The Conquest of America and International Law

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Special Session

Padua - Venice 5-9 October 1992

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Session organised by:

The Veneto Region - Regional Council

With the collaboration of:

Centro di studi e di formazione sui diritti dell'uomo e
dei popoli dell'Università di Padova
Comune di Venezia - Comune di Padova -
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The Peoples' Permanent Tribunal met in Padua on 5-8 October 1992 for a Special Session devoted to: "The Conquest of America and International Law"

Members of the Jury:

François Rigaux (Belgium), Chairman

Perfecto Andrés Ibañez (Spain)

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Monique Chemilier-Gendreau (France)

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Eduardo Galeano (Uruguay)

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Raniero La Valle (Italy)
Fabiola Letelier (Chile)
Antonio Papisca (Italy)
SalvatoreSenese (Italy)
Eduardo Umana Mendoza (Columbia)

The following speakers took the floor:

Peter Haggenmacher (University of Geneva): *Sur les origines du droit international au XVI et XVII siècle*

Joe Verhoeven (Catholic University of Louvain): *Les grandes étapes de l'évolution du droit de la guerre*

Anna Badia Martì (University of Barcelona): *Virtualidades de la Carta de las Naciones Unidas*

Charalambos Apostolidis (University of Dijon): *Rationalité juridique et idéologie*

Jean Bart (University of Dijon)*: Où l'on apprend que l'on peut servir deux ma^tres*

Monique Chemillier-Gendreau (University of Paris VII): *Le Droit du Développement, dernière version de la rationalité occidentale*

Jean Claude Fritz (University of Dijon): *Echanges économiques et possession du monde*

Armando Còrodova (University of Zulia, Venezuela): *América Latina y el Nuevo Orden Internacional*

Stefano Rodotà (University of Rome): *Note su sovranità e proprietà*

Luigi Ferrajoli (University of Camerino): *La conquista delle Americhe e la dottrina della sovranità esterna degli Stati*

Hans Hurgen Prien (University of Marburg): *El contest teològico e historico de la Conquista y el desafio de relaciones entre la sociedad cristiana occidental-ibérica y sociedades no-cristianas de América*

Padre Angelo Pansa, missionary: witness of the violation of the rights of the native populations of Amazonia.

Texts used:

International legal instruments:

United Nations Charter (1945)
Universal Declaration of Human Rights (1948)
International Pact on Civil and Political Rights (1966)
International Pact on Economic, Social and Cultural Rights (1966)
Universal Declaration of People's Rights
Convenciòn sobre Pueblos Indigenas y Tribales en Paises Indipendientes (1989)

Decisions issued by the Permanent Peoples' Tribunal, in particular:

Guatemala (1983)
International Monetary Fund and World Bank (1988)
Amazonia (1990)

Latin America: trial against the impunity of crimes of ‘lese humanity’ (1991)

Documents of Native Peoples

Declaraciòn del Primer Congreso de Pueblos Indigenas de Mexico (1975)

Declaraciòn del Encuentro de Organizaciones Indigenas de Mexico y Centroamérica (1980)

Declaraciòn Del Primer Congreso Indigena Nacional de Colombia (1981)

Resoluciones sobre Derechos Humanos concernientes a las Poblaciones Indigenas del Noveno Congreso Indio Interamericano (1985)

Declaraciòn del Primer Congreso Nacional Indio de Venezuela (1989)

Acuerdo sobra Derecho Territorial con el Estado Ecuadoriano (1990)

Declaraciòn De quito y Resoluciòn del Encuentro Continental de Pueblos Indigenas (1990)

Documents of the "Campana 500 anos de resistencia indigena, negra y popular":

Declaraciòn del Primer Encuentro continental de la Campana, Bogotà, Colombia, 7-12 de octubre de 1989

Actas del Segundo Encuentro continental Quetzaltenango, Guatemala, 7-12 de octubre de 1991

Five Hundred Years of Solitude

End of century, end of millennium, an anniversary. The world of our times - a world transformed into a market, a time when Man is reduced to merchandise - celebrates its five hundredth anniversary. On October 12th, 1492 the reality that we are now experiencing on a global scale was being born: a *natural order* that is enemy to nature and a *human society* that labels as "humanity" only twenty percent of the human race.

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In their pastoral letter the bishops of the Catholic Church in Guatemala asked the Maya people for forgiveness and rendered homage to the local religion "that sees in Nature a manifestation of God". And yet the Vatican is celebrating "the five hundredth anniversary of the arrival of the Faith in the American continent". Did faith not exist in America before Columbus? The conquerors imposed their faith as the one and only possible truth, thus slandering the Christian God by reducing Him to a role of Universal Head of Police by stating that he had ordered the invasion of the infidel lands. Prophetically those were the times when *freedom of communication* was the invader's right to speech against the voiceless conquered.

The Indios were condemned just for being or for continuing to be Indios. These barbarians who did not allow themselves to be converted deserved slavery. And how many were burned at the stake for committing the crime of believing that all lands are sacred? In their adoration of Nature, the pagan Indios practised idolatry and thus offended God. But were they offending God or nascent capitalism? It was then that the identification of private property with freedom began, which translates into using the world as a source of profit and as a consumer good. From Charles V to electronic dictatorship: five centuries later the planet is but scorched earth.

Five hundred years later and Europe has yet to shake off an ancient illness: racism. Evangelical mission, the duty to civilise, the horror of diversity, negation of reality - racism was and still is a safe conduct to escape from history. Winners are born to win, losers are born to lose. And so if one's destiny is written in one's genes the riches of the rich are blameless for five centuries of crime and pillage, while the poverty of the poor is not a result of history but of a biological curse. If the winners have nothing to repent of, the losers have nothing to complain about.

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End of century, end of millennium - a time for disdain. Few holders, many held; few judges, many judged; few consumers, many consumed; few developed, many overwhelmed. And the few get fewer. The many increasingly become more, in every country across the globe. During this century the gap between rich and poor countries has increased fivefold. The world today is the masterpiece of a school of thought that we could label as *Capitalist Realism*. In its boundless generosity the system allows us all to choose between capitalism and capitalism, but eighty percent of the human race is barred entry into the consumer society. They can always watch it on television, of course - those who do not consume things can consume consumer fantasies.

