
Gaius, Vattel, and the New Global Law Paradigm

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Abstract

Emer de Vattel (1714–1767), in his influential work The Law of Nations, established a new international statist paradigm which broke with the classical partition of the law into the three realities of ‘persons, things and actions’ (personae, res, actiones). This new paradigm substituted the state for the person, downgraded the generic concept of ‘things’ to the obligations among states in their relations, and changed the focus of the concept of ‘action’ to that of ‘war’ as a legal remedy to resolve conflicts between and among states. This international paradigm (or statist paradigm) has survived almost up to our time in international praxis. Nonetheless, today the statist paradigm appears to be in every way insufficient, since it does not consider humanity as a genuine political community, nor does it reflect the three-dimensionality of the global law phenomenon. The transformation of the law that governs our international community (international law) into a law that is capable of properly ordering the new global human community (global law) demands the creation of a new paradigm, originating in the following conceptual triad: global human community, global issues, and global rule of law. In the construction of this new global paradigm, cosmopolitan constitutionalism could play a key role.

1 Introduction

European jurists of the 16th, 17th, and 18th centuries forged international legal doctrines based on the conceptual categorizations of Ancient Roman law. The American jurist and diplomat Henry Wheaton (1745–1848) recognized this fact over 150 years ago with the following words, which are themselves not exempt from criticism: ‘[t]hough the Romans had a very imperfect knowledge of international morality as a science, and too little regard for it as a practical rule of conduct between states, yet their

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national jurisprudence contributed to furnish the materials for constructing the new edifice of public law in modern Europe'.¹

In classical international law we easily find the mark both of Roman fetial law (*ius fetiale*) and the law of nations (*ius gentium*) in its various forms: diplomatic/consular rules (*ius legationis*), the law of war (*ius belli*), etc.² We also come across the most genuine aspects of the civil law (*ius civile*), as well as the natural law (*ius naturale*). A careful reading of the works of thinkers like Alberico Gentili, Hugo Grotius, Richard Zouche, or Cornelis Bynkershoek confirms this point. However, what I wish to outline in these pages is the relationship which exists between the structuring of *The Law of Nations* (1758),³ written by the great Swiss jurist, Emer de Vattel (who dominated international legal science until the beginning of the 20th century), and the well-known *Institutes* of the enigmatic Roman jurist, Gaius.⁴ I believe this is worth our timely consideration, as hitherto insufficient attention has been paid to this important link in the development of global legal history.

The tripartite division of the Law into persons, things, and actions that Gaius offers us was adopted and subsequently institutionalized by Emperor Justinian in his *Institutes*⁵ (from AD 533), one of the most influential teaching works of universal legal literature. This tripartite division of the law has provided order and structure to the teaching of both the *civil law* and the *common law* for centuries, serving as a theoretical paradigm or conceptual juridical milestone that has contributed to the striking development of the law in the West. Moreover, it has maintained a certain amount of unity within the genuine differences that otherwise exist when comparing the civil law and the common law traditions.

Many times, paradigms end up being expressed by using simple words or phrases, which lay the foundations for subsequent doctrinal development. As examples we see the revolutionary triad of 'Liberty, Equality and Fraternity' or the traditionalist classic of 'God, King and Country', among others. These conceptual triads have been used to explain, rationalize, and forge concrete political doctrines, setting them up upon the solid bases of authentic paradigms. Something similar happened in the Western legal

¹ H. Wheaton, *History of the Law of Nations in Europe and America* (1845), at 29.

² See, as regards this topic, R. Domingo, *The New Global Law* (2010), at 3–11.

³ E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (1916), 2 vols. Vol. iii contains an English translation prepared by Charles G. Fenwick, with an Introduction by Albert de Lapradelle, whose French original appears in vol. i. A more recent English edition has been published by B. Kapossy and R. Whatmore, *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (2008). Unless otherwise noted, we will cite the language from this latest edition.

⁴ For more on this jurist see T. Honoré, *Gaius* (1962); Diósi, 'Gaius der Rechtsgelehrte', in H. Temporini (ed.), *Aufstieg und Niedergang der römischen Welt II. Prinzipat XV* (1976), at 605–631 with an extensive bibliography put together by Ronald Wittmann (at 623–631). More recently see Liebs, 'Gaius', in R. Domingo (ed.), *Juristas universales I. Juristas antiguos* (2004), at 179–184, with bibliography. Regarding the discovery of Gaius' *Institutes* see C. Vano, *Der Gaius der Historischen Rechtsschule: eine Geschichte der Wissenschaft vom römischen Recht* (2008).

⁵ *Justinian's Institutes* 1.2.12 (ed. Paul Krüger, 16th edn. 1954), i: '[o]mne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones'.

tradition with the Gaian–Justinian tripartite division into *persons*, *things*, and *actions*, especially in the area of private law.

In Vattel's *Le droit des gens*, the Gaian–Justinian tripartite division into persons–things–actions was quite consciously substituted by the triad of 'States, Relations-between-States, and War'. In effect, in the international legal sphere, the state, and not the person, became the most important subject (and focus) of the law, while 'things' were reduced to the role of 'rights and duties running between states'. The way of resolving conflicts between states, after all diplomatic means had been exhausted, was war, and not some form of legal action. This new Enlightenment-imbued tripartite division has become outdated in our time due mainly to the renewed importance that the person is acquiring in the international order and to the fact that humanity as a whole, because of globalization, has become a political community.

These new circumstances force us to exchange the statist international paradigm, which has become obsolete, for a new cosmopolitan paradigm which brings back the notion of the person as the defining and integral component of the global human community.⁶ Many steps have been taken in this direction, especially after the issue of the Universal Declaration of Human Rights in the last century. Nevertheless, such steps are not by any stretch of the imagination sufficient for today's requirements in light of rampant ongoing globalization. In order to reflect the reality on the ground, a long road lies ahead for humanity and the Law. With this end in mind, the role of cosmopolitan constitutionalism is key, one which has been freed from the conceptual demands of the nation-state.⁷ This is important, since humanity, although existing as a moral reality, must somehow be given shape as a global political community, one that differs from the society of sovereign states. The global human community needs a new global legal paradigm for this reality, one that is pan-human in nature and goes beyond the international statist paradigm. This global paradigm must also be anchored in the same classical legal paradigm that has shaped both the common law and the civil law systems. One might accuse me of a certain Western bent in my thoughts and reflections, and one would be right. There are many things that the East has brought us, but the law, and legal science as a whole, has been principally a product of the West: *ex Oriente lux; ex Occidente, ius* (light from the East; law from the West).⁸

⁶ Joseph Weiler uses harsh words when referring to this issue: see Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547, at 558: '[t]he individual in international law seen, structurally, only as an object of rights but not as the source of authority, is not different from women in the preemancipation societies, or indeed of slaves in Roman times whose rights were recognized – at the grace of others'.

⁷ Cf. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State', in J.L. Dunoff and J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), at 258–324. Cf. also Kumm, 'The Best of Times and the Worst of Times. Between Constitutional Triumphalism and Nostalgia', in P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?* (2010), at 201–219.

⁸ In this vein see R. Domingo, *Ex Roma ius* (2005).

