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In Defence of Cosmopolitan Law

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Front cover: *The upper section of the page uses an image of doves of peace in flight. It has been there since the start of TOAEP's Occasional Paper Series. From No. 11 onwards in the Series, the lower section of the page shows the ancient wrought ironwork above the entrance of the CILRAP Bottega in Florence, which also serves as the office of TOAEP.*

Back cover: *The image on the back cover shows a segment of the age-old terracotta floor of the CILRAP Bottega in Florence. The Bottega premises have been used for various purposes over the centuries, including as a leather* bottega *for decades.*

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TABLE OF CONTENTS

In Defence of Cosmopolitan Law

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1. International Law – A Long History and a Rather Young Theory

International law has a very long history. Based on the documents known to us, a treaty between the city states of Umma and Lagash was signed as early as 3100 BCE in Sumerian Mesopotamia. Even better known is the peace treaty between the Hittite Empire and Egypt from 1279 BCE.[1] We can therefore claim with good reasons that international law, as the legal instrument that regulates relations between conflicting political communities, dates back almost to the time when our ancestors began to develop highly structured forms of coexistence. However, while the foundations of the domestic political system were examined in detail quite early on – that is, at least since Plato and Aristotle – and presented in groundbreaking philosophical works, a theory of international law only developed much later, initially in the Muslim[2] as well as Christian Middle Ages, and then, from the sixteenth century on, in the form of the modern Western *jus gentium*.[3]

Given this discrepancy, the question arises as to why the discourse on the conceptual foundations of international law took so long to get started. In all likelihood, the reason for this was that international law for a long time had an essentially practical task, namely, the regulation of conflicts between political communities and the limitation of damage in the event that the conflict could not be prevented. For centuries, it was believed that this required the development of concrete instruments rather than theory, while the only conceptual prerequisite was the consent of the states, which, in turn, was examined and justified by the discourse of state theory. Over time, however, this idea turned out to be short-sighted: if you want to have a solid international law in the traditional sense, that is, a robust system of rules to guarantee peace, you cannot avoid the question of what a legal system for all of

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1 Arthur Nussbaum, *A Concise History of the Law of Nations*, The Macmillan Company, New York, 1954 (first published in 1947), pp. 1 ff.

2 Mashood A. Baderin, "Muhammad al-Shaybānī", in Bardo Fassbender, Anne Peters, Simone Peter and Daniel Högger (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, 2012, pp. 1081–1085.

3 Sergio Dellavalle, *Paradigms of Social Order: From Holism to Pluralism and Beyond,* Palgrave Macmillan, London-New York, 2021, pp. 110 ff.

humanity could look like. In other words, one cannot establish strong international law in the narrower sense without thinking about the conceptual justification of cosmopolitan law: international law is only solid if it can refer to an idea of the legal *cosmópolis*.

Before we discuss the differences between international law and cosmopolitan law, however, it is necessary to clarify some concepts, especially with regard to the relation between law in general (and international law in particular), ethics and practical philosophy (Section 2.). Precisely the existence of that unavoidable relationship explains why the legal system that regulates relations between states and is intended to protect peace and universal human rights must be founded on a discourse that includes, at least potentially, all human beings on a global scale and, in doing so, also addresses the problem of how this discourse can be implemented through legal norms and political organization. Moreover, if it can be reasonably argued, on the one hand, that traditional international law must have a foundation in the *jus cosmopoliticum* (Section 3.), on the other hand, it is also undeniable that cosmopolitan law poses very special challenges, starting with its rather recent origin (Section 4.) and then moving on to its inclusiveness (Section 5.), normativity (Section 6.) and legitimacy (Section 7.). In addition – and despite its unique relevance as the most essential tool that humanity has to address global concerns – cosmopolitan law presently faces a deep-going crisis, substantially triggered by an aggressive revival of the old-fashioned particularistic understanding of the interests of the individual political community (Section 8.).[4] These challenges raise the question of which future an ambitious international law – or, *a fortiori*, a realistic *jus cosmopoliticum* – can have in our difficult times (Section 9.).

2. Some Conceptual Clarifications

The analysis of international law in terms of its connection to law, ethics and practical philosophy requires the clarification of some foundational concepts. Firstly, the understanding of law and its relation to practical philosophy must be addressed. If one strictly defines law as a self-reliant system of norms which is assumed to be independent of extra-legal foundations,[5] then

[4] Armin von Bogdandy and Sergio Dellavalle, "Parochialism, Cosmopolitanism, and the Paradigms of International Law", in Mortimer N.S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law*, Cambridge University Press, 2012, pp. 40–117.

[5] Hans Kelsen, *Reine Rechtslehre*, Deuticke, Leipzig-Wien, 1934; H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1994 (first published in 1961).

any exploration of its relation to ethics and practical philosophy would be pointless. However, this view is untenable for several reasons. The primary argument is epistemological. Legal positivists argue that the legal system consists of hypothetical sentences validated by the form and content of further sentences located at a higher hierarchical level. To avoid infinite regress, the positivist legal system thus requires a final normative justification as a proposition or assumption on which all lower-level norms are based. Since positive legal norms are assumed to have a hypothetical structure, and the final normative justification cannot be hypothetical because it could not otherwise provide a conclusive justification while averting an infinite regress, we must conclude that the final justification cannot be a legal norm (that is, a hypothetical sentence or proposition with the task of giving binding and formal rules to the interactions of the members of the political community).[6] At this point, there are two possible solutions. The first claims that the legal system can find its extra-legal foundation in its sheer efficacy, without any further normative qualification. On the other hand, however, relying on merely factual effectiveness as the ultimate justification poses a number of questions, in particular as regards the reasons why we should accept those normatively unqualified rules and principles. As a result of these difficulties, the second solution emerges, according to which the legal system has to be grounded on a broad application of practical reason, which not only goes beyond positive law but is also rooted in a comprehensive and normatively meaningful understanding of the 'well-ordered society'.[7] Additionally, even effectiveness, as the least demanding and supposedly normatively neutral requirement for a functioning legal system, ultimately implies an idea of the 'well-ordered society', namely, one in which socially relevant rules and principles reflect power relations as their highest normative qualification.

To summarize the first conceptual premise, one can therefore say that, on closer examination, law is always built on a specific view of society, that is, on an idea of how the social community is to be organized in a rationally justified way. Such a statement leads us directly to the second conceptual premise, which addresses what we mean when we speak of the 'use of practical reason'. Simply put, the concept of the 'use of practical reason' refers to the fact that our rational capacities, when we use them in a practical sense,

6 Sergio Dellavalle, "International Law and Interdisciplinarity", in Peter Hilpold and Giuseppe Nesi (eds.), *Teaching International Law*, Leiden-Boston, pp. 273 ff.

