



Giuliana Ziccardi Capaldo

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ASHGATE

# The Pillars of Global Law

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GIULIANA ZICCARDI CAPALDO

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To those who will play a role in shaping tomorrow's global world.

To my grandchildren, Federico Karol and Giuliana

# Preface

This book aims to meet the pressing need – among international scholars, political scientists, legal practitioners, and students – for a systematic assessment of the changes taking place under the impact of globalization on the international community and its legal order; it describes how different constitutive processes of globalization transform key aspects of international society, its institutions and legal norms.

Fundamental shifts in the rules and structure of the classical international community highlight the ‘public’ dimension of international law, which is developing rules increasingly oriented towards a structuring process for a universal human society (i.e., global community), and the protection of common values and goods (such as world peace and security, fundamental rights of individuals and peoples, collective management of common human beings, etc.) accompanied by objective safeguard mechanisms and procedures. These changes raise the question of whether the evolution of the classical international legal system has produced a corpus of rules autonomous enough from inter-state law to be called ‘Global Law’. This, in turn, raises the question of the distinctive features of this new body of laws.

These questions are not merely theoretical. For several years I have studied the evolution of the international order, starting from its origins and moving through a wide analysis of the relevant practices of states, international organizations, and other new actors, including an analysis of the case law of international courts and tribunals. This analysis addresses important key legal issues from the Westphalian period to the post-war period, and from the establishment of the UN to the present, in order to provide an overview of the new world order. The basic goal is to identify, from the great variety of international practices in political and jurisprudential contexts, a uniform set of legal rules and procedures designed to manage global interests and goods, established for the purpose of institutionalizing governance mechanisms and procedures, defining and allocating powers to the global level, and creating authorities or bodies exercising functions of a public nature.

Attention on international institutions (and their activities) undoubtedly predominates in my book and my selection of them as referentially appropriate was with a view to identifying those changes in international law which are indicators to the birth of global law. This is the result of a methodological choice that I believe provides a useful approach to problems that are intrinsically linked to the scope of my work, which is to focus particularly on ‘structural’ changes and key features brought about by the impact of the globalization on ‘inter-state’ international law. The aim of my research is made even more evident by the book’s title which employs the word ‘pillars’ in its most denotative sense, referring to the fact that this investigation is directed at the ‘structural’ aspects of emerging global law, rather than to substantive ones.

Interest in the structural profile derives from the fact that most internationalists have made important contributions to changes that have occurred through the effect of globalization in various areas of substantive international law (human rights, world peace, world health, commons protection, etc.). Conversely, the structural profile and features of the growing global community and new world legal order has barely been touched on and no specific, systematic study exists.

My investigation is especially based on the decisions of international bodies with a supranational nature (Security Council, General Assembly, WTO panels, International Court of Justice and other international courts, etc.). Certainly, I am well aware that there are other centers of international power apart from international institutions: many important international and transnational normative regimes are not found in international institutions, but in more informal law-making promulgated by international arbitral panels, networks of regulatory entities, or non-state accreditation and standard-setting bodies; just as it is true that various forces of globalism also contribute to mechanisms of global governance. It makes today's international legal framework more complex because there are many centers of international power and influence, and powerful new forces; that is why my analysis focuses on new integrated procedures and mechanisms of shared governance between States, international organizations and the global NGO community acting jointly with a supranational authority. Already the substantial international community has developed mechanisms of integration with the organized international community and, above all, the United Nations, and other forces of globalism in the areas of human rights, international criminal law and international environmental law.

These new forces of international power, however, do not yet have a well established role at a general level and on the decision-making processes which the present book examines (i.e., global constitutive processes and basic constitutional principles). I myself complain in my book about their exclusion and marginalization within international world bodies and hope that more weight will be given to them in those forums where nowadays the power of world decision-making resides.

The changes I detail (summarized in the annexed Tables) have been considered with reference to three phases that characterise the evolution of the international order towards a law for a global community: (1) the Westphalian phase (see Table 1 *infra*); (2) the post-Westphalian phase (see Table 2 *infra*); and (3) the post-UN Charter phase, characterised by globalization (see Table 3 *infra*).

In considering these three periods, changes in the international legal order may be said to have taken place as a result of the interplay of five variables in the international community:

1. the enhancement of international functions;
2. the expansion of the social base;
3. the legality of norms depending on their substantive content and their role in structuring the principles and practices of a public nature;
4. the development of interaction between legal systems regional, national, and international; and
5. the promotion of collective guarantees.

On the basis of these variables, today's international legal order presents the following distinctive features compared to prior phases of the international order (see Tables 4, 5, 6 *infra*).