2 The Tripartite Gaius–Justinian Division of the Law into Persons, Things, and Actions

In Book I of his *Institutes*, Gaius states, ‘*Omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones*’, which is to say, ‘The whole of the law observed by us relates either to persons or to things or to actions’.⁹ This classification is in fact the compass which completely guides the development of this important work, which is broken down into four books: the first relates to persons (paternal power, marital power, guardianship, and curators); the second and the third deal with things (property, inheritance, and obligations) – the most extensive portion of the work; and the fourth deals with actions (legal actions, real actions, personal actions, civil actions, etc.). Gaius himself probably was not the author or originator of the tripartite division, but it was he who, as a law professor in the provinces, brought together in his *Institutes* the traditional legal *divisio* used by other legal teachers and authors. However, this question is not of immediate importance to us at present, and will not be examined here.¹⁰ Nor will we look at the detailed development of the *persona*, *res*, and *actio* in Roman legal thought.¹¹ That will be for another time.

On this occasion, we will limit ourselves to exploring their common meanings. The term ‘person’ was not a technical legal concept, as it is in our times. Roman jurists did not elaborate a legal theory based on personality or personhood, nor did they deal with human rights concepts as they are understood today. The person (*persona*) included all human beings, whether free or slave,¹² regardless of whether he or she was considered a subject of rights and duties, and regardless of whether or not he or she had legal capacity. The legal unit *par excellence* in the Roman world was the family, governed by the *pater familias*. All its members, even if they were Roman citizens, were subject to his paternal authority (*patria potestas*). In fact, Roman law was primarily shaped as a law between families governed by a *pater*. This scheme of things, at least in part, passed into modern international law during the *Ancien Régime* as the law which governed relations between nations ruled by monarchs. Moral or legal persons were not considered persons in the strict sense.¹³

⁹ Gaius, *Institutes* 1.8 ((ed. F. de Zulueta, 1946), at 4). This statement also appears in the *Digest of Justinian* 1.5.1 (ed. T. Mommsen and P. Krüger, 16th edn, 1954), i.

¹⁰ Several interesting arguments against the authorship of Gaius may be found in W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, revised by P. Stein, 1963), at 56–57 with bibliography.

¹¹ As regards the concepts of person, thing, and action in Roman law, one may generally refer to the excellent explanations provided by M. Kaser, *Das römische Privatrecht* I (2nd edn, 1971), at 270 (*persona*), 376 (*res*), 223–224 (*actio*), containing an extensive bibliography. In English see Buckland, *supra* note 10, at 56–61 (*persona*); 180–186 (*res*), and 604–606 (*actio*). Also very useful is F. de Zulueta’s commentary on Gaius’ *Institutes*: see F. de Zulueta, *The Institutes of Gaius. Part II. Commentary* (1953), especially at 23–24 (*persona*), 55 (*res*), and 221 (*actio*).

¹² Gaius, *Institutes*, *supra* note 10, at 1.9: ‘[e]t quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi’ (‘the primary distinction in the law of persons is this, that all men are either free or slaves’).

¹³ Cf. in relation to this Domingo, *supra* note 2, at 126–128.

The word ‘thing’ (*res*) was used by Roman jurists in its most generic sense, which touched upon people’s property, which was made up of tangible things (*quae tangi possunt*) and intangible things (*quae tangi non possunt*), as well as all things that may be the object of litigation (*res litigiosa*): rights and duties, obligations running between parties, contracts, private damages and private torts, acquisitions or purchases made by persons pursuant to some sort of legal power (*in potestate*), etc. The law of things (*ius rerum*) governed all that was capable of being valued or appraised and, for this reason, did not cover freedoms, or paternal authority (*patria potestas*), or those laws dealing with people living in a state (*civitas*). These were purposely dealt with under the law of persons (*ius personarum*).

Finally, the law referred to actions. *Actio* (from *agere*, to act) had a very specific technical meaning in the Roman classical form of ordinary civil procedure. It meant ‘to act in a lawsuit’. The action encompassed, in a formal sense, the plaintiff’s act and, more generally, all acts of parties before the magistrate (proceedings *in iure*) or the judge (proceedings *apud iudicem*) in the so-called formulary system. Each action was associated with a required set of clauses or *formula* which encapsulated the issue which the judge had to address in the dispute. Gradually over time, and especially after the establishment of a new extraordinary procedure (*cognitio extra ordinem*), the meaning of *actio* came to include all the forms of litigation until it became synonymous with the term ‘legal procedure’.¹⁴

Gaius, and later the Emperor Justinian, steeped in the Roman legal tradition, perceived this tripartite connection of *personae–res–actiones* both as logical and functional, and capable of accommodating the law as a whole. Since law was created to protect individual persons (*hominum causa*),¹⁵ all analysis of law (*omne ius*) would then by necessity flow from the person, and would by necessity seek to resolve any object (‘thing’, *res*) of a dispute (arising among persons) by means of taking actions (*actiones*). Thus, even though we have analysed persons, things, and actions as independent elements, all juridical relationships occurring within various legal systems would require the interacting of the three.¹⁶

As universalized by Justinian, the abovementioned Gaian division was dominant for many centuries in Western legal science, both in the civil law and the common law traditions. This was especially true in the area of private law. However, this does not necessarily mean that it exclusively pertained to the ambit of the private law practitioner or theorist. What is more, the Romans did not differentiate between private law and public law with our contemporary definitional precision (which is, without a

¹⁴ Cf. F. Schulz, *Classical Roman Law* (1951), at 24–26.

¹⁵ *Justinian’s Institutes*, *supra* note 10, at 1.2.12: ‘nam parum est ius nosse, si personae, quarum causa statutum est, ignorentur’; cf. also Hermogenianus, *Digest of Justinian* 1.5.2 (ed. T. Mommsen and P. Krüger, *Digesta. Corpus Iuris Civilis*, vol. I, 16th edn, 1954): ‘[c]um igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris, ordinem edicti perpetui secuti et his proximos atque coniunctos applicantes titulos ut res patitur, dicemus’.

¹⁶ For more on this see d’Ors, ‘Personas-cosas-acciones en la experiencia jurídica romana’, 20 *Historia, Instituciones, Documentos* (Seville) (1993) 287, at 288: ‘[t]oda relación jurídica debe verse como conjunción de los tres términos’.

doubt, excessive).¹⁷ In this sense, I do not entirely agree with Francis de Zulueta when he states in his commentary on a piece of Gaius's *Institutes* (at 1.8): 'we expect, but are not given, a preliminary division of law into public and private, with an announcement that the latter is to be our subject (perhaps faintly implied by *ius quo utimur*)'.¹⁸

In the civil law tradition, the tripartite division into persons, things, and actions received a strong push forward when it was utilized to frame the French Civil Code (1804), as well as many other European and Latin-American codes that followed its structure. The *Code civil* dedicates Book I to persons (*Des personnes*), and Books II (*Des biens et des différentes modifications de la propriété*) and III (*Des différentes manières dont on acquiert la propriété*) to things. Although actions were originally to be dealt with in a separate Book IV, in the end, French jurists put this into a separate procedural code (the *Code de procédure civile*), which came into effect in 1806. In Germany, the Gaian–Justinian tripartite division was notably more diluted (although not entirely obscured) in the German Civil Code (the famous BGB of 1900), due to the importance attributed to the General Part of the Code (*Allgemeiner Teil*) by the Pandectists.¹⁹