The world now looks like any of the many Latin American metropolises, where enormous suburbs crowd around the impregnable fortresses of the plush neighbourhoods. While not even the ruins of the temporary wall of Berlin are still standing, the wall that for five centuries has divided the «haves» from the «have-nots» grows taller and becomes more massive day after day. How many have fallen and how many continue to fall every day in their efforts to jump over that wall? No one has ever counted them or told their story.
End of century, end of millennium - a time for fear. The North panics at the mere thought that the South might take the promises lavishly made by its advertising world seriously, just as the East has believed in the invitation to Paradise. An impossible dream: if the eighty percent of mankind were given the possibility to consume as voraciously as the remaining twenty percent, our already moribund planet would die altogether. If the squandering of resources were not a privilege, it would not exist. The international order that preaches justice is founded on injustice and depends on it. It is no coincidence that the industry of fear guarantees the handsomest deals today: trafficking in arms and drugs. Arms, generated by the fear of dying; drugs generated by the fear of living.

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Time of fear: huge holes in the ozone layer, even larger ones in the soul.
The system that has promoted unequal trade on a world scale and has put price tags on the planet and on the human species was born five centuries ago. Since then it has transformed anything it touches into hunger and money. In much the same way as lungs need air, the system can live and survive only in the presence of an unequal organisation of the world.
Nowadays the weakness of weak peoples and weak countries is either scorned or pitied. Solidarity is no longer fashionable. But how strong is the strength of the strong? Power, the product of violation, is full of violence, it is full of fear. A body full of muscles frightened of its own shadow, a body with no soul - an un-souled society.
A body blind to itself and that has wandered away from itself, owner of everything but no longer master of itself. It can afford no other passion but that of consumption. It has sacrificed the right to life, its own right to life on all the altars of consumption and property. It has already begun to consume itself.

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Men and women from the South and North, we have met this week in Padua for a further hearing of the Peoples' Tribunal. We have discussed international law in the light of the five hundredth anniversary of the conquest of America, because international law stems from the right to conquer and is marred by what François Rigaux called "its own original sin".
They have accustomed us to forgetting what deserves to be remembered and to remember what deserves to be forgotten, but we have gathered here in the certainty that the world is not 'this' world and nor is Law 'this' Law. They have accustomed us to ignoring history so as to oblige us to accept the present as our fate, but we have gathered in the certainty that the world can and must be a home to everyone and in the certainty that another Law is possible, a Law that does not legitimise injustice and guarantee the impunity of those who rule over us, thus acting as an alibi for a system that never says what it does nor does it do what it says it does.

This is our small contribution to a huge task - to fully recover from the mutilitaions that have been inflicted and restore dignity to the human condition.

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A new century, a new millennium are being born. A time for hope. On my way to Italy I crossed Andalusia. There I heard the refrain of a flamenco song, the cante jondo. In three short lines this refrain gives the most direct answer to the civilisation that confuses being with having. The refrain struck my heart, and is still with me. During the sessions of the Tribunal in the last few days I heard it several times and each time I thought: "Lelio would have liked it". And I thought "Sergio and Antonis would have liked it". And now as I think of them and hear it with them, I say it to you:

> My hands are empty,
> From so much giving without receiving,
> But they are mine.

Eduardo Galeano

The Conquest of America and International Law

Contents

Introduction

Int. 1.1. The subject matter of this session needs to be clearly defined in relation to the previous session and in relation to what this decision could have been but that was then decided that it should not be. Clearly defined objectives are essential for the quality of outcome.

Int. 1.2. First of all the terms of the problem need to be clearly delimited, namely the Conquest of America and International Law. The conquest of America is not only a particular historic event, but in the history of human relations it opens up a new era that has not ended yet and one of the objectives of this decision is to demonstrate that the mechanisms of conquest and of domination triggered in 1492 have not yet stopped working and being refined consistently with their inherent rationale. The discipline of History, applied to this huge phenomenon, cannot restrict itself to making us better understand what happened and that will never occur again with that same initial violence. History serves to help understand the current economic and political realities, and perceive the elements of today's world that are a continuum with the past.

Int. 1.3. Hence the aim of this session was not that of pronouncing a verdict of guilty on a given colonial conquest, albeit emblematic for its significance, nor, even more so, on the protagonists of the conquest, guilty of violence as documented by contemporary witnesses and cause of many genocides.
And it is not a question of seeking to see whether one or the other of those unjust acts can be repaired today and with what means. In considering the role assigned to international law in justifying the Conquest of America, the subject matter of this decision is to analyse the fundamental traits of contemporary international law in the light of its colonial origin and of its subsequent developments, and discuss the 'degrees of justice' that it allows for in matters of fundamental rights of peoples.

Int. 1.4. The Court would however fail in its mission if it were to restrict itself to issuing a purely negative judgement acknowledging the injustice of the current world order, which denounces the ambiguities of the international legal order currently in force, and which endorses the domination of the economic laws and of the legal rules governing the global trade market over the respect for fundamental rights which, what is more, it purports to champion. Formulating proposals to change the current world order was however a logical consequence of this process and indeed such proposals are formulated in the fourth and last part of the Decision.

Int. 2. What the official fifth centennial celebrations call "the discovery of America" was in actual fact a conquest, an endeavour to subjugate peoples by States and by their economic forces. This was a conquest which differed thoroughly from all previous conquests, from those which led to the creation of great empires: the Chinese Empire, Alexander's Empire, the Roman Empire, and of the many even more ancient or contemporary forms of expansion of a State beyond its original frontiers, Egypt, Babylon, Persia. This latter example being deeply embedded in the cultural imagery of the West given the presence of Greek resistance in European Humanism as a symbol

of the struggle between a free people and its conquerors, and of the victory of democracy over the armed force of the king of kings.

Even though the phenomenon was not totally absent in the case of some great empires of Antiquity, in particular the Roman Empire, the originality of the first modern colonial conquest was the effort it made to find a rational legal justification of the exercise of force by having recourse to a judgement of value on the basis of which civilisation could be separated from barbarism, which thus became the source of and explanation to the inequalities among peoples. Moreover, a movement which up to then had been restricted only to one part of the world, large though it may have been (the coexistence of the Chinese Empire and the Roman Empire is one such example), was extended for the first time to the whole universe.

Int. 3.1. Why 'The Conquest of America *and International Law'?*
The modern era which started around 1492 is characterised not only by the reformulation of the models of ancient rationality, by the take-off of scientific discoveries and by their technological applications, but also by the birth of a new theory of the State (that was to become established between the late sixteenth and early seventeenth centuries), and by the autonomy of a new legal discipline, International Law.
Not only was the conquest of America the opportunity for a first outline of secularised international law, as described in the lectures delivered at Salamanca in the early 16th century by a Spanish theologian, Francisco de Vitoria, but moreover one of the essential elements of these lectures was the fact of suggesting a new argument taken from natural law to justify the conquest, the *jus communicationis*. Contrary to Vitoria, Francisco Ginés de Sepulveda had declared the wars against the inhabitants of the Indies as being righteous in the name of a higher duty, the propagation of the Christian faith.