7 Dellavalle, 2021, see *supra* note 3.

do not aim at providing a falsifiable description of the external world, but rather at rationally justifying our actions. In contrast to the epistemological use of reason, when we implement its practical dimension, we do not have objective instruments at our disposal whose use and outcomes can gain the approval of the entire epistemic community. In the practical realm, reason can only invoke the principle of the better argument, so that the deployment of practical reason becomes a form of inclusive social self-reassurance and validation, which necessarily – although not as radically as commonly assumed – sets itself apart from the much less contestable scientific knowledge.

Substantively, two different applications of practical reason can be identified: the moral and the ethical.[8] The first characteristic of the *moral* use of practical reason is that it should have a universal scope, which, in turn, contains two dimensions. To begin with, the use of reason is universal in the sense that all rational beings can and should participate, at least potentially, in the exchange of arguments. In addition, universality refers to the fact that the norms that emerge as the best result from the exchange of arguments are assumed to have general validity. The second characteristic of the moral use of practical reason highlights that moral norms bind the individual, but not a group of people as a whole, and even less society in its entirety. In other words, there are neither laws nor unwritten but nevertheless binding rules that enforce moral norms – and there should not be any. There are many reasons for this restriction; yet, they all point to one element: in general, moral norms are so deeply rooted in personal convictions that they are either irrelevant to social life as a whole or cannot achieve consensus as regards their content. For example, I may be firmly convinced, on the basis of moral considerations, that misleading other people in private is wrong, or that abortion violates indefeasible principles of natural law. Therefore, I am certainly entitled to express my beliefs publicly and also to try to convince other people of them. Nevertheless, I cannot ignore the fact that the first attitude that I reject (namely, privately cheating on friends, partners, family or, simply,

[8] Jürgen Habermas, *Erläuterungen zur Diskursethik*, Suhrkamp Verlag, Frankfurt, 1991, p. 100 ff. (English translation by Ciaran P. Cronin, *Justification and Application*, MIT Press, Cambridge, 2001 (first published in 1994; English: pp. 1 ff.); Sergio Dellavalle, "Our Legitimate Sovereignty and Global Responsibility", in André Santos Campos and Susana Cadilha (eds.), *Sovereignty as Value*, Rowman & Littlefield, Lanham, 2021, pp. 66 ff.; Dellavalle, 2021, pp. 427 ff., see *supra* note 3.

fellow humans) mostly lacks a wide social relevance, while the second (that is, condemning abortion) does not enjoy social consensus.

Quite different – and almost opposite – is the *ethical* use of practical reason, through which arguments are discussed that should shape social behaviour on the basis of shared values. Insofar as this use of reason is thought to generate rules that are directed to all individuals within the political community – and not just to those belonging to a religious or cultural group – these rules take the form of binding norms with the task of guaranteeing peaceful, predictable and, in the best case, co-operative interactions within society as a whole. Being expressed in formal and binding sentences, the totality of these norms creates what we call a legal system or legal order. If we apply the first conceptual premise, namely, that all law is grounded on a certain use of practical reason, to the second one, which concerns the discursive quality of the different uses of practical reason, then we can conclude that the extra-legal basis that supports any legal system must lie in that kind of ethical use of practical reason that creates binding norms for the entire community through inclusive and consensus-oriented discourses.

In summary, we can thus state that the legal system consists of the formalization of rules of conduct that are relevant and binding for the entire community. Furthermore, it is assumed that these rules of social behaviour arise from a specific ethical use of practical reason, that is, from a discourse on the norms that should determine the political coexistence of a specific society. On this basis, we can now move on to the third conceptual premise. This refers to the characteristics that the ethical use of practical reason must have in order to serve as the extra-legal foundation of international law. Three features stand out because of their importance in this context: inclusivity, normativity and legitimacy. Inclusivity indicates that the use of practical reason here has a significantly different quality than in the national political discourse. If we assume that every legal system contains the norms that regulate interactions within a community, then it follows that the community to which international law refers is structured very differently from national communities. Above all, this community is much broader and less identity-based. In particular, international law claims to create a world society to which all members of the human community belong, so that the legal discourse must extend far beyond traditional national borders. Normativity, for its part, refers to the form that the rules of conduct take, that is, whether they consist essentially of unwritten natural law principles or of a corpus of

formal laws. In addition, the question of normativity also points to the hierarchical relation between constitutional law and normative systems that extend their validity beyond national borders. Finally, legitimacy assumes that norms must always be accepted by those who have to follow them. As we will see below, this acceptance can take various shapes, some of which require only implicit consent, while others necessitate active and reflexive participation. According to a post-metaphysical and democratic view based on the premises of the communicative theory, it must nevertheless be emphasized here – as the fourth conceptual prerequisite – that only a deliberate and inclusive participation of all those affected in the norm-setting process can give the highest legitimacy to the rules.

3. International Law and Cosmopolitan Law

Four clarifications have been made so far. Firstly, all law is grounded on a specific use of practical reason and, through this, on a certain idea of the 'well-ordered society'. Secondly, this idea, in order to be properly legitimized, has to rely on an inclusive exchange of arguments, aiming at finding out the solution for the given challenge. Thirdly, international law cannot refrain from a cosmopolitan dimension as its deepest *raison d'être*. Consequently, fourthly and finally, the international legal order, due to its deep cosmopolitan nature, should be characterized by an exchange of arguments – or discourses – that allows, in principle, the participation of all members of the human community. Having said that, we can now move on to specify what cosmopolitan law is, in particular if compared to international law.

International law in its broader sense consists of two different legal systems. The first can be called 'international law in the narrower sense' (or *stricto sensu*) and is characterized as inter-national law, since it contains legal instruments which, as treaties, regulate the relations between legally organized political communities on the basis of the consent of all signatory parties, that is, of all states involved. International law *stricto sensu* does not raise any relevant problems with regard to its inclusiveness, normativity and legitimacy. It is legitimate insofar as treaties are ratified by all actors bound by them in accordance with their specific internal procedures. In addition, its normativity is unquestionable, thanks to the legal form of the treaties. Finally, its inclusiveness is manageable, since the legal texts created as a result do not claim to be generally binding.

The situation is different if we consider the second legal system of international law *sensu lato*, namely, the so-called *cosmopolitan law*. These

are the legal instruments located *above* or *beyond* the nation-states which, explicitly or implicitly, bind sovereign states regardless of their consent. Under these conditions, all three characteristics of the ethical use of practical reason require a profound redefinition. As for its inclusiveness, since cosmopolitan law is intended to apply to the entire human community, the ethical discourse in which it is rooted has to be opened up to the contributions of all individuals as well as of all social, political, religious, ethnic and cultural groups worldwide. In this sense, it has to be assumed that a cosmopolitan humanity not only exists in the abstract, but also that it has already developed an effective common basis of values – or, at least, that there is the possibility for humankind to develop shared values in the not-too-distant future. From the standpoint of normativity, this basis should then also be cast in a legal form, which certainly represents a much greater challenge than in the nation-state framework. Finally, the cosmopolitan legal system must be provided with appropriate legitimacy, which is difficult insofar as legitimation processes are traditionally based on national identities and procedures.