The persons–things–actions tripartite division entered the Anglo-American common law tradition via Henry de Bracton's (c. 1210–1268), *De legibus et consuetudinibus Angliae*, which takes the exact wording of Gaius's *Institutes*, and applies it instead to the laws of England: 'the whole of the law with which we propose to deal relates either to persons or to things or to actions, according to English laws and customs'.²⁰

A factor in the success of the Gaian–Justinian tripartite division in the common law tradition was its influence, at least in part, on the structure of the well-known *Commentaries on the Laws of England* by William Blackstone (1723–1780),²¹ which helped to educate the majority of British and American jurists of the 18th and 19th centuries. In Book I of his *Commentaries (Of the Rights of Persons)*, Blackstone refers to persons (the rights of individuals, Parliament, King, magistrates, the clergy, etc.); in Book II (*Of the Rights of Things*), he deals with things (property, English tenures, inheritance,

¹⁷ M. Kaser, *Das römische Privatrecht* (2nd edn, 1971), i, at 197: '[v]ielfach erweisen sich dir beiden Begriffe [ius publicum and ius privatum] als untechnisch und mehrdeutig'. The main differences between the two in the legal sources are those appearing in Justinian's *Institutes* 1.1.4: 'publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet' ('public law relates to the welfare of the Roman State; private law relates to the advantage of the individual citizen').

¹⁸ De Zulueta, *supra* note 11, at 23.

¹⁹ A detailed study touching upon all these issues is the monumental work coordinated by H. Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte III. Das 19. Jahrhundert* (1976–1988), i–v.

²⁰ H. de Bracton, *De legibus et consuetudinibus Angliae (On the Law and Customs of England)* (ed. G.E. Woodbine and S.E. Thorne, 1968), ii, at 29: 'sed quia omne ius de quo tractare proponimus pertinet vel ad personas, vel ad res, vel ad actiones secundum leges et consuetudines Anglicanas'.

²¹ W. Blackstone, *Commentaries on the Laws of England* (ed. W. Morrison, 2001), i–iv. In *Commentaries*, Book I, para. 122 (i, at 91), Blackstone notes that the definition of the Law that Cicero offers in his *Philippicae* (or *Philippics*) (*Philippic XI*, 28) decisively influenced the division of his commentaries ('[e]st enim lex nihil aliud nisi recta et a numine deorum tracta ratio imperans honesta, prohibens contraria'). This definition was later taken up by H. de Bracton, *supra* note 20 (Bk I, para. 11; ii, at 22): 'tamen specialiter significat sanctionem iustam, iubentem honestam, prohibentem contraria' ('its special meaning is a just sanction, ordering virtue and prohibiting its opposite').

etc.); in Book III (*Of Private Wrongs*), he basically covers actions and civil proceedings (the courts, remedies, injuries, etc.); and in Book IV (*Of Public Wrongs*), he considers crime and criminal proceedings (crimes, felonies, offences, courts and criminal jurisdiction, prosecution, trial, judgment, execution, etc.).

The fact that some of the most influential teaching works in the Western legal tradition have followed the order and structuring of the Gaian–Justinian tripartite division was of great importance to the forging of the Western legal paradigm. This meant that future generations received this classical paradigm (which, I might note, is also present in certain Asian countries such as Japan and Korea), which has enlightened legal thought for centuries and continues to do so today.

3 The Tripartite View of Emer de Vattel: States, Relations-between-States, and War

The tripartite division into persons, things, and actions which, as we have noted, substantially shaped the classical legal paradigm was cleverly altered by Emer de Vattel (1714–1767)²² in the structuring of his treatise entitled *Les droit des gens; ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758). Notwithstanding his lack of originality, Vattel still holds a place of honour in both international law theory and practice, which at that time he still referred to as the ‘law of nations’.

Vattel’s treatise involved the truly formative idea of a *law of nations* that existed as a separate, concrete, and independent area of legal science, and which was therefore distinguishable from the civil law (*ius civile*) and the natural law (*ius naturale*). In this sense, he built upon and continued the work started by Richard Zouche and Christian Wolff. The simple fact that Vattel’s treatise was written in French and not in Latin also helped to highlight the differences among various classical legal works that dealt with the *ius gentium* and the *ius naturale*. Vattel’s treatise became so well-known and influential²³ that Robert von Mohl, nearly 100 years later (1855), did not hesitate to state that it was of ‘great authority’ (*eine grosse Autorität*), or to consider it as ‘a sort of oracle’ (*Art von Orakel*) for diplomats and especially for consuls, since it was cited even in documents of state as irrefutable evidence.²⁴

²² For more about this author see E. Jouannet, *Emer de Vattel et l’émergence doctrinale du droit international classique* (1998); Hurrell, ‘Vattel: Pluralism and its Limits’, in I. Clark and I.B. Neumann, *Classical Theories of International Relations* (1996), at 233–255; and also F. Mancuso, *Diritto, Stato, Sovranità. Il pensiero politico-giuridico di Emer de Vattel: tra Assolutismo e Rivoluzione* (2002).

²³ As to the success of this work and its wide dissemination see Albert de Lapradelle’s introduction to the edition of *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (1916), i, at pp. xxvii–xxxiii (with an English-language translation in iii, at pp. xxvii–xxxiii).

²⁴ R. von Mohl, *Die Geschichte und Literatur der Staatswissenschaften* (1855), i, at 386: ‘Vattel ist bekanntlich eine grosse Autorität . . . Es gilt bei Diplomaten und namentlich bei Consuln als eine Art von Orakel, wird nicht selten sogar in Staatsschriften als ein unbeantwortbarer Beweis angeführt, und bietet somit das eigenthümliche Schauspiel eines fast zum positiven Gewohnheitsrechte gewordenen Lehrgebäudes dar.’

Vattel's *Law of Nations* was also recognized as a classic in the United States. In August 1913, Charles G. Fenwick made the following statement: 'There is no more significant commentary on the growth of international law, both in precision and in comprehensiveness, than an estimate of the relative authority of the name of Vattel in the world of international relations a century ago and in that of today.'²⁵ Notwithstanding this praise, a few lines later he notes that even though Vattel continues to be cited, 'at the present day the name and treatise of Vattel have both passed into the remoter field of the history of international law'.

Vattel's work established the rules of the game for this new international society, which was born in Westphalia, confirmed at Utrecht, and made up of states recognized as such. These states were equal, free, and independent, arrayed and ordered under a positive law of nations, whether voluntary, conventional, or customary, and shaped by a necessary law of nations 'which consists in the application of the law of nature to nations'.²⁶

For these and other reasons, it is not surprising that Vattel's treatise would come to dominate international legal science for more than a century and would serve the purpose of shaping the paradigm of a renewed law of nations, one which Jeremy Bentham, after having eliminated any traces of jusnaturalism, did not hesitate to call 'International Law'.²⁷ This new international law needed a new paradigm, one which in large part was based on the work and study of Emmer de Vattel. Thus, on the one hand, Vattel was a conservative, since he started from the Gaian–Justinian classical paradigm; however, on the other hand, he was a revolutionary, since he substantially altered it, or at least laid the foundation for changes that occurred shortly thereafter.

