to ourselves, our nation and the world; duties that we do not grudgingly accept, but rather seize gladly, firm in the knowledge that there is nothing so satisfying to the spirit, so defining of our character than giving our all to a difficult task.

democratize decisions that affect all people, and this will only be possible if the new President pursues open policies in all areas—not only on commercial or trade issues. Restoring the person as the fundamental actor in international actions is an indispensable condition for any renewal efforts. Democratizing international relations means granting enough power to the global citizen to change structures and cease limitations imposed by existing structures. The need for this shift, overlooked and even objected to by some today, is fundamental to the reform and reconstruction of a global order that sadly has brought war, hunger, crisis, and destruction—the horsemen of an apocalypse whose end is as yet uncertain.