4. The Dawn of the *Cosmópolis*

Before we focus on how the concepts of inclusivity, normativity and legitimacy developed and were justified through the history of cosmopolitan law, we have to briefly refer to an essential condition for the idea of cosmopolitan law to even be conceived. Indeed, without a universalistic understanding of society, according to which humans form a worldwide community comprising all individuals, no cosmopolitan order is thinkable.

From the linguistic point of view, 'cosmopolitan' derives from *cosmópolis*, an ancient Greek word combining two different nouns: *cósmos* (world) and *pólis* (city). Therefore, *cosmópolis* means the 'city of the world' or the 'city that embraces the whole world', and cosmopolitan law refers to the norms that should govern global human interactions. Yet, the two words came together rather recently in human history, namely, not before the middle of fourth century BCE. Until that moment, the *pólis* had nothing to do with the world, indicating that the political community was seen as inherently particularistic. This does not imply that the ancient Greek world did not know some form of global order. Indeed, *cósmos* meant at the same time 'world' and 'order'; nevertheless, the 'global order' did not have political connotations. Instead, the ancient Greek perception of 'global order' only suggested that all human beings – representing humanity on a global scale – shared biological traits and a general inclination towards sociability, but

lacked common political institutions. In other words, humans were assumed to have the tendency to form political and legal communities everywhere, but these communities – to be 'well-ordered' – had to encompass only a limited number of individuals, united by shared values and a common history.[9] Beyond these communities and in their mutual relations, the only achievable outcome was the containment of disorder.

Consequently, far from being the initial understanding of the potential extension of the 'well-ordered society', universalism rather evolved from the rejection of a preceding paradigm known as particularism. To discover the first presentation – and defence – of the particularistic paradigm of order, we have to go back as far as to the ancient Greek historian Thucydides. In the chapter of his book on the Peloponnesian War describing what happened during the siege of Melos, Thucydides outlined three fundamental aspects of particularism: firstly, the dominance of power over law in the absence of a balance of power; secondly, the belief that the law of the strongest reflects a natural or even divine order; and thirdly, the lack of trust in the impartial intervention of a third party, as any intervening party would likely act out of self-interest.[10] These tenets have constituted since then the core of every particularistic – or, according to a second, very common definition, of every *realistic* – conception of international law and relations until our time.

The universalistic concept of cosmopolitan law opposes the particularistic view of order, leading to claims that contradict its tenets. To begin with, cosmopolitan law asserts that right should triumph over might, not the other way around. Additionally, it emphasizes the rational imperative for existential competition and war to be replaced by peace and co-operation. Finally, it suggests the feasibility of establishing impartial international norms and organizations. Yet, the universalistic view of society was essentially unknown – at least in the Western world – until the Stoic philosophers, at the end of fourth century BCE, first created the notion of a shared humanity, thus initiating the paradigmatic revolution from particularism to universalism. Together with the introduction of the new 'paradigm of social order' – and as a consequence of it – the Stoics also envisaged the perspective of a cos-

[9] Aristotle, *Politics*, translated by Harris Rackham, Harvard University Press, Cambridge, 1959, Book I, Chapter 1, 1253a *et seq*., pp. 8 ff.

[10] Thucydides, *The Peloponnesian War*, in Richard Schlatter (ed.), *Hobbes's Thucydides*, Rutgers University Press, New Brunswick, 1975, Book V, Chapter 84 *et seq*., pp. 377 ff.

mopolitan order. Thanks to their contribution, the notion of *cosmópolis* appeared for the first time in the vocabulary of Western political philosophy as the concept indicating a worldwide human community, whose inhabitants were then the *cósmou polítai*, the citizens of the well-ordered world.[11]

5. The Rising – and Contradictory – Inclusivity of Cosmopolitan Law

Although the idea of a universal ethical community can be seen as the prerequisite for the transition to its implementation in the form of a political and legal *cosmópolis*, the practical impact of the Stoics was rather modest, since their idea suggested a borderless community of thought rather than an institutional and legal implementation. The situation changed drastically after Christian philosophy adopted Stoic universalism. In religious terms, this took the form of the worldwide *Missio ad gentes*, namely, the doctrine of unrestricted accessibility of the Christian message of salvation for all individuals and peoples. However, since Christianity also gained great political influence relatively quickly, it was inevitable that the religious message was supplemented by a complex construct of laws and institutions. This resulted in a sophisticated system that combined divine law, natural law, the *jus gentium*, and state law in one coherent *corpus juris*.[12] With regard to the political and legal structure, the Christian normative system initially favoured the solution of a centralized imperial power, but then, given the increasing independence of the individual states, moved to a view that recognized their identity and partial sovereignty. Nevertheless, the autonomy of the individual states continued to be subject to the aegis of the higher legal norms – that is, the laws of God, natural law and the *jus gentium* – and thus also to the doctrinal authority of the Catholic Church, which was responsible for the unchallenged final interpretation of the highest normative provisions.[13]

Thus, the Christian-Catholic political and legal philosophy conceived the first legal system with a claim to universal validity. Despite its undoubtedly ambitious goal and its fascinating design, Christian-Catholic law and, in particular, its aspiration to cosmopolitan inclusivity were nonetheless afflicted from the outset by a flaw, namely, the attempt to create a cosmopolitan

[11] Johannes von Arnim, *Stoicorum Veterum Fragmenta*, Volumes I and III, Teubneri, Lipsiae, 1903–1905.

[12] Thomas Aquinas, *Summa Theologica*, 1265–1273, see William Benton (ed.), *Encyclopedia Britannica*, 15th ed., Chicago, 1980.

[13] Francisco Suárez, *De legibus, ac Deo legislatore*, 1612, in *id*., *Selections From Three Works*, Clarendon Press, Oxford, 1944, pp. 1–646.

legal system based on the assumption of the superiority and universal acceptance of a specific religion. Yet, this presumption is untenable insofar as no religion ever had worldwide extension and recognition. Indeed, questions about religious identity are too intimate to assume that they will be answered in the same way everywhere and by all people. The inevitable consequence was, therefore, that the Christian-Catholic project ultimately betrayed its claims to universal inclusion and justified the discrimination, and even persecution, of non-Christians in the name of an allegedly global legal order.[14] If the failure of the Christian-Catholic project resulted from the fact that it was based on the fallacious assumption of the superiority of the Christian religion, then one could postulate that a universal legal order, which renounced religious revelation and followed the commands of pure reason, would be free of the deficiencies of the earlier theories, thus finally leading cosmopolitan law to an unrestrained inclusiveness. Indeed, this was the path taken by some of the founders of the modern *jus gentium* who, under the influence of the Protestant Reformation, demanded that international law be considered as a derivative of pure natural law, without the former reference to divine law.[15]

Admittedly, modern international law based on natural reason was much less universalistic than its proponents generally assumed, since their understanding of rationality included profound and self-contradictory forms of normative disregard, especially against non-Western peoples and women in general. Nevertheless, it marked a significant step forward on the path to full inclusivity, since no religious barrier was erected anymore and rationality was regarded – at least in principle and despite all conceptual imperfections – as a universal human capacity. The increase in inclusivity was, however, bought at the price of a decrease in normativity: while Christian-Catholic cosmopolitan law had positive legal instruments and the institutions to interpret and implement them, the modern *jus gentium* grounded on natural law could only rely on unwritten, and often difficult to interpret, customary

[14] Francisco de Vitoria, *De Indis et De Jure Belli Relectiones*, Oceana, New York-London, 1964.