After dealing with several preliminary questions (*Preliminaries*) that are extraordinarily important to understanding his thought, Vattel divides his work into four books (as Gaius did with his *Institutes*). He dedicates the first book (*Of Nations Considered in Themselves*) to nations as such, which he identifies with sovereign states.²⁸ The second book (*Of a Nation Considered in Her Relation to Other States*) concentrates on the common rights and obligations running between states; in Book III (*Of War*), he deals with all questions relating to war (its declaration, its causes, neutrality, and the enemy); and,

²⁵ Fenwick, 'The Authority of Vattel', 7 *Am Political Science Rev* (1913) 395, at 395; he continues, 'Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence of executive officials. It was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration.'

²⁶ Vattel, *supra* note 3, Preliminaries sect. 7, at 70.

²⁷ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd edn by J.H. Burns and H.L.A. Hart, with a New Introduction by F. Rosen, 1996), ch. 17, no. 25, at 296: '[t]hese may, on any given occasion, be considered either as members of the same state, or as members of different states: in the first case, the law may be referred to the head of internal, in the second case, to that of international jurisprudence'. He adds in a footnote, 'The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible.'

²⁸ Cf. Vattel, *supra* note 3, sect. 1, at 67: '[n]ations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength'. He repeats this same definition in Bk I, Ch. I, sect. 1, at 81.

finally, in Book IV, he touches upon the restoration of peace and diplomatic missions (*Of the Restoration of Peace; and of Embassies*). In reality, though, the last two books work as a single unit dedicated to war and its consequences.

Notwithstanding the fact that Vattel does not expressly refer to the Gaian–Justinian division, there are significant parallels to be drawn between the structure of Vattel's *Law of Nations* and that of Gaius's *Institutes* about which we spoke earlier. In the end, it may be that Vattel was incapable of ridding himself of the classical paradigm (which he knew so well and with which, as a jurist of his time, he felt so perfectly familiar and conceptually comfortable). Alternatively, he may have only wished to modify it in order to adapt it to the needs of international relations of his time. In effect, the Gaian–Justinian tripartite division into persons, things, and actions is present throughout Vattel's work, but in a form in which Vattel replaced the classical triad with his new conceptual triad of 'States, rights and duties [relations] running between states, and war'.

For an instant, let us consider the reason for this conceptual change. In the first place, at that time nations held the position which the person held in the Gaian–Justinian triad. As with almost everything in Vattel's work, the ultimate motivation or inspiration for his reasoning may be found in the writings of his master, Christian Wolff, of whom he considered himself a disciple, even though he did not always accept his arguments and opinions.²⁹ Thus, in his work, *Jus Gentium (Prolegomena, section 2)*, Wolff notes that '[n]ations are regarded as individual free persons living in a state of nature. For they consist of a multitude of men united into a state. Therefore since states are regarded as individual free persons living in a state of nature, nations must also be regarded in relation to each other as individual free persons living in a state of nature.'³⁰

Since, in Vattel's mind, international law is 'the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights',³¹ it is understandable that he replaced the term person with the term state, and even more so if, as he noted at the beginning of his work, states are to be construed as 'moral persons': 'such a society has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights'.³² It is in this way that sovereign states, which are free and independent entities, eventually became the exclusive subjects of an international law which was later to be totally reduced to an absolute state of positivism. This view of international law would enter into crisis only after the start of World War II.

²⁹ *Ibid.*, Preface, at 12, describes Wolff as a 'great philosopher' and at 13 posits: '[t]hose who have read Monsieur Wolf's treatises on the law of nature and the law of nations, will see what advantage I have made of them'.

³⁰ C. Wolff, *Jus gentium methodo scientifica pertractatum* III (1934), at 9. But also see what is mentioned in the preface, at 555.

³¹ De Vattel, *supra* note 3, Preliminaries, sect. 3, at 67.

³² *Ibid.*, sect. 2, at 67.

Vattel dedicates Book II to relations between nations (*Of a Nation Considered in Her Relation to Other States*), in other words, to the rights and duties arising between sovereign states. This, in classical Ancient Roman Law, would be the same as speaking about ‘things’ (*res*) between States. While this is not the place to consider in detail this important juridical metamorphosis, it is worth noting that it affected not only the science of international law, but also legal studies generally in the modern era. In effect, the subjective orientation which gave the Law its rationalist natural law stamp (which was shaped, at least in part, by theories relating to the natural state of things and the social contract), led to the subjective ‘right-duty’ binomial predominating over the monomial objective ‘thing’ (*res*). Most notably, from the time of Samuel Pufendorf onwards, it was the focus of ‘duty’ which prevailed over ‘right’ in international relations,³³ to the extent that the science of international law was, above all, taken to be a branch of ethics: rights arose from duties, and not vice versa. Vattel, as a disciple of Wolff, is certainly in this school of thought. In *Preliminaries*, section 3, the Swiss jurist already had clearly stated that ‘it is evident that right is derived from duty, or passive obligation’.

Any Roman jurist would have considered ‘things’ (in the widest sense of the word which we referred to earlier) to include all the topics that Vattel deals with in his second book: the introduction relating to common duties of a nation (chapter I); mutual commerce between nations (chapter II); the dignity and equality of nations – titles and other marks of honour (chapter III); security (chapter IV); domain, *usucapio*, and prescription (chapters VII–XI³⁴); treaties (chapters XII–XVIII); and, to finish, an extensive chapter regarding ways of terminating disputes between nations (chapter XVIII). This last section is clearly linked to Book III.

Finally, Vattel dedicates Books III and IV to war (*Of War*) and its consequences (*Of the Restoration of Peace; and of Embassies*). In Vattel’s international paradigm, actions, the third element of the Gaian–Justinian tripartite division, were somewhat consciously replaced by the concept of war. Following a centuries-long tradition of which Titus Livius had already given us a clear account,³⁵ Vattel considered war a coercive legal tool to resolve conflicts between states: ‘[w]ar is that state in which we prosecute our right by force’.³⁶ Therefore, ‘[w]hatever constitutes an attack upon these rights is an injury and a just cause of war’.³⁷ For an internationalist at

³³ The prevalence of rights in relation to duties is already apparent in the writings of G.F. von Martens (1756–1821), *The Law of Nations: Being the Science of National Law* (4th edn, 1829).

³⁴ Ch. VIII of Bk II may be considered an exception due to its reference to *Rules respecting foreigners*, but I do not believe that in reality it is. Vattel deals with non-citizen residents (*inhabitants*) in Bk I sect. 213. There, he merely refers to relations with transient foreigners passing through a state (issues of security, the things they are transporting, etc.). Since the state is the subject *par excellence* of international law, and since foreigners do not make up the state, it is understood that in a certain way, Vattel ‘objectifies’ them (treating them as if they were things) in Bk II.

³⁵ Titus Livius, *Ab Urbe condita* 38.38.17 (available at: www.thelatinlibrary.com) noted that controversies were resolved by way of the judicial process or, when the parties otherwise agreed to such, by way of war: ‘*controversias inter se iure ac iudicio disceptanto aut, si utrisque placebit, bello*’.

³⁶ De Vattel, *supra* note 3, Bk 3, Ch. 1, sect. 1, at 469.

³⁷ *Ibid.*, Bk 3, Ch. 3, sect. 26, at 484.

that time, there was nothing more logical than war – a just war, of course – as a means of resolving conflicts between states once diplomatic efforts had been exhausted.