1. *A (re)organization of power structures and authority.* The classical, unorganized international community is progressively moving towards becoming a more organized entity, vertically structured, due to the increasing institutionalization of law-making, law enforcement, and judicial processes; the proliferation of international courts and tribunals; the increasing authority of international bodies, and the development of democratic forms of participation in the decision-making process for various new actors. A wide range of new law-making processes and enforcement mechanisms results in integrated procedures more rapid as compared to customary procedure and more informal as regards UN Chapter VII enforcement system, working to overturn the veto rule.
2. *An expansion of the social base and the development of constitutional principles.* The transformation of international law from mere inter-state law to the law of universal human society, in which the range of legal subjects increasingly includes not only states but also individuals and new players. Constitutional norms and legal principles protecting public values and goods have been established at an international level, together with the fundamental rights of individuals and of peoples; these supreme principles, which are 'public' in character, complement the 'private' norms that protect the interests of individual states and relations between them.
3. *A development of integration processes between legal systems.* Domestic law is increasingly adapting to international law through regional integration, the harmonization of legislation, and by means of standard conventions.
4. *A consolidation of collective guarantees.* New mechanisms, inspired by the principle of collective enforcement, have been established for the objective enforcement of the above-mentioned supreme constitutional principles, by setting up new international tribunals and forms of judicial control and introducing new sanctions regimes, suitable to function against states, entities, groups and individuals.

It follows that globalization has changed not only the law but also international decision-making processes, enforcement strategies and the interactions between the international legal system and legal systems at other levels (regional and domestic). On the basis of these findings, I have identified the key elements of the global legal system which I have termed the 'pillars' of global law, i.e., verticality of decision-making processes; legality and safeguarding of common values and goods; integration between legal systems and processes; development of forms of collective guarantees. What I am arguing for is also that States have agreed on a set of legal rules and procedures and an operating organization which is based on that set of rules to collectively deal with public needs. Thus, this book aims to explicate the existence of an autonomous legal system: using a systemic approach, it strives to

present the foundations of this emerging law for the global community – what I will call ‘Global Law’.

The book is organized into four Parts, reflecting the four pillars outlined above, dealing with the ways in which the decision-making processes of the global legal system and fundamental functions of the global community are carried out/performed (law-making; law-enforcement; judicial functions); the features peculiar to the system, both the fairness/legality and the law-integration; and the construction of an embryonic system of collective guarantees.

Accordingly, the global legal system is described by examining:

Part I – Verticality and sharing of the decisional processes

Part II – Legality principles and common global values

Part III – Integration of legal systems in the direction of global law

Part IV – Collective guarantees: an embryonic new system.

Therefore, the first part deals with constitutive processes of social organization such as hierarchy, authority, allocation of powers, and functions, through an analysis of the mechanisms of joint governance and processes of multilateral authoritative decision-making; it is devoted to the three above-mentioned functions, in which more and more international institutions are taking part, thus fostering the development of a supranational system of governance and the verticalization of international power (Part I, Chapters 1–3).

There then follow two parts describing the main characteristics of the emerging global law system. One of them describes the increasing legality of a system which overturns the ‘private’ nature of inter-state law by shifting the centre of gravity from the State towards Humanity and to future generations, and safeguarding the basic right of Man as well as universal values, to the detriment of the sovereignty of the States that are restricted through principles of legality. Legality, a cornerstone of the new global law, is compared with the principle of effectivity, a cornerstone of the classical international system that has been eroded by the rise of legality, yet remains ready to re-emerge (Part II, Chapter 4). The other part addresses the growing harmonization between domestic and international legal systems, describing the process of integration between legal systems, achieved through the subordination of national law to norms laid down by international organizations, regional and universal. The emphasis here is on the rules and principles that ensure an effective and uniform application of international law in state legal systems in the move towards the construction of a global law. I describe an integrated structure of global legal order and its organization into concentric circles within which the various legal systems (national, sub-regional, regional, international), ordered hierarchically and subordinated between themselves, are dominated by the system of the UN Charter; all of which, in turn, is subject to the supreme principles of global law (*jus cogens*). The verticality of the global system poses problems of coordination between various different legal systems and this leads to the necessity to focus on the relationship between them (Part III, Chapter 5).

The final part underlines the passage from self-protection to heteronomous processes for the protection of global fundamental values and contains a reconstruction

of a new collective guarantee system: procedures and integrated mechanisms of safeguard which seek to adapt to the needs and characteristics of the non-state actors following the broadening of the social base to accommodate the new actors (Part IV, Chapters 6–9).

In conclusion, I argue that today's international legal order is developing into a truly global system of law. I certainly do not mean to say that it has already been structured, much less disavow the importance that 'inter-state' international law has had and will continue to have. In my vision of a world law system, the sphere of legal relationships established between states comes within the field of what in internal law is 'private' law, whilst emerging 'global law' represents the 'public' dimension of the world legal system, establishing a new juridical organization of the world.