[15] Alberico Gentili, *De Jure Belli Libri Tres*, 1589, Typographeo Clarendoniano, Oxonii (Oxford), 1877 (in English: Clarendon Press, Oxford, 1933); Hugo Grotius, *De Jure Belli ac Pacis*, 1625, in English: Richard Tuck (ed.), *The Rights of War and Peace*, Liberty Fund, Indianapolis, 2005; Samuel Pufendorf, *De jure naturae et gentium libri octo*, 1672, complete English translation by Basil Kennet, printed by Lichfield *et al*., Oxford, 1703, partial English translation by Michael J. Seidler, in Craig L. Carr (ed.), *The Political Writings of Samuel Pufendorf*, Oxford University Press, 1994.

norms. This was the era that was shaped by the authors whom Immanuel Kant, not exactly flatteringly, referred to as the "sorry comforters".[16]

6. The Establishment of a Strong Normativity in Cosmopolitan Law and Its Downsides

It was Kant, in fact, who initiated the transition to a renewed strengthening of legal normativity in cosmopolitan law. In his view, the "community of all peoples on earth" should unequivocally be based on a "legal principle".[17] Almost a century and a half after the Königsberg philosopher, the next and most radical step on the way to the full recognition of the normative content of cosmopolitan law was taken by Hans Kelsen. The system he designed was not only explicitly universalistic – with international law at the top of the hierarchical pyramid – but also gave unequivocal priority to the legal dimension of social interaction.[18] He even went so far as to claim that the framework of a correctly understood world order should consist only of legal norms and could do without significant involvement of political institutions. The international courts would then have the task of making this legal order effective.

At first glance, Kelsen's universalistic legal system appears to meet the highest requirements of inclusiveness and normativity. However, once again, we encounter problems whose solution made it necessary to begin a new chapter in the history of cosmopolitan law. These issues go beyond the usual accusation of excessive abstraction. Indeed, Kant maintained a certain ambiguity regarding the relationship between the essentially state-based political institutions and the world order rooted in legal norms and principles. This approach, however, led him into a kind of conceptual dead end and, therefore, into an unresolved contradiction between the aspiration to a "world republic" and the sober recognition that the highest achievable, but highly unstable goal was a kind of "federation of peoples".[19] On the contrary, Kelsen

[16] Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, 1795, in *id*., *Werkausgabe*, Volume IX, edited by Wilhelm Weischedel, Suhrkamp Verlag, Frankfurt, 1977, p. 210 (English translation by Hugh B. Nisbet, *Perpetual Peace: A Philosophical Sketch*, in Hans S. Reiss (ed.), *Kant: Political Writings*, Cambridge University Press, 1991, p. 103).

[17] Immanuel Kant, *Die Metaphysik der Sitten*, 1797, in *id*., *Werkausgabe*, Volume VIII, 1977, see *supra* note 16, pp. 309–634, Parts I and II, para. 62, p. 475 (English translation by Mary J. Gregor, *The Metaphysics of Morals*, Cambridge University Press, 1991, p. 158).

[18] Hans Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge, 1949 (first published in 1945).

[19] Kant, 1795, pp. 208 ff. (English: pp. 102 ff.), see *supra* note 16.

took a clear position in favour of the priority of international law. Yet, in doing so, he failed to recognize that individual political communities with their constitutional traditions represent an important source of legitimacy. In addition, even cosmopolitan law would remain opaque and alienated without flanking political institutions with a global basis and the associated reflexive processes of political deliberation. Based on the perception of these deficits, cosmopolitan international law has concentrated in recent decades, on the one hand, on giving again more weight to individual states without thereby giving up the universalistic claim and, on the other hand, on bringing the political dimension back into play as a source of legitimacy. I will return to the latter aspect in the next section. First, however, it is appropriate to concentrate on how the most recent international law has attempted to overcome Kelsen's marginalization of the state as an international actor. These attempts have gone down in legal history under the term of the 'constitutionalization of international law'.

The 'constitutionalization of international law' is a complex phenomenon that has developed essentially two main variants over time. We can call the first the *ontological* one, and the second the *deliberative* one. Despite their differences, it is possible to work out some characteristic aspects that are common to both variants. The first element that distinguishes the theory of the 'constitutionalization of international law' consists – as already indicated – in the attempt to revalue the role of states in the international legal order compared to Kelsen's radical devaluation. According to the contemporary constitutionalization approach, states are still to be regarded as the most important actors in international law, but this should not exclude the possibility that they are legally bound by superior norms to comply with universal principles of humanity and to respect the shared interests of all nations. These norms form the legal framework of the constitutional dimension of international law (or, better, of its cosmopolitan variant).[20] The second distinctive element of the theory of the 'constitutionalization of international law' claims, then, that the 'constitution of the world community' – or the equivalent 'cosmopolitan law' – is made up of two components. The first comprises legal instruments which I referred to in a previous section as the law *above* the nation-states.[21] This supra-state law claims to be valid *erga*

[20] Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, 2009.

[21] See *supra* Section 3.

omnes and is essentially composed of the positive law of the United Nations ('UN') and the customary law of the *jus cogens*.[22] As for the goals of this normatively and universally binding legal system, these should be limited to preserving peace and protecting universal human rights.[23] The second component of the 'constitution of the world community' consists of what has been described as the law *beyond* the nation-states.[24] This system of legal instruments and institutions based on them, also known as 'global law', has the task of addressing globally impacting phenomena.[25] Although it does not directly bind nation-states beyond their consent, it nevertheless has a deep-going influence on their decision-making processes, thus indirectly limiting their sovereignty.

The self-limitation required by the theory of the 'constitutionalization of international law' leads to the conclusion that its understanding of the legal world order is significantly different from the one advocated by Kelsen. Here, the third distinctive element of the theory comes into play. According to the idea of the 'constitutionalization of international law', it is no longer a question of designing and justifying an all-encompassing pyramidal structure of the global legal system with international law at the top, but of maintaining a constitutional dimension within the global legal order, given its increasing and unavoidable differentiation. Such a step implies, on the one hand, the assurance that the global legal system is pluralistic, that is, made up of a significant number of specialized and autopoietic legal orders, each of which regulates a particular form of social interaction in the global context.[26] On the other hand, it also recognizes that legal pluralism is not a pathology but a positive increase in functional efficiency that is to be welcomed

[22] Stefan Kadelbach, "Genesis, Function and Identification of Jus Cogens Norms", in *Netherlands Yearbook of International Law*, 2015, vol. 46, pp. 147–172.