In order to describe his notion of the modern state in the cosmos of the community of states, Vattel took into account the figure of the Roman *pater familias*, especially in his relations with other *patres familias*, as full subjects of applicable law, the *ius civile*. For Vattel, each state was basically like a Roman family, subject to the absolute power of the *pater*. He saw relations between sovereign states as similar to those between *patres familias*. Therefore, it is from this source that international law would on many occasions make use of private law concepts, even though it was public in nature. This familial reference is well evidenced by Grotius himself.³⁸ To explain the second element of his tripartite division, Vattel had in mind the Roman law concept of *dominium*, as full power over something. Lastly, his understanding of the idea of war inherently reflects the Roman notion of just war (*bellum iustum*), one of the most important contributions of Ancient Rome to Western culture. In this way, the triad of persons, things, and actions changed into one of states, relations between states, and war, based on the Roman legal notions of *patria potestas-dominium-bellum iustum*.

Vattel's proposed tripartite division of international law was positively received in legal circles, even by those in the common law tradition.³⁹ Although the layout of Vattel's treatise was not necessarily followed by subsequent treatise writers, who preferred to discuss in terms of subjects and objects, or rights and duties, the new international law paradigm born of Vattel's tripartite division was accepted almost universally and endured right up to World War II.

Contrary to Vattel's thinking was that of the renowned German jurist, August Wilhelm Heffter (1796–1880). In his treatise on the *ius gentium europaeum*, Heffter attempted to recover the paradigm of the ancient Roman concept of *ius gentium* and rejected Vattel's reductionism, as well as the new 'international law' terminology as proposed by Bentham. In effect, for Heffter, this new 'Enlightened' statist paradigm unnecessarily distanced itself from the classical paradigm, since it dealt with only a part of the law of nations, that portion relating to relations between states. The Roman law of nations was more than just that, since it also included individual rights (*allgemeine Menschenrechte*).⁴⁰ Even though the law of nations did not recognize any human authority superior to independent and sovereign states (having history as its ultimate or highest court), it tended by nature to unify the human family, bringing it closer together in one grand and harmonious community.⁴¹

³⁸ H. Grotius, *De jure belli ac pacis*, Bk 1, Ch. 1, sect. 6 (1913), at 2 notes that royal power contains both paternal and religious (as in 'lord-like') aspects of power: '*sic regia potestas sub se habet et patriam et dominicam potestatem*'.

³⁹ The voluminous treatise authored by R.J. Phillimore, *Commentaries upon International Law* (1879–1889), 4 vols, is based upon Vattel's framework. There, after an introductory first part, the second part continues by treating the 'Subjects of International Law. States', while a third concerns the 'Objects of International Law', and an additional (and final) one deals with the 'Principle of Intervention'.

⁴⁰ A.W. Heffter, *Das europäische Völkerrecht der Gegenwart, auf den bisherigen Grundlagen* (8th edn, by C.F. Müller, 1888), sect. 1, at 1: '*[e]s enthielt demnach theils ein äusseres Staatenrecht, theils ein allgemeines Menschenrecht*'.

⁴¹ *Ibid.*, sect. 2, at 4.

Coherently with his view of international law, Heffter dedicates the first section of Book I of his treatise to ‘the subjects of the law of nations’, among which, of course, we first encounter states, as well as sovereign rulers (in the second section) and individual persons (in the third part). Also in the second section of Book I, he refers to things (*Rechte der Sachen*) and, in the third section, to obligations (*Das Recht der Verbindlichkeiten*), which clearly reflect Roman law influences. Book II concerns state rights to take action in times of war (*Actionenrechte der Staaten*), while Book III deals with issues of international commerce, in times both of peace and of war. Taking a close look at this structure, it could be said that Heffter was the last great defender of a form of law of nations which still formed part of the traditional juridical paradigm and which was ultimately anchored in the Roman *ius gentium*.

Even though Heffter has been criticized from time to time by legal thinkers as being out of date for trying to apply private law concepts to international relations,⁴² he was, in my opinion, a pioneer in laying the foundation of the new global law in certain aspects. For example, Heffter clearly anticipated that international law as a strictly inter-state law was insufficient to address the legal problems of the human community as a whole.

The development in legal science of a new area of private international law which would be separate from public international law was one of the first consequences of the adoption of this closed international statist paradigm which Heffter strongly opposed.⁴³ Those restrictive legal theories supporting the idea of international law as an exclusive interstate law were completely contrary to the great expansion of a flourishing, transnational and open entrepot trade. This growing commercial reality would relentlessly march forward against a rigid positivist and bureaucratic state order that was dead set against turning ‘private international law’ into an ‘international private law’.

The new international paradigm was consolidated during the 18th century, at the same time as the new emerging constitutionalism, but remained entirely on the sidelines. As international law was at that time simply a law between states, and affected relations solely between and among states; constitutionalism remained a world apart, reserved exclusively for domestic issues. As a result, international law and constitutional law continued to be unrelated, as if they were polar opposites in dealing with legal thought. For a mind such as Vattel’s, international law could not be constitutionalized, since it did not, given the legal mindset at the time, relate to any sort of established community or to any type of overarching supra-national government, which theoretically would have to exist above the states themselves.

Even though it appears paradoxical, the international statist paradigm would not need to have recourse to public law in the strict sense (the law between two non-equal parties: the state and the citizen), as all states were by definition equals. Therefore, their relations could be governed either simply by contractual means or, if need be, by recourse to arms, that is, war. This marked separation between constitutionalism and international law at

⁴² For more like this see A. Nussbaum, *A Concise History of the Law of Nations* (1947), at 230.

⁴³ On this topic see Domingo, *supra* note 2, at 32–35.

that time has resulted in certain unfortunate consequences for legal science and has led to a sort of corruption of the true essence of both constitutional law and international law. Thus, constitutional law has been limited to the basic law of specific states, while international law has been limited to a law merely between and among states, and one in which there has traditionally been no place for the individual.

The paradigm offered to us by Vattel has become completely outdated in our time. The three elements of Vattel's tripartite division have been shown to be totally insufficient for the task of legally governing international relations, especially in this era of globalization. The first element of Vattel's triad, the state, has lost its monopoly in that realm, since it is no longer the exclusive subject of international law. From the Universal Declaration of Human Rights (1948) onwards, the person⁴⁴ has slowly but surely gained a greater active role in the area of international law, to the point that it has been recognized as a subject of international relations (a holder of international rights) with a limited capacity to take part in international disputes. Today, it is a matter of fact that the person possesses international legal status.⁴⁵

In addition, international organizations have also been gaining an increasing voice and role in the international arena.⁴⁶ It seems very difficult to understand the *modus operandi* of the international law of our days without these global institutions, which are increasingly more present and active on the world scene and have greater decision-making abilities than ever. On the other hand, the international paradigm, by focusing its attention on the state as a member of a society or a grouping of states, has neglected the emerging global human community into which humanity is evolving as a result of globalization.