Int. 3.2.1. Three elements stand out in Vitoria's theory, who developed a legal doctrine some forty years after the conquest:

a) the fact that human societies entertain peaceful trade relations is consistent with natural law; no ruler shall thus prevent his subjects from trading with the foreigners who set foot on his territory.

b) another issue that is formulated only secondarily (which is rather curious for a theologian) concerns the freedom to spread the Christian faith: just as they cannot oppose economic trade relations, non-Christian princes cannot prohibit missionaries from evangelising their subjects.

c) The third element of Vitoria's theory, which is the logical consequence of the first two, is the doctrine of a just war (*bellum iustum*). This doctrine which was already present in the Fathers of the Church, in particular in Saint Augustine and Isidore of Seville, considers as being illicit any war that is not aimed at preventing a threat by evil forces against the prince (namely self-defence) or at redressing a wrong (*injuria*) inflicted on the prince or on his subjects.

Now, according to Vitoria, refusal to open up one's territory to the peaceful penetration of foreign merchants or the prohibition to allow evangelisation, are a wrong because they contradict the *jus communicationis* founded on natural law; it is therefore lawful to right such wrong by conquering the territory unjustly deprived of the freedom of communication.
This justification of the conquest of America raises two sets of objections.

Int.3.2.2. On the one hand the *jus communicationis*, which assumes that the identity of all subjects communicating with one another is recognised and that they have equal rights, is taken by Vitoria to include rights tailored to fit the conquerors that the Spaniards had used indiscriminately to the detriment of the native populations in the decades subsequent to the conquest. Such rights are the right of settlement, namely of invasion; the right of appropriation, of becoming the owners of the natives' gold and silver considered as *res nullius;* the right of trade, equated for the natives to the obligation of letting themselves be robbed, and the right to the propagation of faith, meaning the obligation for the natives not to oppose it. Refusal by the "barbarians" to offer themselves as victims in order for such rights to be exercised is assumed by Vitoria as cause for war.

In this way, the "just cause" demanded by the medieval doctrine of just war is inflated beyond measure and removed from objective criteria; once you assert the unequal or skewed right to conquest, to appropriation, to trade and to the propagation of faith, the war to impose such right is considered as legitimate defence of that right, reinstatement of security and reparation of the *iniuria.* Hence the war, designed in all truth to satisfy appetites, is placed at the centre of the system of human rights and raised to the status of judgement, by means of which the prince takes on the role of equitable judge of his own cause, legitimated to reinstating the right impaired by the *iniuria* by "killing those responsible" for such impairment. Identifying the "just cause" with the prince's cause, and ultimately with the cause of the stronger of two entities, was to be perpetuated in time through to our day.

Moreover, the doctrine of a just war can be applied to conquest only if documents can be provided proving that the invaders presented themselves in a sufficiently peaceful manner and that therefore the conditions required for the violation of the principle of natural law underlying the *jus communicationis* did exist. It is furthermore required that the violent reaction be commensurate with the severity of the wrong it means to make right and that the means used be limited to bare need. Though declaring that he adopts this principle of proportionality and that he has doubts about the criteria for applying the two-tier evaluation in practice, Vitoria opts for the legitimacy of the conquest. Furthermore, as he was teaching forty years after the facts, he deemed the situation to be irreversible: the king of the time, Charles V, nephew of Isabella the Catholic, could not at this point in time refrain from ruling the conquered territories. We are thus confronted with a situation that is bound to become a constant in international law, namely a de facto situation demanding defence of the legitimacy of a situation resulting from an original injustice.

Int. 3.2.3. On the other hand, the exclusive nature of the prerogatives that derive from the colonial conquest establish a contradiction between the *jus communicationis*, that justified it, and the commercial exploitation that ensued. As early as 1493, Pope Alexander VI Borgia issued the "Inter cetera" bull setting up a line of demarcation from pole to pole. Spain was given exclusive rights to the region west of the line, while Portuguese expeditions were to keep to the east. The following year, the treaty concluded in Tordesillas between Spain and Portugal delimited the two colonisation zones, where Portugal was assigned the area now known as Brazil. The two new colonial powers, like all those that were to follow in America and in other parts of the world, decided immediately that each was to exercise its monopoly on the establishment of trade relations between the Old and the New World. The *jus communicationis* invoked to justify the conquest, was to be refused in the relationships that each colonial power entertained with the other States. While the Spaniards had claimed this right to justify their conquest (and Vitoria himself had founded on this very right the freedom of the French to trade with the Spaniards in Spain and vice versa), the provinces of America were excluded from this apparent liberalism, and freedom of trade was refused to both English and French navigators.

Int. 4. As already expressed by Vitoria and reinforced by his successors, in particular Grotius, the secularisation of international law has two characteristics.

Int. 4.1. According to Vitoria the Pope had no sovereign power in temporal matters. The 1493 bulls cannot be deemed to have had the effect of legitimating the conquest of the new territories. They merely recognised to each of the two sovereigns the exclusive rights to evangelise the inhabitants of the Indies. Commercial exclusive rights underpinned by the law of colonial power and the legitimacy of evangelisation declared by the Pope, are mutually supportive in that the profit made from the exploitation of the natural resources and of the native workers was to encourage evangelisation which in turn was to confer a further title of legitimacy to the right to trade. Thus, the workings of all colonial enterprises were traced right from the very beginning. They provided access to the raw materials that Europe did not have, they made available to the conquerors a servile and at times slavish work-force, they opened up territories for new settlements whose original occupants were expelled or exterminated, but colonialism presented itself as a "sacred mission of civilisation", explicitly stated in the Preamble and in Article 6 of the General Proceedings of the Berlin Conference of 25 February 1885 and in Article 22, par. 1 of the League of Nations Pact. At a time when secularisation has taken the upper hand on the prevalence of a given religion, the mission of spreading civilisation has replaced the duty to evangelise.