[23] Jürgen Habermas, *Der gespaltene Westen*, Suhrkamp Verlag, Frankfurt, 2001 (English translation by Ciaran Cronin, *The Divided West*, Polity Press, Cambridge, 2006); Jürgen Habermas, "Eine politische Verfassung für eine pluralistische Weltgesellschaft", in *Kritische Justiz*, 2005, vol. 38, no. 3, pp. 222–247 (English: "A Political Constitution for the Pluralist World Society", in *Anales de la Cátedra Francisco Suárez*, 2005, vol. 39, pp. 121–132); Jürgen Habermas, "Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft", in Winfried Brugger, Ulfried Neumann and Stephan Kirste (eds.), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp Verlag, Frankfurt, 2008, pp. 360–379.

[24] See *supra* Section 3.

[25] See *infra* notes 37 and 38.

[26] Gunther Teubner, "'Global Bukowina': Legal Pluralism in the World Society", in *id.* (ed.), *Global Law Without a State*, Dartmouth, Aldershot, 1997, pp. 3–28.

in principle, and cannot be suppressed by any one-dimensional hierarchy. In this context, cosmopolitan law, as that part of the general global legal system that displays constitutional features, has the task of holding the entire global legal order together while giving it a higher normative quality.[27] This normative superiority arises exclusively from the ethical argument that the preservation of peace and the protection of human rights – that is, the tasks of constitutional cosmopolitan law – are constitutive for all other areas of the global legal order. Only a recourse to respect for peace and human rights can, in fact, guarantee that the specialized parts of the global legal system, in their social and legal interactions, grant the inclusion that is peremptorily required by a non-discriminatory ethical use of practical reason. In contrast, the opposite argument does not hold, since none of the specialized legal systems, taken alone and without the constitutional reference, is constitutive for peace and human rights or for an inclusive ethical use of practical reason. Since the possible conflicts between the different legal systems in the context of the global world order – including constitutional cosmopolitan law – cannot be resolved by recourse to hierarchy, the only solution is the dialogue between the institutions, in particular between the courts, which are responsible for interpreting and implementing the norms within the distinct national and international legal systems.[28] In this context, however, the specialized courts should recognize the normative superiority of the cosmopolitan/constitutional values in the context of the exchange of arguments.

The theory of the 'constitutionalization of international law' guarantees the highest possible normativity in a context characterized by a plurality of legal systems. However, a serious reservation must be made regarding its inclusivity. Indeed, international law, and even cosmopolitan law, have been far from the ideal perspective of including all those affected, especially in two respects: women and citizens of non-Western nations have always been largely excluded from both the ethical and legal discourse on the content of international law norms. Unfortunately, we can see that the elimination of this deficiency has not yet been the focus of efforts to bring about a constitutional turn in international law. Accordingly, if one wants to achieve the

[27] Jan Klabbers, "Setting the Scene", in Klabbers, Peters and Ulfstein (eds.), 2009, pp. 1–44, see *supra* note 20.

[28] Vicki C. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford University Press, 2010; Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart, Oxford-Portland, 2013.

highest standards of inclusivity in international law in general, and in cosmopolitan law in particular, their discourses must be opened up to gender issues[29] and to the perspectives of non-Western global citizens.[30]

7. Legitimacy

The fact that cosmopolitan law is to be considered binding on all state and non-state actors poses a significant legitimacy problem. The *erga omnes* obligations circumvent the principle of consent as the basis of legitimacy of binding norms in international law and, therefore, require the development of strategies that justify the obligation to comply with norms by actors under cosmopolitan law – especially states – even in the absence of their explicit consent. The problem arises not only with regard to norms that are explicitly *erga omnes* – such as the provisions of the UN Security Council or *jus cogens* norms – but also for some legal instruments of 'global law' created by international organizations: although not explicitly generally binding, these instruments are understood in such a way that actors who reject them are effectively excluded from relevant international interactions.[31] In addition, the practice has become established that the decision-making bodies of these organizations pursue normative developments that do not seek further approval from the signatory parties and are nevertheless considered binding.

So far, five main strategies have been developed to solve the problem. The first reduces legitimacy to legality: insofar as the decisions taken respect the rules for norm production, they should be considered legitimate.[32] However, this is a non-solution, as it only shifts the problem from the derived norms to the legal instruments that should regulate their production. These hierarchically higher legal instruments – in essence, international treaties – must then, in turn, also be legitimized, which cannot be done by simply complying with legality, because one of the tasks of such instruments is precisely to define the conditions for legal compliance. The fact that legal instruments

[29] Hilary Charlesworth, "Feminists Critiques of International Law and Their Critics", in *Third World Legal Studies*, 1995, vol. 13, no. 1, pp. 1–16.

[30] Bhupinder S. Chimni, "Third World Approaches to International Law: A Manifesto", in *International Community Law Review*, 2006, vol. 8, no. 1, pp. 3–27.

[31] Armin von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions*, Springer, Heidelberg, 2010.

[32] Rüdiger Wolfrum, "Legitimacy of International Law and the Exercise of Administrative Functions", in *German Law Journal*, 2008, vol. 9, no. 11, pp. 2039–2059.

that lay down the conditions of the legality of derived norms cannot be justified by the same conditions – which would be a circular argument – means that they can only be considered legitimate if they are, in turn, the result of general consent. But this is precisely not the case, since cosmopolitan law, according to its definition, is not grounded on general consent. In other words, the argument that downgrades the legitimacy of cosmopolitan law to its legality is affected by circularity inasmuch as the legitimacy of the cosmopolitan norms is assumed to be derived from a hierarchically higher layer of legal instruments – that is, from international treaties – which nevertheless require justification themselves, since they are established by free acts of will and, therefore, cannot be regarded as self-evident. Moreover, the strategy is equally inconclusive when we consider the consent-free development of the competences of international organizations.