The loss by states of their exclusive monopoly (as subject of international law) has changed the second element of the Vattelian tripartite division, that regarding interstate relations. The 'things' included in the tripartite Justinian division were reduced to 'the duties and rights as between states' as the sole purpose of international law. It is nonetheless well-known that international relations are no longer strictly and exclusively *inter nationes*, but rather have become a complex matrix of trans-national (if not supra-national) networks and relations, created by a great variety of non-state actors: international public companies, transnational (TNCs) or multinational corporations (MNCs), non-governmental organizations (NGOs), international institutions, etc.⁴⁷

Finally, war, the third element of Vattel's tripartite division, can no longer properly be considered as a *bona fide* legal tool for the resolution of conflicts between states, thanks to the voluntary, multilateral refusal and renunciation of the threat of force or the actual use of force between states (see Article 2(4) of the UN Charter), except in cases of a right to collective defence according to Article 51 of the Charter.

⁴⁴ In this sense, the title of A. Cassese's selected papers is quite accurate: *Human Dimension of International Law* (2008).

⁴⁵ A limited view of this quite transcendent topic is offered in I. Brownlie's *Principles of Public International Law* (7th edn, 2008), at 65.

⁴⁶ As regards their role, I refer to the works of J.E. Álvarez, *International Organizations as Law-Makers* (2005), and J. Klabbers, *An Introduction to International Institutional Law* (2nd edn, 2009).

⁴⁷ For more on this see A.-M. Slaughter, *A New World Order* (2004).

4 The New Paradigm of Global Law

Such being the state of the world today, international law must definitively abandon its statist paradigm and, following the classical legal paradigm, must forge a new one properly adapted to the needs arising from globalization. In effect, the classical legal paradigm which emerged from the tripartite division of ‘persons–things–actions’ remains essentially valid today, both in the spheres of private law and that of public law. The classical paradigm only needs to be updated, so that it applies to the new arena of global law.

The following tripartite division provides us with a specific idea of the new global law paradigm: ‘global community–global issues–global rule of law’. The new global paradigm that would emerge from the tripartite division would differ from the statist paradigm in that it would not involve a rupture with the classical model of persons, things, and actions, but would be rather, I believe, an adaptation of it. Instead, the triad of *patria potestas–dominium–bellum iustum* that shapes the current international paradigm would be broken up.

As we will see, to shape the new global law paradigm it is important to redeem the notion of ‘constitution’. However, here we are not dealing with concepts associated with the idea of a nation-state, and even less with something relating to a written document that outlines a state’s basic law. Instead, we are dealing with a concept that reflects the most authentic sense of the word, to ‘constitute’ (*cum statuere*), or rather, jointly to establish, set up, or institute the organizational and functional model of a political community which is identified as such. In this sense, the *Res Publica Romana*, even though it never had a foundational written text or document, did of course have a constitution. Note that a constitution is not necessarily born at a specific historic moment in time but may instead take shape over time, without one having to say when exactly it was established or definitively came into existence. With these insightful words, Cicero expresses this same idea in his dialogue, *De re publica*⁴⁸: ‘our own commonwealth was based upon the genius, not of one man, but of many; it was founded not in one generation, but in a long period of several centuries and many ages of men’. From this, then, one may easily refer, as Bruce Ackerman has, to ‘constitutional moments’.⁴⁹ Moreover, I believe that we are facing one of these moments right now, but on a global level.

For this reason, in the same way that an attempt to forge an international constitutionalism subject to the statist paradigm is really a *contradictio in terminis*, a cosmopolitan constitutionalism, built upon the new global law paradigm, is an obvious and urgent necessity, one that is required by the very nature of the new global community. It therefore should come as no surprise that certain jurists push hard for the constitutionalization of international law.⁵⁰ Constitutionalization would be akin to providing

⁴⁸ Cicero, *De re publica* 2.2 (trans. C.W. Keyes, ed. The Loeb Classical Library, reimpr., 2006), at 111–113: ‘*nostra autem res publica non unius esset ingenio, sed multorum, nec una hominis vita, sed aliquot constituta saeculis et aetatibus*’ (at 110–112).

⁴⁹ B.A. Ackerman, *We the People I. Foundations* (1991).

⁵⁰ J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009) and Dunoff and Trachtman (eds), *supra* note 8.

the emerging new global law paradigm with its naturalization papers. However, this notion of cosmopolitan constitutionalism has absolutely nothing to do with the creation of a 'Global World State' or anything of a similar nature. Rather it would be the exact opposite.

A Global Human Community

The central focus of the law is the person. Without the person, no law could emerge (*ius ex persona oritur*).⁵¹ For this reason, the global law paradigm fully takes on board the first element of the classical law paradigm, the person. It considers the person, not only in and of itself, or as a member of a specific political community, but instead as the integral constituent part of humanity as a whole. In the statist international paradigm, the state takes the place of the person, whereas in this new global paradigm, the global community (that is to say, humanity) neither replaces nor displaces the person, but naturally integrates it therein. Thus, in this new global paradigm the person is the primary subject and focus, and is not relegated to a secondary role, as happened with the application of the international law paradigm.⁵²

Notwithstanding the profound changes in the last half of the 20th century, the current international community cannot yet be identified with humanity itself as a whole, since it remains firmly anchored in the idea of state sovereignty. Thus, the international community continues to be more of a society of states, ordered by their often divergent self-interests, than a human community (in the strict sense), which would instead be guided by the concept of the common good. Antonino Cassese very accurately states that 'the world community continues to be dominated by sovereign states, each of which is primarily bent on the pursuit of its own short- or medium-term interests'.⁵³ In addition, humanity cannot be identified with the Society of Peoples, comprised of 'liberal and decent peoples', that is to say, the 'well-ordered peoples' to whom John Rawls refers in his well-known monograph.⁵⁴ The reason for this is that the Society of Peoples does not include humanity as a whole, but rather only a certain portion of it. Neither the 'liberal and decent' peoples nor the 'well-ordered' peoples incorporate the full dimension of the total human community, which we will speak about shortly.

For many years, two communities will have to co-exist, communities which do not fully coincide or fit together well, but rather which are superimposed one upon the other, overlapping oddly at times. Until the international community is transformed

⁵¹ On this subject I make reference to my book, Domingo, *supra* note 2, at 123–126.

⁵² Anne Peters skilfully heads in this same direction, as evidenced in Klabbers, Peters, and Ulfstein, *supra* note 51, at 157: '[i]n a constitutional world order, natural persons are the primary international legal personal and the primary members of the global constitutional community'.

⁵³ In this sense see Cassese, 'Soliloquy', in Cassese, *supra* note 45, at p. lxxvii: '[t]he world community continues to be dominated by sovereign states, each of which is primarily bent on the pursuit of its own short- or medium term interests'; and at pp. lxxvii–lxxviii: '[i]n sum, the world community is still bedeviled by the huge gap between generous and visionary legal rhetoric and the harsh reality of states each substantially pursuing its own national interests'.

⁵⁴ J. Rawls, *The Law of Peoples, with 'The Idea of Public Reason Revisited'* (1999), at 4–6, 62–78.

into or is absorbed by the global human community, the two paradigms will continue to survive: one, the statist paradigm, which has shaped and been a source for international law for so long, and the second, the new global human community, which shapes and acts as a source for the emerging global law.