Int. 4.2. In both of its forms, the claims to civilise the world that accompanies the colonial conquests is based on the belief that peoples are not equal. Based on the call to all human beings to share in the salvation of Christ, and enshrined in the instruments for the protection of human rights, the principle of the equal dignity of all human beings is not considered to be inconsistent with the unequal value attributed to cultures and political institutions. By using different forms of violence, societies that are convinced they are the carriers of a higher civilisation will go ahead and destroy the

institutions of other societies qualified as being barbarian or primitive. As these institutions which are despised are the expression of the deep soul of the people that conceived them and that shaped them according to their needs, it is the people that in fact are "annihilated" according to the contemporary definition of genocide (even though this does not always coincide with the physical elimination of its members). On the basis of the alleged mission of bringing civilisation, the civilisers can reconcile the destruction of the collective soul of a people with the flaunting respect for the dignity of the individuals of which it is made up. The paradox is even reached in which the institutions and governments of the so-called "uncivilised" individuals are destroyed for their own good and on the grounds of wanting to raise them to a higher level of civilisation.

The term "barbarian" used by the Greeks to designate those who did not speak their language and did not share their institutions is adopted by Vitoria to designate the Indians, and to declare that they have not reached the same level of civilisation as the Spaniards and above all that they have not been taught the only true religion.

A similar awareness portraying belief in the superiority of the civilisation brought by the conquerors emerges clearly in the expression used to designate the sensational event organised for the fifth centennial celebrations. The use of the term "discovery" of America reveals the deep Eurocentrism that has accompanied these celebrations. The term "discovery" places the peoples of America in the passive situation of those who are discovered and (as the subsequent events were to show) whose culture was to be denied and destroyed, their religious treasures and civic emblems pillaged and melted and their natural resources drained away towards the European markets. Within this framework a set of new practices also appear that mark the cleavage between the world of the past and that of the future, namely those of the present day.

Int. 5.1 A first phenomenon that accompanied the conquest of America was the new attitude vis-à-vis nature. While all traditional societies, without excluding those that had reached a high level of concentration of powers (like the Roman Empire) had shown respect for the equilibrium of nature, and had limited themselves to exploiting reproducible resources and to a sparing use of products from the subsoil, starting from the sixteenth century an intense and reckless type of exploitation of natural resources began. The fact that such exploitation began in the colonial territories made it easy to alienate a nature that perceived as a *terra nullius.* However the ways in which the man-nature relationship are overturned are much much deeper.

Int. 5.2. This radical change is indeed part of a new model of reasoning, typical of mercantile trade. The limited trade relations experienced by traditional societies were now being replaced by a system of universal trade characterised by the inclusion of natural resources and of labour relations in a universal system according to which each asset and activity is transformed into its monetary equivalent. The *homo oeconomicus* comes into being with the conquest of America. And once again it is necessary to keep clear of superficial analogies: all conquerors plundered the peoples they subjugated, and at times they reduced the vanquished to slavery; what was new now was the rationale underlying the models of colonial exploitation.

There were forms of protest against the excessive exploitation of the conquest and dissident voices did rise to defend the Indians. Bartolomeo de las Casas, Pedro de Cordoba, Antonio de Montesinos harshly criticised colonialism in its early years, but theynever questioned its legitimacy; their criticism was based on ethical grounds, it addressed the abuses of the system but not the principle underlying the colonial order.
The slave trade sets up a relationship between Africa, which through this route of horror becomes part of the history of colonisation, and America, the recipient of the slaves. Slavery and slave markets existed also in ancient times but the new fact is the production of a slave system fuelled by regular trade activities, in full accordance with the economic rationale of the time. Whereas according to natural law all human beings are free, slavery is not against 'derived natural law', namely the version of natural law inferred from the observation of existing political institutions. According to St. Thomas Aquinas, Vitoria or Suarez, slavery, like property is compatible with derived natural law, provided that the victims are not Christians.

Int. 5.3 The *homo oeconomicus* broke the tie between traditional societies and nature, and the colonial conquests destroyed those ties with violence wherever they survived. But there is a third phenomenon which characterises the culture of the modern age: its alleged universality which has a twofold connotation: geographic, first and foremost, because the colonial conquests that began in 1492 have, over five centuries, led to the spreading to the rest of the universe or world as it was gradually "discovered" by the Europeans, of an economic model that was progressively released from its initial alibi, in the name of its rationale: evangelisation of the Indians or the so-called mission of civilisation.

Universality is however part of discourse: it is the formulation of rules that hold for all human societies. So the claims of the "religions of salvation", whose message was addressed to all human beings, were replaced by an authoritarian idea that took Vitoria's teachings and adjusted them to the new concept of a secularised universe: freedom of trade and economic development on the one hand, democracy and human rights on the other.

Int. 6. Having identified the original sin which lies at the origin of international law, and which was invented to have the violent conquest of America recognised as a just war, is not enough. What remains to be verified, and this is the core of this Decision, is whether international law throughout the course of its history has purified itself from its original flaw.

I. Five Centuries of Mercantile Trade. Five Centuries of Mercantile Trade. Five Centuries of Mercantile Trade. Five Centuries of Mercantile Trade. Five Centuries of Mercantile Trade

There are three stages in the history of economic relations arising from the *jus communicationis*. What these three stages have in common is that both individuals and goods have been introduced into the market.

A. Exchange-Drainage of Resources (15th-18th Centuries)

Starting from 1492 each of the three parts of the non-European world were submitted to different types of drainage of resources.

1.A.1. When the illusion of reaching Asia from the Atlantic faded away, the early conquerors of America were dazzled by the gold and silver treasures buried in the ground of that continent. The mines were intensely exploited and the working conditions of those who were insistently called "Indians" contributed, even more than the violence of the conquest, to extinguishing most of the enslaved peoples. Most of the gold and silver excavated from the mines transited through Spain and Portugal and were the basis for the economic development of the commercial towns in Northern Europe.

The Dutch and the English who reached North America starting from the 17th century founded colonies that progressively expelled and destroyed the native populations.

I.A.2. The "Romanus Pontifex" and "Dum diversas" bulls, that Pope Nicholas V addressed to Henry the Navigator and to King Alphonse as early as 1454, attributed the coastal areas of Africa to the Portuguese king together with the duty of spreading the Christian faith. The need for labour in the two parts of America lie at the heart of the slave trade that was to be the subject matter of a normal trade flow between Africa and America. Such trade was to continue through to the 19th century and was to entail the deportation of masses of people in such horrible conditions as to cause a high death-rate during the journey.

I.A.3. Ever since ancient times merchants from Europe had made their way to Asia to purchase spices, silk and starting from the modern age, furniture and porcelain objects. Such trade grew and flourished thanks to the trade centres set up by European traders in a context whose rules were much closer to the principles of mercantile trade than they were in the other two parts of the world.