Two other strategies attempt to circumvent the difficulties of legitimizing cosmopolitan law by relying on rational justifications that more or less explicitly dispense with consensus-oriented or deliberative processes, regardless of whether these processes are initiated by states or by other international actors. The first of these two strategies coincides with the strand of the theory of the 'constitutionalization of international law' which I referred to in the previous section as the 'ontological variant'. Basically, it draws from the tradition of *natural law* and presupposes that cosmopolitan norms are justified by the objective existence of values and interests shared by the whole of humanity. On that basis, it is then an essential task of international courts to interpret and implement the legal instruments that constitute the cosmopolitan dimension of international law,[33] or what has also been defined as the "law of humankind".[34] However, this approach has at least two major deficits. Firstly, the epistemological status of the assertion of the existence of a 'humanity' that shares the same values and interests is precarious since the claim is not self-evident, nor is it grounded on sufficient external (empirical) substantiation. Secondly, precisely because the humanity, allegedly united by common values and interests, is regarded as a given reality that is simply to be discovered, it is unsurprising that the substance of what is deemed to be an undeniable truth is considered enshrined in legal documents

[33] Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", in *Collected Courses of The Hague Academy of International Law*, 1999, vol. 281; Mehrdad Payandeh, *Internationales Gemeinschaftsrecht*, Springer, Heidelberg-New York, 2010.

[34] C. Wilfred Jenks, *The Common Law of Mankind*, Praeger, New York, 1958.

and in their interpretation by international courts, instead of being entrusted to deliberative processes of legitimation, for instance, through parliamentary assemblies or direct participation of the stakeholders. As a result, this strategy tends to underestimate the importance of political-deliberative processes and overestimate the role of the courts.

The third strategy also circumvents the demand for consent to cosmopolitan law by referring to an allegedly higher rationality. This time, however, the superior rationality is not based on natural law, but on the systems theory.[35] In concrete terms, this means that transnational constitutional regimes are justified insofar as they provide an increase in functional efficiency. If high systemic services are provided and the recipients of these services are satisfied with their quality, it is assumed that deliberative consent *ex ante* can be replaced by passive acceptance *ex post*, that is, by the so-called "output-oriented legitimacy".[36] The approach of systems theory also gained relevance as the arguably most significant justification of the phenomenon generally known under the label of '*global governance*'. This notion, which became particularly influential between the end of the twentieth century and the beginning of the twenty-first century, contended that the control of worldwide impacting economic and social processes should be realized through a network of international organizations.[37] The institutions of global governance – based on an essentially efficiency-related understanding of the normative framework of 'global law' and composed of representatives of national governments – are presumed to be largely independent of domestic hierarchies in their decision-making processes. Taking up such an approach unquestionably reinforces the executive power, in particular against national legislatures, whereas courts – both national and international – retain a certain capacity to review the law of global governance.[38] However, judicial control is something quite different from democratic legitimation,

[35] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization*, Oxford University Press, 2012.

[36] Fritz Wilhelm Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford University Press, 1999.

[37] Armin von Bogdandy, Philipp Dann and Matthias Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", in *German Law Journal*, 2008, vol. 9, no. 11, pp. 1375–1400; Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, "From Public International Law to International Public Law: Translating World Public Opinion into International Public Authority", in *European Journal of International Law*, 2017, vol. 28, no. 1, pp. 115–145.

[38] Eyal Benvenisti, *The Law of Global Governance*, Martinus Nijhoff, The Hague, 2014.

which must imply some kind of active contribution by those who have to abide by the rules. Therefore, advocating a technocratic approach to cosmopolitan law always implies, as its most negative consequence, the substantial disempowerment of those affected, thus resulting in a view with undeniably post-democratic features.

The fourth strategy draws attention back to the indispensability of reflexive and discursive processes in order to legitimize cosmopolitan law. At the same time, however, it is also assumed that such processes in international law cannot have a democratic form, that is, they cannot develop procedures that are equivalent to those that arise from the constitutional structure of democratic states. The consequence is that the normative claim emerging from the deliberative process must be weakened, in the sense that the procedure is no longer implemented through a discourse characterized by general participation and concluded with a reflexive decision by precisely those who have to abide by the rules. Rather, the discourse here is mainly focused on procedures that make it possible, for at least some of the most affected individuals or for their representatives, to submit requests and contestations, to which the decision-makers must then respond with reasonable justifications.[39] Indeed, 'reasonableness' – as the notion to which this approach essentially refers – means that measures have to be justified by providing convincing reasons. In the end, however, the substantial decisions are taken away from those who have to possibly bear the brunt of the consequences, and left to essentially bureaucratic bodies. The relevance of the processes of contestation and reasonable justification should by no means be underestimated. Yet, their weaknesses should not be concealed either. In fact, expecting that the holders of public power deliver good reasons for their decisions is not tantamount to guaranteeing effective and inclusive participation by the individuals affected by those decisions. In other words, one should not lose sight of the great normative difference that separates the democratic procedure, which guarantees the participation of all those affected and places the final decision in their hands, from a process in which real participation is highly selective and the assessment of the justifications for decisions provided by those in power is, ultimately, only the competence

[39] Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", in *European Journal of International Law*, 2004, vol. 15, no. 5, pp. 907–931; Mattias Kumm, "On the Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State", in Jeffrey L. Dunoff and Joel P. Trachtmann (eds.), *Ruling the World?*, Cambridge University Press, 2009, pp. 301 ff.

of the courts. As a result, processes of contestation and reasonable justification should be deemed useful to a better legitimation of decisions by the holders of public power only insofar as they integrate – but not replace – more inclusive and participative options, such as the practices implemented by indirect or direct democracy.

The fifth and final strategy corresponds to the second variant of the theory of the 'constitutionalization of international law' and is fundamentally rooted in the conceptual framework of the communicative paradigm of social order.[40] This is the only approach that really takes the democratic rules seriously and wants to uphold them in cosmopolitan law without any comforting shortcuts. In this case, the democratization of international organizations and the recourse to global civil society should ensure the legitimacy of cosmopolitan international law that has been called into question by the loss of the general consent of all states. Since unanimous legitimation by all states is lacking, the proponents of this fifth strategy propose to replace it with 'bottom-up' processes that appeal directly to those affected. This should be done by means of the so-called "dual democracy".[41] On the one hand, to ensure robust legitimacy beyond national approval, all international organizations would be democratized, for example, through the introduction of parliamentary assemblies into their institutional framework or, if these assemblies already exist, by way of increasing their competences. On the other hand, the international community would also have to exert pressure so that the internal legal order of all states takes on democratic features.

This fifth and last solution seems to be by far the most convincing, since it understands legitimacy in cosmopolitan law in the only way that is suitable for a post-metaphysical society, namely, as the result of the reflexive participation of all those affected. In other words, according to this approach, there is no legitimacy of political decisions without democracy. Yet, what seems the most rational proposal on paper is not always easy to implement. The

[40] Sergio Dellavalle, "Legitimacy and Rationality in National and International Law-Making", European University Institute, Academy of European Law, European Society of International Law Working Paper No. 2022/09, 2022, pp. 1–24 (https://www.legal-tools.org/doc/nixwerpo/); Sergio Dellavalle, "What Is Cosmopolitan Law", Policy Brief Series No. 159 (2024), Torkel Opsahl Academic EPublisher, Brussels, 2024 (https://www.toaep.org/pbs-pdf/159-dellavalle/).