The birth of humanity as a true political community has not been the result of a social compact or accord, but rather has come about as the result of an unquestionable social reality, that of globalization. The ‘disunited multitude’ of human beings, as Hobbes calls humanity,⁵⁵ begins ever more to resemble a massive, multitudinous assembly brought together by a consensus view regarding the global nature of the law and the utility of the common good. This is, in a sense, the *commonwealth* (*coetus multitudinis iuris consensu et utilitatis communione sociatus*) which Cicero refers to in his dialogue *De re publica*.⁵⁶

First comes social reality, and then comes the law that governs it, not vice versa. These are the current facts, the *nova facta*, that force jurists to search for new solutions to deal with the challenges currently facing society. To think otherwise and not to acknowledge change (and its inevitable impact on the law) is merely to turn the law into the problem, and not the solution. As things stand today, from a juridical point of view we are dealing with a humanity that exists as a nascent community, one that (paraphrasing the Roman jurists) we could call ‘incidental’ or spontaneous (a *communio incidens*). Such a community arises without an explicit prior agreement among its members. Even so, it is no less a real community and certainly no less worthy of being further developed as such. In fact, for this development to occur, it is necessary legally to institutionalize the ‘global social contract’.⁵⁷

In his work, *The Leviathan*, Thomas Hobbes carefully notes the two general ways of creating communities. All communities (as *commonwealths*) arise either by institution or by acquisition.⁵⁸ Applied to humanity, one may certainly therefore believe that mankind will be institutionalized as a political community through some sort of world-wide consensus, or instead will end up being dominated by unscrupulous imperialistic plutocracies or economic cryptocracies. The recent economic crisis has highlighted the real risks and possibilities of the latter situation coming to pass.

⁵⁵ Cf. T. Hobbes, *The Leviathan* (ed. J.C.A. Gaskin, 1996), ch. 18, no. 2, at 115.

⁵⁶ Cicero, *De re publica*, *supra* note 48, 1.39, at 64–65: ‘[e]st igitur, inquit Africanus, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus’ (well, then, a commonwealth is the property of a people. But a people is not just any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good’).

⁵⁷ See, similarly, D. Held, *Global Covenant, The Social Democratic Alternative to the Washington Consensus* (2004), at 161–169.

⁵⁸ Cf. Hobbes, *supra* note 55, Pt II, ch. 17, para. 15, no. 88, at 115, and its subsequent related development in chs 18–20. The difference between the two of them is clearly explained by Hobbes in Pt II, ch. 20, para. 2, no. 102, at 132: ‘[a]nd this kind of dominion, or sovereignty, differeth from sovereignty of institution, only in this, that men who choose their sovereign, do it for fear of one another, and not of him whom they institute: but in this case, they subject themselves, to him they are afraid of.’

The establishment of humanity as a political community has, in my opinion, a potential reach and certain legal consequences (both positive and negative) that, for the time being, we are scarcely able to comprehend. It is precisely this which justifies a transition from international law to a new global law, such as the transition which occurred centuries ago when the birth of the nation-state led to the transformation of the law of nations into the international law that we are familiar with.⁵⁹

All established communities need law, rules of the game which guarantee justice and peace. Here we are dealing with a clear example of the most basic principle of justice: *ubi societas ibi ius*.⁶⁰ And where there is a community, there must subsequently be an *ordo iuris*, a legal system which includes and integrates private law with public law, structuring the law in a constitutional manner. Thus, the global law paradigm is both constitutional and cosmopolitan in nature, a point very well expressed by Mattias Kumm.⁶¹

The main legal consequence of turning humanity into a political community is the necessity of establishing a true global legal system (*ordo iuris universalis*) to order and govern it. This legal system, *sui generis* by definition, must somehow integrate all the world's existing legal systems, and be compatible with the immense variety of legal traditions and actual normative content that exists.⁶² Thus, the opposition between monism and dualism, which is still a very popular issue in contemporary constitutional debate, would lose its significance in the new global paradigm. The new paradigm would be capable (thanks to its inherently constitutional character) of unifying legal systems without imposing uniformity, of harmonizing without forcibly equalizing, and of integrating without levelling: *plures in unum*. Humanity, by nature very inclusive, allows for an internal range of diversity, due to its uniqueness, which is far greater than that existing under the restrictive rules governing the community of sovereign states. Law must take into account this inclusive dimension of humanity.

Law is ever personal, relating to a specific person (the individual dimension), to a group of persons (the social dimension), or to the entirety or totality of persons, that is to say, humanity as a whole (the universal dimension). This tridimensionality has legal importance, in the sense that it is not the same to apply or enforce individual, social, or universal laws. When law is applied in this three dimensional manner, it recognizes and covers the full meaning and aspects of our humanity, and we are therefore able to speak strictly of a 'complete' legal system. For this reason, so long as sovereign states refuse to recognize global law, the typical state-based legal system will continue being incomplete. Why? It fails to take into account the human person

⁵⁹ For more on this topic I refer to my book, Domingo, *supra* note 2, at 3–32.

⁶⁰ I provide commentary on this aphorism in R. Domingo (ed.), *Principios de Derecho global. 1000 reglas y aforismos jurídicos comentados* (2006), at para. 959.

⁶¹ Kumm, *supra* note 8, at 263–264: '[c]osmopolitan constitutionalism establishes an integrative basic conceptual framework for a general theory of public law that integrates national and international law'. In my opinion, nonetheless, cosmopolitan constitutionalism is even more expansive in the way it must also integrate the private sphere; in other words, it is not truly constitutional. Thus, the difference between the public sphere and the constitutional sphere is that the constitutional sphere includes by definition both the public and the private spheres. The constitutional sphere is broader than the public one.

⁶² Regarding this legal order see Domingo, *supra* note 2, at 121–153.

as an integral member of humanity as a whole, and thus as a member of the higher-level political community.

Thus, the 'I' (*ego*) of the individual dimension, the 'we' (*nos*) of the social dimension, and the 'all' (*omnes*) of the universal dimension have different legal effects, since they each affect the law in different ways. The three dimensions are interrelated as they are all essentially personal (i.e., deal with human persons), but are qualitatively distinct. When the individual legal dimension does not take into consideration the law's social dimension, one rapidly falls into legal (or juridical) individualism. There, law becomes increasingly closed to the idea of solidarity with others in the human family. Alternatively, when the social dimension does not properly consider law's universal dimension, it easily leads to imperialism, which aims to impose the rules and outlook of a specific political community on the global community (or part thereof). If the universal dimension of law fails to recognize the other dimensions (individual and social), personal rights are suffocated and suppressed, and self-government of institutions is paralysed. Subsidiarity is not respected, turning the world into a sort of centralized and standardized legal wilderness where 'one size fits all'. This is ultimately incompatible with the true rule of law and the respect for the individual that it entails.

B Global Issues

In the new global paradigm, 'things' no longer refer exclusively to 'relations between States', but rather to those questions that truly affect humanity as a whole (*global issues*). These are relatively few and variable. Among others, global issues would include, for example, those fundamentally relating to the preservation of the planet (environmental protection, climate change, etc.) and the physical survival of human beings (poverty eradication, natural disaster prevention and post-disaster aid/rebuilding efforts, elimination of nuclear arms, etc.). They would also cover questions like global security, dealing with international terrorism, the prosecution of crimes against humanity, etc. Of course, the protection of human rights would be of the highest priority, but only to the extent that such rights were not sufficiently protected under the various local or national legal systems. Decisions regarding what constitutes a truly global issue (and what its actual parameters would be) must always be made on the basis of the key global law foundational principles of subsidiarity and solidarity.