I.A.4. In the three parts of the world economic activities were carried out by private merchants, at times organised into "companies" that had obtained from the European monarchs the monopoly of trade as well as territorial rights in many cases. The main regulator of this trade was the European market.

B. The Globalisation of Trade (end of 18th - beginning of 20th centuries)

I.B.1. The political economy of the second half of the 18th century drew up an initial theory of mercantile trade governed by the "invisible hand" of the market, which was to contribute, even more than the mercantile doctrines employed by some states, to spreading wealth universally. Being contemporary with the philosophy of the

Enlightenment, the new economic theories seemed to be based on the same ideal of freedom. The struggle for independence of the Spanish colonies and the separation of Brazil from Portugal seemed to succeed in having these two aspects of the ideal of freedom coincide, but they also encouraged the conquest of markets in this part of the world by English merchants. At the same time the last colonial conquests were taking place one after the other, the Indies by England, and the subdivision of Africa, ratified at the Berlin Congress (1885).

The rivalry among the great European powers did not spare its effects on the colonial conquests between 1870 and 1914. The colonial expansion of France, which was becoming consolidated during this period, was considered favourably by Bismarck who saw this as compensation for France's loss of Alsace-Lorraine and as a possibility that the Third Republic might forego the claim of demanding the provinces it had lost. At the same time the 1914 crisis was also fuelled by the frustration of the German Empire for its small number of colonial territories: Germany was about to become the first economic and commercial power in the world, but its leaders insisted on identifying the status of true world power (*Weltmacht)* with the ownership of colonial territories.

I.B.2. Over and above the extent of territorial sovereignty, that for the State was tantamount to ruling a colonial empire, what at the time seemed to be a key element of the capitalist system run by private entrepreneurs, started to take shape.

D. International Economic Relations after 1945

I.C.1. The reorganisation of the world started by the winners of the war after 1945, brought to the fore the universal extension of a global trade system, inspired by the Americans and the English. The political plan consisted in eliminating the economic causes of the Second and, even more so, of the First World War.

The internationalisation of a privatised economy and the dismantling of national protection systems were to prevent the causes that had led to the international conflicts. Three institutions were conceived for this purpose: two financial institutions created by the Bretton Woods Agreements, which entered into force on 27 December 1945: the International Monetary Fund (IMF) which was to ensure stability of monetary parities, and the International Bank for Reconstruction and Development (IBRD), which had the task of helping the countries devastated by the war to restore their economy. The third institution which was part of the initial plan was the International Trade Organisation (ITO) whose charter was signed in Havana and the statutes approved in March 1948. These instruments were never ratified after being rejected by the U.S. Senate. Faced with this setback it was decided to remove Chapter IV from the Havana Charter and after a revision, make a separate instrument of it, which was called General Agreement of Tariffs and Trade, GATT. The philosophy underlying GATT was the freedom of international trade (Free Trade), without the restrictions envisaged when it was part of the ITO.

Furthermore, as concerns the monetary aspects, the Bretton Woods system was severely undermined if not destroyed by the 1971 monetary crisis and by the decision to discontinue the convertibility of the dollar (into gold), decision taken by President Nixon on 15 August of that same year. Since then, monetary turbulence has not ceased, as witnessed by the exchange rate of the dollar, the main currency of reference for monetary exchange.

I.C.2.1. In a free trade system the players on the world trade scene may seem to be many and the category would even seem to be unlimited if one were to include also the users endowed with sufficient resources to have access to the market. But in reality the number of significant players is very small, and this makes of the world-wide economic system an oligarchy.

I.C.2.2. The two major financial institutions, the IMF and the World Bank, were established on the basis of a model of a joint-stock company where the shareholders' right to vote is proportionate to the shares the own. The result is that the industrialised countries with a market economy have held power within the two institutions right from their creation, and they have shaped the institutions' policies in such a way as to protect their interests, with a sharp predominance of the United States. The directorate of the great powers that shaped international relations in the 19th century was succeeded by the directorate of the three great components of the economic and financial power of the late 20th century, namely the United States, Japan and the EEC, namely a group of countries that account for 15% of the world's population.

I.C.2.3. In the private business world a similar concentration of power can be noticed. A very restricted number of transnational companies exercise control over advanced technology, industrial and commercial know-how, over trade routes and procedures and over communications technology. Most of these companies are based in one of the countries that are members of the directorates of monetary and financial international institutions. The transnational groups belonging to these companies constitute distinct juridical entities that in line of principle are subordinated to the law of the country in which they are based. An appreciable part of the trade qualified as being international takes place among the various companies of the group and are considered to be closed international trade. Rather than speaking of multilocation of the group one should speak of delocation, because the various entities are substantially not subject to the power of the State in which they operate, especially with regard to group strategy and the power of taking major economic decisions.

I.C.2.4. Then there is another major sector of international trade which however is considered as unlawful: namely drugs trafficking managed by criminal organisations in both producer and consumer countries, criminal organisations in which power is extremely concentrated. Drugs trafficking is related to the issue of international trade for two reasons. On the one hand, in producer countries, legal production activities are deteriorating and this prompts local agricultural activities to shift to the growing of crops that are more profitable, thus establishing a link between the poor peasants in the South and the consumers in the North. On the other hand the huge profits made by the drug lords are laundered *in* and *by* the transnational banking system. The laws recently

passed in various industrialised countries are seeking to fight against money laundering, but they have been uneventful thus far.

I.C.3.1. Before examining the global trade market forces that prevail today it is worthwhile tracing the evolution of the strategy adopted by the dominant players.

I.C.3.2. Whereas up to World War I, European capitalism operated along two guidelines, direct investment in colonial territories and funding addressed to the central countries whose resources could not be exploited only with the help of local capital (the Czarist Empire is among the most significant), from 1945 onwards, the participation of the richer countries in world-wide trade has followed three subsequent, and to some extent parallel, paths.

a) In the immediate post-war period, direct investments prevailed following the routes that had been opened up in the previous period, i.e. the money flowed into the development of the mining industry (non-renewable raw materials). The concession system was used whereby the concessionaires were granted major privileges, and at times real ownership, over the natural resources of the country.

b) During a later period, the abundance of liquidity encouraged bankers to finance the economic development of local enterprises as well as the budget deficits of the States. This movement climaxed in 1982, with the so-called foreign debt crisis of the Third World countries. Some solutions to square the debt balance led to having it converted into the allocation of shares of national companies, which means in some respects going back to direct investment.

c) Starting from the Sixties many countries of the South nationalised foreign concessionaire companies (especially in the oil sector). But even if considerable compensation was paid, the original concessionaires concluded favourable agreements under which they committed themselves to controlling the technology of the mining industry and to marketing its products, thanks to the networks in which they already held a dominant position. Such changes have been part and parcel of the most global technology transfer process ever.