The book is complemented by six Tables in the annex that provide an overview of the development of international law in the three stages of development from the Congress of Westphalia in 1648 to the present. Two tables supplement the text and facilitate reading; the other four summarize in systematic form the topics under discussion and the features of a global legal system.

This book draws on more than 25 years of analysis of the transformation of the international community and its legal system. It arises from the thesis of the 'verticalization' of the international community, which I first outlined in 1977<sup>1</sup> and developed further in a number of later studies. This thesis, moreover, has been largely confirmed by recent developments in international practice and the rise of globalization. International integrated processes of decision making based upon this concept have become concrete and formal.

Some of the chapters in this book, previously published as articles, have been carefully updated and further developed to produce this volume (Oceana Publications and Harvard International Law Journal granted the permission to their use); the date and the place of publication are identified in a note. However, the present book attempts a new and difficult task: to outline the general framework of the new body of norms regulating global society and the world order. Therefore, in addition, previously unpublished essays are included here in line with the basic goals of this study. Because the ideas contained in these papers have been developed and refined over time, the reader might encounter some of them more than once. I apologize, in advance, for this occurrence.

Among those who supported the project, I am extremely grateful to M. Cherif Bassiouni, Professor of Law at the DePaul University College of Law in Chicago. Steven Becker and Gilbert Lenz, also of the DePaul University College of Law, made helpful comments and editorial revisions. For that I would like to express my appreciation. A group of researchers in the Ph.D. program at the University of Salerno, including Anna Oriolo and Michele Nino, also contributed to the production of this book by providing editorial assistance in preparing the manuscript for publication, and I shall always be grateful to them for their support. Finally, special thanks to my son Antonio, who provided support and encouragement for

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<sup>1</sup> GIULIANA ZICCARDI CAPALDO, *LE SITUAZIONI TERRITORIALI ILLEGITTIME NEL DIRITTO INTERNAZIONALE/UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW* (1977) (Summary in English).

this project and with whom I discussed the processes and dynamics of globalization in a more comprehensive, socio-economical perspective. Remaining errors are my responsibility.

Giuliana Ziccardi Capaldo

# List of Abbreviations

CFIEC	Court of First Instance of the European Communities
CSCE	Conference on Security and Cooperation in Europe
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Communities
ECOWAS	Economic Community of Western African States
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
KFOR	Kosovo Forces (NATO)
OACI	Organisation de l'Aviation Civile Internationale
OAS	Organization of African States
OCHCR	Office of the High Commissioner for Human Rights
OMPI	Organisation des Modjahedines du Peuple d'Iran
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
UNAT	United Nations Administrative Tribunal
UNCLOS	United Nations Convention on the Law of the Sea
UNIFIL	United Nations Interim Force in Lebanon
UNITA	União Nacional para a Independência Total de Angola
UNMIK	United Nations Interim Administration Mission in Kosovo
WEU	Western European Union
WTO	World Trade Organization

# International Law Journals

AM. J. INT'L.L.	American Journal of International Law
ANN. FR. D.I.	Annuaire Français de Droit International
BYIL	British Yearbook of International Law
CASE W. RES. J. INT'L L.	Case Western Reserve Journal of International Law
DENVER J. INT'L L. & POL'Y	The Denver Journal of International Law & Policy
EMORY INT'L L. REV.	Emory International Law Review
EUR. J. INT'L L.	European Journal of International Law
FORDHAM INT'L L.J.	Fordham International Law Journal
GCYILJ	The Global Community. Yearbook of International Law and Jurisprudence (G. Ziccardi Capaldo ed., Oceana Publications/ Oxford University Press, New York)
HARV. ENV. L. REV.	The Harvard Environmental Law Review
HARV. INT'L L.J.	Harvard International Law Journal
IND. J. GLOBAL LEGAL STUD.	Indiana Journal of Global Legal Studies
INT'L & COMP. L.Q.	International & Comparative Law Quarterly
INT'L LEGAL MAT.	International Legal Materials
LJIL	Leiden Journal of International Law
N.Y.U. J. INT'L L. & POL.	New York University Journal of International Law & Politics
NETH. INT'L L. REV.	Netherlands International Law Review
OR. L. REV.	Oregon Law Review
REV. BELGE D.I.	Revue Belge de Droit International
REV. GEN. D.I.P.	Revue Générale de Droit International Public
REV. HELL. D.I.	Revue Hellénique de Droit International
ST. LOUIS U. L. J.	Saint Louis University Law Journal
TEX. INT'L L. J.	Texas International Law Journal
U. COLO. L. REV.	University of Colorado Law Review
U. KAN. L. REV.	University of Kansas Law Review
VA. J. INT'L L.	Virginia Journal of International Law
VAND. J. TRANSNAT'L L.	Vanderbilt Journal of Transnational Law
Y. INT'L L. COMM.	Yearbook of International Law Commission

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