The global law paradigm would take a *subject-matter* jurisdictional approach, since territorial and personal aspects are by nature constituent parts of the global community. These global issues would be covered by a sort of '*reserve of globality*', and would thus be subject to the '*global legal domain*'. The actual determination of global issues would be the purview of a world parliament, and its sole task (in order to ensure it did not acquire excessive power). These global issues would be managed by global institutions created *ad casum*, whose ongoing efforts under global law would be subject to relevant judicial monitoring and control.⁶³

⁶³ As I have dealt with them in great detail elsewhere, at this point I will wrap up my treatment of these issues. Cf. *ibid.*, at 144–147.

C The Global Rule of Law

The third fundamental element of the global paradigm is the 'global rule of law'. This would substitute for war (which has already become outdated in legal science, both theoretically and practically) in the state-based paradigm and would complete the Roman law concept of *actio* of the classical legal paradigm. The diversity of legal conflicts and the variety of dispute resolution systems in the transnational area inevitably lead us to a more general concept of the enforcement of the law as guarantor of liberty and of social order. This concept should represent, in my opinion, the clear, unquestioned, and universally accepted supremacy of law, otherwise known as the 'rule of law'. In this way, both the global human community (the first element in our triad of foundational elements) and global issues (the second element) must be subjected to the *imperium* of the law (the *rule of law*). This would make up the necessary core of a global legal order capable of interacting with and binding together all the world's legal systems.

This third element of the global paradigm is found at the heart of the common law tradition.⁶⁴ As noted by the famous British historian, William S. Holdsworth, the doctrine of the *rule of law* is possibly 'the most distinctive, and certainly the most salutary, of all the characteristics of English Constitutional Law'.⁶⁵ The great advantage that this third element offers over the concept of the State of Law (in German, *Rechtsstaat*) is that the former in history developed before the modern idea of the state did. From there, it is not too difficult to imagine a notion of the *rule of law* which exists separately from that of the state.⁶⁶ To the contrary, it is difficult to imagine a State of Law which exists separately from the sovereign state. It is by nature subject to the state's theoretical confines. The formation of a world state would, in the words of Hannah Arendt, be 'not only a forbidding nightmare of tyranny, it would be the end of all political life as we know it'.⁶⁷

⁶⁴ Still interesting and well worth reading is Holdsworth, 'Rule of Law', in W.S. Holdsworth, *Some Lessons from Our Legal History* (1928), at 109–169. In a certain way, Holdsworth foresaw the phenomenon of the globalization of the law (at 155): 'the inventions of modern science have diminished the size of the world, and have thus made it possible for new legal and political ideas to assume a cosmopolitan character'. An excellent outline of the history of the 'rule of law' is provided in W.S. Holdsworth's *A History of English Law* (1938), x, at 647–650 and the internal references in that work. For an overview of the historical development of the concept see Costa, 'The Rule of Law: a Historical Introduction', in P. Costa, D. Zolo, with the cooperation of E. Santoro (eds), *The Rule of Law: History, Theory and Criticism* (2007), at 73–149. Of great interest as well is Zolo's essay, 'The Rule of Law: A Critical Reappraisal', in *ibid.*, at 3–71.

⁶⁵ Holdsworth, *A History*, *supra* note 64, x, at 647.

⁶⁶ This is actually the title of Palombella's article on the topic, 'The Rule of Law Beyond the State. Failures, Promises and Theory', 7 *Int'l J Constitutional L* (2009) 442. On this topic see also, among others, L. Morlino and G. Palombella (eds), *Rule of Law and Democracy. Internal and External Issues* (2010), as well as G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (2010).

⁶⁷ Arendt, 'Karl Jaspers: Citizen of the World?', in H. Arendt, *Men in Dark Times* (1995), at 81. At 82 she insists on the same idea: '[t]he establishment of one sovereign world state, far from being the prerequisite for world citizenship, would be the end of all citizenship. It would not be the climax of world politics, but quite literally its end.'

To avoid the occurrence of that which Joseph Raz describes so clearly – with a spot of irony and much truth – in his well-known essay on the rule of law,⁶⁸ I will attempt to substantiate the three points which reflect the reality and the significance involved in the global rule of law by paraphrasing the British constitutionalist, Albert V. Dicey.⁶⁹ First, global rule of law means ‘the absolute supremacy or predominance of global law as opposed to the influence of arbitrary power’. Secondly, it means ‘equality before the global law, or the equal subjection of the whole human community to the global law administered by the global law courts’. Lastly, the global rule of law may be used as a way of expressing the fact that global law would be a part of the ordinary law of each country, in the sense that all humanity, and the political institutions and communities established by it, are part of the global human community.

The establishment of a global rule of law demands the full harmonization (at least as regards basic global questions) of the various legal systems, as well as an authority that would exist above the states themselves. This global authority would in turn be subjected to the law. Otherwise, the rule of law could not be applied justly, because it would have been established to govern vertical legal relationships rather than horizontal ones. This global political authority would be nothing other than a Global Parliament, the democratic institution *par excellence*. It would be the only conceivable institution capable of bringing into reality that which I would consider, in the words and terminology of H.L.A. Hart,⁷⁰ the ‘rule of recognition’ of the new global law: ‘*quod omnes tangit ab omnibus approbetur*’. Law which affects all must be approved by all. This basically means that rules governing issues affecting all humanity (and only those issues, and only to the extent that they affect all) would have to be approved by humanity as a whole.⁷¹ This, and nothing else, would be the means by which we could democratize the new global law paradigm right to its core. Of course, this ambitious proposal would arise at a much later stage in a lengthy evolutionary process. There will be many steps to take between the adoption of the global law paradigm as an interpretive framework that replaces the statist paradigm and a global institutional reform that establishes a Global Parliament.

5 Conclusion

The Gaian–Justinian tripartite division of law into persons, things, and actions was important for laying the groundwork for the development of the classical legal paradigm, one which has come down to us through the centuries both in the common law and civil law traditions. The Gaian–Justinian tripartite division, even though it developed primarily in the area of private law, should not be restricted or limited to it.

⁶⁸ J. Raz, *The Authority of Law* (1979), at 210: ‘[n]ot uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to one it originally designated’.

⁶⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, 1915), at 198–199.

⁷⁰ H.L.A. Hart, *The Concept of Law* (2nd edn, with a Postscript edited by P.A. Bulloch and J. Raz, 1997), especially at 95–110.

⁷¹ For more on this subject I make reference to my book, Domingo, *supra* note 2, at 144–145.

William Blackstone, for example, applied it with remarkable deftness to public law. In the area of international law, Emer de Vattel substituted the classical 'persons, things, and actions' tripartite division for that of 'States, Relations-between-states, and War' in his work, *The Law of Nations*. The modified tripartite division led to the shaping of a new (at that time) international statist paradigm, which was exclusively focused on the concept of the nation-state. This statist paradigm has become entirely outdated in the era of globalization. The new global paradigm, as successor to the statist paradigm, must be developed from and based on the classical paradigm, adapting it to the needs and requirements of global society. The global paradigm could be built upon the following triad: global human community, global issues, and global rule of law. These three elements would comprise the basic cognitive building blocks upon which the principles of a nascent global legal system could be developed. To carry out this mission, cosmopolitan constitutionalism, uncoupled from the limiting connotations of the term nation-state, would play a fundamental role.