I.C.4.1. Three elements characterise the present situation of the world-wide market: globalisation, privatisation and deregulation. Access to this market is presented as a precondition for the viability of the economy. Evidence submitted at the session on the IMF of the Permanent Peoples' Tribunal has shown that the need to service foreign debt has compelled the indebted countries to increase the income they produce from exports to the detriment of the products necessary for the survival of the Country's population. As a consequence, from 1982, in spite of minor adjustments to development aid, financial flows between North and South yield a net balance which secures huge profits for the economies of the industrialised countries, which are thus financed by the countries of the South, according to the model introduced with the conquest of America. From 1982 to 1990 the foreign debt of Southern countries with the bankers of the North increased by 60%. The payments made during that same period exceed the financial flows produced thanks to public development aid for a total

amount of 418 billion, namely six times the amount of aid allocated by the Marshall plan to reconstruct Europe after 1945.

I.C.4.2. Globalisation has had a major impact on the world of labour. Two rival but often complementary policies can be identified: on the one hand, the immigration policy of foreign workers that has involved all industrialised countries since 1945, and the relocation of industries in Southern countries to cut back production costs on the other. These two policies have had a negative impact on the conditions of unskilled workers with the ensuing double split between workers: namely a geographic and a hierarchical division between workers.

On the one hand the immigration policy after World War I curbed wage increases and divided the working class by keeping a considerable proportion of people in the precarious condition of immigrant workers. Presented initially as a form of development aid, the relocation of a part of the manufacturing and industrial sector in Southern countries enabled transnational companies to benefit from much lower salaries and also, thanks to the multiplication of diversified and complementary production centres, to have all of the activities subjected to the decision-making centre of the transnational group.

In addition, the gap between skilled labour required for leading edge technologies and unskilled labourers has grown considerably and has involved virtually all geographic areas.

One of the consequences of this double cleavage has been a decrease in the influence of the trade-union movement that has lost the all-encompassing momentum that had characterised it during its development in the 19th century and that had enabled the liberal democracies to turn into social democracies.

Just as at the time of the conquest, a religious-based ethical criticism developed in the face of the spreading of neo-liberism, the Churches express severe judgements of the social conditions deriving from this situation. This is precisely the case of the social doctrine of the Catholic Church, whose ethical criticism focuses in particular on interpersonal behaviours, but rejects the mediation of an analysis of social relations, and thus it ends up reinforcing the system while seeking to moralise it. Not only: ecclesial authorities delegitimise the theology of liberation which formulates its judgements on a strongly analytical basis.

I.C.4.3. Besides globalisation there is also privatisation and deregulation but these aspects should be examined from the viewpoint of the deterioration of the functions of the State.

D. The Deterioration of State Functions

I.D.1. The elements of continuity from the Monarchic State of the 16th and 17th centuries, which inspired the theory of the modern state, to the liberal state of the early

19th century prevail over the disruption which seems to have been introduced by the liberal discourse. State functions go on being the traditional ones: namely to ensure the maintenance of order and security for its citizens, and to provide private property with the guarantee of sound state institutions.

I.D.2. In the course of the 19th and early 20th centuries, the State acquired two new functions: encourage a more equitable distribution of national income under the pressure of the trade union movement (welfare State), and subject the economy to its laws.

As concerns this latter point, it was clear from the end of the 19th century that the power of some economic players had to be put under control, and this originated the first American laws on the concentration of companies (Sherman Act, 1890) and on dominant position abuses (Clayton Act, 1914). It is however significant that the American tribunals applied these laws only to protect their national market without extending their application to the abuses committed by the same companies in foreign countries: *American Banana Co, United Fruit Co,* 213 U.S: 347, 357 (1909).

The need to put industry at the service of national defence during the First World War later contributed to economic planning according to a trend which went well beyond the presence of the causes that had brought it into being.

I.D.3.1. Today, privatisation and deregulation which are the hinge terms of the new liberal economy, are two forms of aggression both against the welfare state and against the State as regulator of the economy.

I.D.3.2. The weakening of the State functions has also been expressed by their becoming members of international organisations of which the EEC is a paradigm. The underlying principles, freedom of movement for workers, services and capital aim at creating a Common Market and hence an internal market governed by the fundamental principle of economic liberalism. Not only is social Europe lagging behind economic Europe, but the nation States have progressively outstripped themselves of the means of action in those sectors that have been transferred to the Community institutions.

I.D.3.3. However, we cannot conclude that the rules of free trade are truly observed. Many are the protectionist measures which have survived and whose main protagonists are precisely the United States, Japan and the EEC, and which go against the weaker economies in other geographic areas.

I.D.3.4. Privatisation and deregulation are key-words also in the economic policy imposed by the IMF and by the World Bank on some of their debtor States. As specifically demonstrated in the PPT decision on the IMF and on the BM, these two financial institutions of the UN handled the debt problem of the South in such a way as to protect the interests of the lenders. Rescheduling of the debt, subordinated to adjustment policies imposed on the debtor States, has led to the catastrophic deterioration of the public services in those countries, in particular in the areas of education, health and social policies.

And it is not of little importance that the State that has accumulated a foreign debt which is much higher than the sum total of the debts of all the other countries taken together, has escaped all forms of reprimand thanks to its major influence within the financial institutions of the UN.

II. The Legal Institutions of the World-wide Economic System

A. The right of Ownership

II.A.1.1. Unlike a broadly shared opinion, the modern concept of ownership was not directly derived from Roman Law. It was the Romanists of the late Middle Ages and early Modern Age that elaborated a new legal notion that encompasses, in a single concept, the multiple ways, recognised by ancient societies, in which an individual can become owner of the items of the material world. We shall give here only an overview of the most significant steps in the historic evolution of the right of ownership.