[41] Anne Peters, "Dual Democracy", in Klabbers, Peters and Ulfstein (eds.), 2009, pp. 263–341, see *supra* note 20.

problem is not so much that the democratization of the world order is fundamentally impracticable: sensible proposals have been made and are nowhere near as unrealistic as some might believe.[42] The difficulty lies rather in the lack of political will, which has certainly been exacerbated by recent developments and the increase in global conflicts. In fact, it is not easy to be optimistic about the possibility of democratizing the world order when many of the states that should implement the democratic *cosmópolis* are not democratic themselves in their internal structure. Since it is difficult to imagine how this situation could be overcome in the foreseeable future, we are justified to think of putative solutions, such as the establishment of permanent advisory bodies at international organizations, in which representatives of non-governmental organizations ('NGOs') and affected persons' organizations ('APOs') would sit, endowed with an unequivocal right to be heard.[43] Even though it goes in the right direction as an endeavour to strengthen bottom-up legitimacy, the involvement of non-state actors is itself not free from shortcomings. In fact, organizations of the transnational civil society are generally not recognized to have the status of subjects of international law. Furthermore, the empowerment of stakeholders through non-state actors remains highly selective and substantially incomplete, whereas the realization of full-fledged democratic legitimation requires rules that guarantee the potential involvement of *all* citizens. Finally, since the representation of stakeholders by NGOs and APOs is not conveyed through processes that guarantee adequate participation, the rationale at the basis of the legitimacy that can be added to cosmopolitan law-making by this kind of non-state actors risks being limited again to the assumption that some agents within the deliberative process possess a higher competence.

Therefore, considering the difficulties affecting the perspective of the parliamentarization of international organizations and the limits impacting on the empowerment of NGOs and APOs, we have to conclude that none of the solutions developed so far guarantees a complete democratic legitimation

[42] David Held, *Democracy and the Global Order*, Stanford University Press, 1995; Daniele Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*, Princeton University Press, 2008.

[43] Jochen von Bernstorff, "New Responses to the Legitimacy Crisis of International Institutions: The Role of 'Civil Society' and the Rise of the Principle of Participation of 'The Most Affected' in International Institutional Law", in *European Journal of International Law*, 2021, vol. 32, no. 1, pp. 125–157.

of cosmopolitan law. Nonetheless, such an assertion does not imply that cosmopolitan law is entirely illegitimate. Rather, it has to be acknowledged as *incompletely legitimate from the democratic point of view*. This notwithstanding, it is justified – and, thus, to some extent, also legitimate – as an instrument to tackle planetary issues, in particular inasmuch as none of the issues can be successfully addressed by individual nation-states – and cosmopolitan law is the best tool that humankind as a whole has in order to address those existential threats. In fact, as I will explain in a later section, cosmopolitan law is a 'command of reason'.

8. The Crisis of Cosmopolitan Law

The times are not favourable for international law – and even less so for cosmopolitan law. Five phenomena threaten the idea of a legal system for all humanity and its practical implementation. The first problem is *the decline of the rules-based international order*.[44] Although this system itself was certainly not without flaws and its implementation often failed to deliver on its promises, it is quite undeniable that it explicitly embodied universalistic principles, for example, by assuming the worldwide validity of human rights and the global pursuit of freedom, democracy and self-determination. Since democratic states are more likely to identify with the liberal principles of the rules-based international order and are more prone to supporting them, the crisis of the normative framework that has shaped international law and international relations over the past 80 years is also closely linked to – and may be seen as a consequence of – *the retreat of democracy*, the second challenge to cosmopolitan law.[45] The phenomena currently straining the internal social and political balance of even the most robust democracies have led to a weakening of the self-confidence of the liberal world, with the corresponding *increased assertiveness of autocratic regimes*, which represents the third challenge.[46] This ushers in a new era of 'great power rivalry' in which the democratic order is once again pitted against autocracy, as it happened so

[44] Chatham House, "Challenges to the Rules-Based International Order", Royal Institute of International Affairs, 2015.

[45] Freedom House, "Freedom in the World 2021: Democracy Under Siege", 2021; Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, W.W. Norton & Company, New York, 2024.

[46] Anne Applebaum, *Twilight of Democracy*, Doubleday, New York, 2020; Anne Applebaum, *Autocracy, Inc.: The Dictators Who Want to Rule the World*, Allen Lane, London, 2024.

often in history.[47] Growing tensions on the international scene and the fragmentation of the world order have also led to significant *deglobalization* – the fourth challenge – as a further indication of the decline of the cosmopolitan perspective. While it is reasonable to assume that democratic societies are better able to use their resources than autocratic ones, we must be aware of the factors that could weaken democracies from within. Open markets in particular pose the risk of depriving domestic producers of their assets and jeopardizing the jobs that depend on them.[48] The result of an unbalanced process of globalization was *populism*, the fifth and final challenge to cosmopolitan law.[49] In short, populism is characterized by two assumptions: firstly, it distinguishes between the honest and hard-working 'people' and the allegedly corrupt 'elites'; and, secondly, it links the 'elites' to the chimerical project of a global disempowerment of the native populations, often by resorting to well-established and never-dismissed racist and anti-Semitic tropes. However, if the self-determination of individual peoples necessarily depends on the rejection of any kind of global integration – as the supporters of populist movements claim – then there is no room for cosmopolitan law. The slogan that calls for 'making one's own country great again' while ignoring any moral or legal global obligation is, in fact, the triumph of particularism and a tombstone for any cosmopolitan project.

9. A Caveat and a Command of Reason

The existence of these elements of crisis should not imply that there can be no future for the ambitious project of cosmopolitan law. Before we move on to the glimmer of hope, however, a caveat should be made. In the event that international organizations are abused by autocracies to advance their particularistic goals, democratic states are morally justified in withdrawing from co-operation within these institutions. Nevertheless, although democracies may have good reasons not to seek international co-operation under unfavourable circumstances, they should never do so by resorting to particularism and by exclusively relying on their selfish

47 Matthew Kroenig, *The Return of Great Power Rivalry*, Oxford University Press, 2020.

48 Charles Boix, *Democracy and Redistribution*, Columbia University Press, New York, 2003; Thomas Piketty, *Capital in the Twenty-first Century*, Belknap-Harvard University Press, Cambridge, 2014.

49 Cas Mudd and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction*, Oxford University Press, 2017.

interests. This principle implies that democratic states must not themselves violate the rules of whose breach they rightly accuse their autocratic counterparts. Furthermore, a just cosmopolitan order should work to the advantage of all individuals, groups and nations worldwide, and not of a minority of them. In order to do so, it has to explicitly tackle the uneven distribution of the burdens that derive from the climate crisis, as well as questions concerning the redistribution of wealth and opportunities.[50] Even if democratic states are allowed to act outside international co-ordination under certain conditions, they should always keep in mind their universalistic claim and respect the duties that arise from their belonging to a worldwide community of free and equal citizens of the *cosmópolis*.