II.A.1.2. According to classical doctrine, well represented by St. Ambrose's theory (4th century), originally there existed primitive communism. Property is a civil institute created by the early organised societies. St. Thomas Aquinas (13th century), introduced his distinction between natural law (*lex naturae*), which ignores ownership, and derived natural law (*jus gentium*) which establishes it. According to primitive natural law, all men are free and property is collectively owned. Just like slavery, property is an institution which must be respected by virtue of derived natural law. The first great theoretician of international law, Grotius, goes back to the Thomist doctrine on this point. The texts of Roman Law that he refers to are the ones that repress theft.

II.A.1.3. The modern concept of ownership can be attributed to John Locke: his originality consists in having associated freedom with property. Freedom, which makes man the owner of his body and of his actions also allows him to become owner of the goods he has acquired through his work. On the contrary, property guaranteed against interference by the sovereign, creates an area of freedom around the citizen. Money and the "power of hoarding" that it confers play a key role in Locke's system. Money is also a means for hoarding capital which was indispensable for mercantile trade.

II.A.1.4. In the second half of the 18th century David Hume was to apply his utilitarian philosophy to justify private property. Property is the engine for the production of goods that are useful for society, and was related to the contemporary theories of economic policy.

II.A.1.5. After having struggled unsuccessfully against liberalism during the first half of the 19th century, the social doctrine of the Catholic Church at the end of the same century was to support the idea of justifying property in its battle against Socialism, but losing sight of the traditional distinction between natural law and derived natural law.

II.A.2.1. The guarantee of the right of ownership is the cornerstone of the law declarations made in the late 18th century and it was later to be built into the instruments for the protection of human rights. The dual concept of freedom and property as imagined by Locke was definitively adopted together with the utilitarian justification of the right of ownership. Such a global triumph raises three questions.

II.A.2.2. The first question concerns the relationship between freedom and property. Whereas property is necessary in order for freedom to fully develop, what happens with the individuals who do not have access to property? The question is all the more relevant because entire peoples are deprived of any property whatsoever and consequently they have no access to the market. In all countries, but with a much greater violence in the countries in the South and in the East, there is a separation between two classes of individuals depending on whether their members have or do not have access to the market as consumers. The significant difference is that in a group of countries it is the minority which is excluded from the acquisition of primary consumer goods, whereas in the other group it is the majority that is excluded.
If freedom is actually inseparable from property, shouldn't it be the State's duty to take adequate measures to ensure a minimum level of economic equality among all citizens?

II.A.2.3. Doesn't the current evolution of the global trade market provide evidence showing that the utilitarian justification that continues to prevail is in fact wrong? Initially an instrument for measuring trade, money has become an asset in itself. The main source of wealth has stopped being productive work and has been replaced by speculation, thus creating what some economists have called "the casino society". This type of evolution shakes the very rational foundations of the utilitarian justification of property. If one also bears in mind that economic power is concentrated in the hands of a very small number of large companies, (the very opposite of the ideal model conceived by Adam Smith and Ricardo namely a world of small independent producers), then the situation tends to take on the feudal characteristics that liberal economists had sought to destroy.

II.A.2.4. Ever since its origins, private property (ownership the goods of the material world) did not include such common goods (*res communes*) like air, water and the biosphere. The result has been that these natural resources have been excessively exploited: as they belonged to no-one in particular they bore no cost and could hence be used without restraints. The recent 'discovery' of ecological problems which are expected to be solved merely by having recourse to technological remedies, which in turn generate a new industry, does not sufficiently reveal their ties with the economic development model that has been shaped during the last five centuries.

II.A.2.5. Ownership as defined by the scholars of Roman Law has been deemed to be universally valid to express the dominion exercised by man on nature. At the time of the colonial enterprises the conquerors entered into relationships with peoples who respected the natural environment and practised different and collective forms of soil utilisation. But as natural resources were not part of the concept of individual private

property developed during the Renaissance, the conquerors refused to recognise the existence of a set of rules that governed land use and that were followed by the colonised peoples. And so their land was considered to be *terra nullius* namely available for appropriation by the first occupant. In this way companies were recognised a title of ownership over vast territories on the mere basis of a concession of exploitation granted by a European ruler. A European system of land register and allotments according to the Australian Torrens Act was established: the original title of ownership was attributed to the first purchaser, in total disavowal of pre-existing collective rights.

II.A.3.1. Contractual freedom comes to add to the dual concept of freedom and ownership. During the 19th century, the liberal State as it evolved into the Welfare State tried to oppose this freedom by imposing imperative measures on the parties to the contract. Labour law and more recently consumer protection have been the main areas of intervention by States in the area of contractual freedom.

II.A.3.2. The action of the State has of necessity been restricted to the boundaries of its territory. The contracts that have an impact on international trade have substantially been free from this intervention. Three examples may provide sufficient evidence:

- the establishment of a monetary market of currencies located in a country other than the one where they are standard currency (euro-dollars or more in general foreign currency), a market which is entirely governed by transnational bank practices totally free from the supervision of the issuing institutes;
- the rules followed within transnational groups of companies;
- the extent of international arbitration and the settlement of disputes on the basis of general principles qualified at times as *lex mercatoria.*

These three expressions of contractual freedom do not come under the legal rules imposed by the States and they provide an essential contribution to the organisation of the global trade market.

B. International Law

1. The History of International Law up to the United Nations Charter

II.B.1.1. The history of the doctrines of international law has followed a trend which was parallel to that of international economic relations (supra,I). As pointed out in the introduction, the first theoreticians of international law, Vitoria and Grotius, relied heavily on natural law as handed down by Scholastica. Originally men lived in the state of nature (primitive state) which was not an idyllic age, but according to Hobbes' expression, *bellum omnium in omnes.* The establishment of the earliest civil societies introduced peace into the organised communities. In the early 16th century, the nation states had reacted through a right which was inherent in them and one of the functions was the jurisdictional settlement of controversies among the citizens.

II.B.1.2. According to Hobbes and Spinoza, the mutual relationships between States have not emerged from the state of nature. One of the merits Grotius had was that of combining this with the notion of natural law: States form necessary associations that they agree to organise in their common interest. But the theory set up by Grotius and by his main successors is not free from ambiguity.

One of the crucial points of the nascent international law was respect for the untouchability of treaties: *Pacta sunt servanda.* Now is this a fundamental obligation which is part of natural law, or should it be identified as an effect of the implied acceptance by the States? According to contemporary theories on State sovereignty, international law draws its mandatory force from the consent given by the States, and the States are expected to respect only the rules that they have accepted.

II.B.1.3. One of the reasons justifying the respect that the States must have for some fundamental rules in time of peace is the *jus communicationis:* the establishment of a global trade market demands stability of an embryonic international order, the protection of the person and the protection of the assets of those who move to the territory of another state. The condition of foreigners is, from this standpoint, an essential part of the right to peace.