This last admonition also paves the way for identifying a glimmer of hope for cosmopolitan law, or rather for highlighting its indispensable need, especially in times of deep crisis. Despite its weaknesses and current difficulties, cosmopolitan law is the best – and in many ways, the only – tool at our disposal for dealing with planetary problems. Indeed, humanity as a whole is currently facing existential challenges like in no other period of its existence. Climate change is making parts of our planet virtually uninhabitable and many others increasingly vulnerable to environmental disasters. In doing so, it is causing great suffering and is destined to trigger migration movements of unprecedented proportions. The loss of biodiversity is depriving us of the natural beauty that we should instead cherish and protect, while at the same time compromising the provision of ecosystem services that are essential to ensuring decent living conditions, or even the very survival of the human species. Inequality in terms of wealth and education makes it difficult to address other problems on the planet. Moreover, artificial intelligence can be used sensibly as a powerful tool to improve life, but could also spiral out of control and become a threat to democratic coexistence and to the most essential prerequisites for meaningful and truthful human interactions. None of these problems can be successfully addressed by individual nation-states, not even by the most powerful among them. Since humanity as a whole is at risk, resorting to legal instruments that provide for global solutions is an

[50] Thaza V. Paul, "Globalization, Deglobalization and Reglobalization: Adapting Liberal International Order", in *International Affairs*, 2021, vol. 97, no. 5, pp. 1615 ff.

indisputable command of reason. If humanity does not want to go down in history as the first animal species to bring about its own extinction, it will have to make very good use of cosmopolitan law.

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In Defence of Cosmopolitan Law

Sergio Dellavalle

International law has a long history but a relatively short theoretical tradition. This contradiction can be explained by the fact that it was initially limited to the practical goal of maintaining or restoring peace between conflicting individual states. Over time, however, it became clear that this task can only be fulfilled if international law qualifies as cosmopolitan law, that is, as a legal system for the whole of humankind.

From the point of view of the relation between law, ethics, and practical philosophy, the unavoidable cosmopolitan dimension of international law implies that the legal system regulating the relations between states with the task of protecting peace and universal human rights must be founded on a discourse that includes, at least potentially, all human beings on a global scale. Such a step requires not only the development of a robust conceptual framework, but also convincing answers to three challenges not posed with the same urgency in the traditional *jus gentium*, namely inclusivity, normativity and legitimacy.

The first term refers to the conditions for the discourse on cosmopolitan law, as well as for the norms that should derive from it, to be capable of involving, at least potentially, not only all states but also all individuals and social groups on a worldwide scale. 'Normativity' means that principles and rules resulting from the discourse on the necessity of a cosmopolitan order must also be cast into positive law. 'Legitimacy' reminds us that new paths must be explored if we rely on a globally binding law that has cosmopolitan validity and, nonetheless, does not intend to disempower the individual states as the primary addressees of international law. To conclude, the question arises as to what future international law in general and, most specifically, cosmopolitan law might have in a world that once again seems to be increasingly in the grip of the particularistic interests of individual states.

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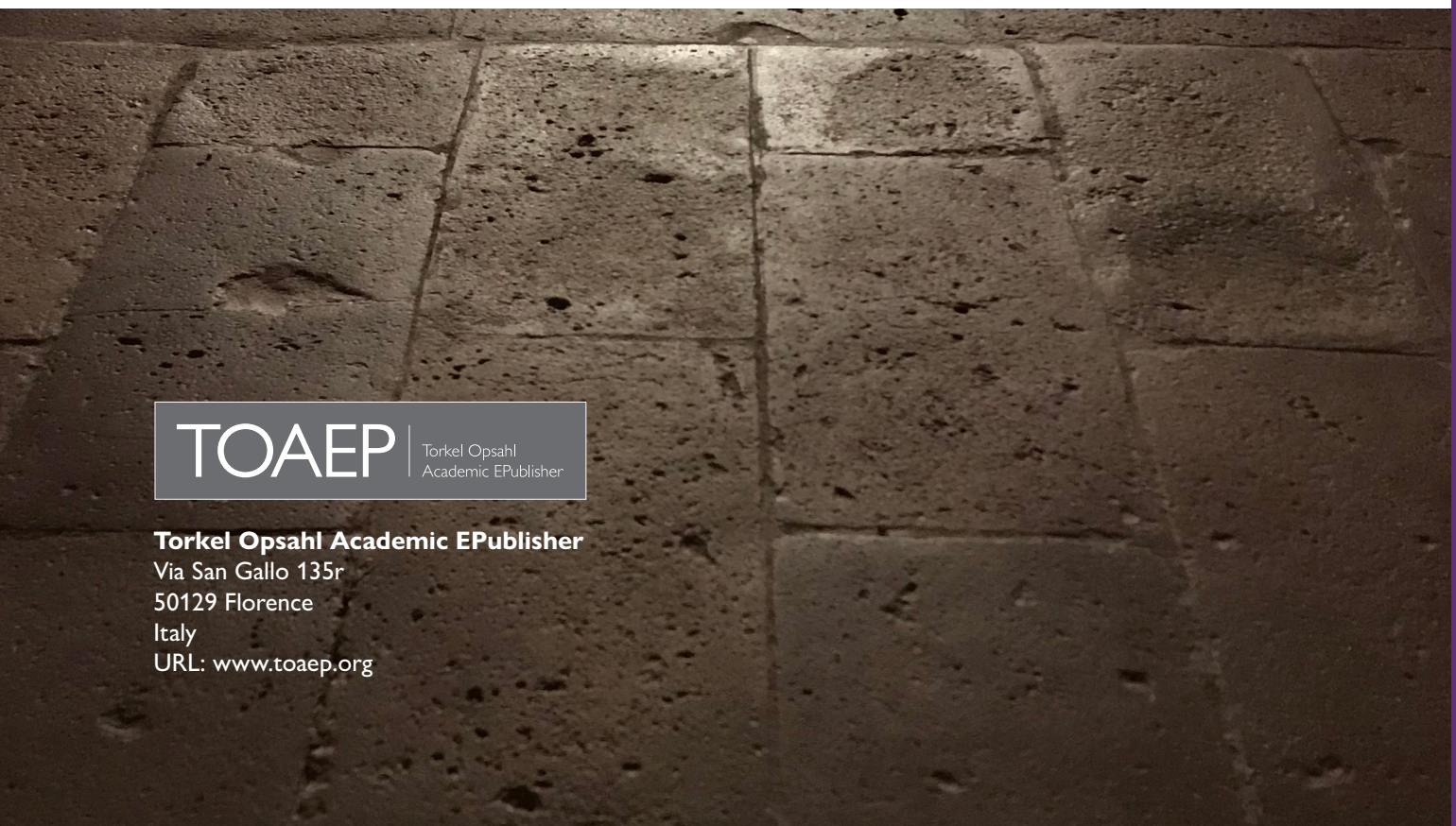

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