Thus, the connection between public and private becomes evident: by governing the mutual relations between States, international law undoubtedly belongs to public law, but it is inseparable from the development of private relations between the traders of different nations. If we go back to the main justification for the conquest of America upheld by Vitoria, one might say that public law followed private law: the conquest of the new territories was legitimate because it enabled the Spaniards to conduct their trading activities and secondarily to propagate Christian faith.

II.B.1.4. At the end of the eighteenth century, the doctrine of international law appeared to be divided between an idealist school and a realist or positivist school. The former was expressed in the perpetual peace project by Abbey St. Pierre (1713), with a commentary by Jacques Rousseau and which inspired Kant (*Zum Ewigen Frieden*, 1975), and the Declaration of Peoples' Rights (1793-1795) by Abbey Grégoire. But the realist school was to prevail in the legal doctrine of the nineteenth century; this school was positivist in two ways: international law is not a version of natural law but it is made up of rules that are actually in force and such rules are those that the States have accepted to observe in their mutual relations.

II.B.1.5. The international legal order which became established in the nineteenth century includes an element which is essential for the subject matter of this session. It was a closed system, of European origin, which was later applied to the independent nations of America but whose sole subjects were the "Christian nations" or "civilised nations". According to the expression of Sir Thomas Holland, the international legal order constitutes the "*Family of Nations*", that is to say *a charmed circle* which did not include China, Persia, Siam, and up to 1899, it did not include Japan.

II.B.1.6. According to this logic, the colonial conquests of the nineteenth century were not subjected to the usual rules of international law; there was no right to peace between the civilised nations and the peoples exposed to colonial conquest. And hence the justifications elaborated by Vitoria, with all their shortcomings, were no longer even necessary: civilised nations do not need to motivate the use of force when their intervention has the purpose of bringing non-civilised peoples into the global trade market. And recently, on an occasion such as that of the war in Abyssinia (1935), it was possible for the Council of the League of Nations to adopt sanctions against Italy only because the State that had suffered the aggression was a member of the League.

2. The United Nations Charter

II.B.2.1. Though not excluding the survival of existing colonies, the United Nations Charter contains new principles. Besides the principle of sovereign equality of all States and the aspiration to universality implicit in being a member of the Organisation, many provisions of the Charter and some of the items of the Preamble emphasise the protection of human rights without discrimination, and the duty of the Organisation to promote the economic and social development of all peoples.

II.B.2.2. Resolution 1514-XV of the U.N. General Assembly of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples) set forth new principles. The Declaration cannot be separated from the previous and ongoing national liberation struggles to which it endowed the legal legitimacy that they had not had up to then. The legal implications of the Declaration was confirmed by the consultative opinion issued on 16 October 1975 by the International Court of Justice on the case of Western Sahara.

3. International Economic Law

II.B.3.1. It was soon clear that access of colonial countries to independence was not sufficient to enable the new States to control their economy. And besides, the experience of independence of the Spanish and Portuguese colonies in America should have made this clear.

II.B.3.2. And so starting from 1972, the idea of setting up a new international economic order was developed. During the VI Special Session of the United Nations General Assembly (9 April - 2 May 1974), two resolutions were adopted: Resolution 3201 (S-VI), called «Declaration Concerning the Establishment of a New International Economic Order», and Resolution 3202 (S-VI) called «Action Plan for the Establishment of a New Economic International Order». The Charter of the rights and duties of States in economic matters was adopted on 12 December 1974 by the Ordinary General Assembly (Res. 3281/XXXIX).

II.B.3.3. Parallel to the attempt of establishing a new economic international order, the idea of a new "human right" was launched, namely the right to development, which in

turn was subject matter of many Resolutions of the United Nations General Assembly. What is the current status of the "new international economic order"?

II.B.3.4.1. There is no point in speaking about the mandatory force of the Resolutions issued by the UN General Assembly. There are some, like Declaration 1514-XV, that evidently are to be acknowledged such force. As concerns the resolutions on the new international economic order and the right to development, it may be worthwhile discussing what their current status is and what development model is suggested.

II.B.3.4.2. More than being a generous idea, the willingness to bridge the gap between the countries that qualify as "developed" and all the others, was a claim made by the politicians who spoke on behalf of the latter. After two decades, instead of decreasing, the gap between the "Haves" and the "Have-nots" had grown. Of course it is not worthwhile pointing out how terribly ineffective such texts were, even though they are quite suggestive. Instead we should discuss the very concept and underlying model of development.

II.B.3.4.3. The development indicator used by the United Nations Organisation in drawing up the classification of countries, is purely economic; it is an instrument used for measuring growth, namely the gross domestic product (GDP). The computation consists in dividing the total GDP of the country by the number of its inhabitants and the result obtained is considered as being indicative of the average income per inhabitant. This indicator is clearly misleading because it does not express the income inequalities across the country. Indeed, the improvement in GDP may be accompanied by such an increase in inequalities that the economic conditions of most of the population actually worsen during a given period of growth.

II.B.3.4.4. This is where the development model plays a role. Driven by the idea that all countries are to be integrated into the global trade market, this model tends to promote activities that produce income from exports, to the detriment of the activities that instead improve the living conditions of the local population; and the exports stimulate the importation of consumer goods that are too expensive for most of the population. In this way internal inequalities are emphasised and a false image is produced for the outside world as to the economic progress attributed to the country. The economists or sociologists who express satisfaction in the face of the widening of the middle class of consumers in Brazil, Mexico and in some countries of south-east Asia, India and Indonesia, are not at all few, and the same miracle is expected now for the Eastern Countries as they shift towards a market economy.

The fact that only twenty or thirty percent of the population of a country (for some cases this figure is optimistic) has access to a market fashioned according to the U.S. or EEC model, fully meets the needs for expansion of producer industries. But what meaning is there in acknowledging as being positive a development model which envisages that the real (and not only the comparative) conditions of life deteriorate for the rest of the population of that Country?

II.B.3.4.5. The production and consumer patterns of rich Countries have propagated only to a proportion of the populations of the Countries in the South of the world. But this consumption pattern could never be extended to all human beings because at the present time where such pattern is being sustained to the exclusive advantage of only one fifth of the world's population, it is using up more than three-quarters of the Earth's natural resources and of the industrial production of the world. This obstacle which is economic in nature would be compounded by the threat of destroying the environment which would be catastrophic if all the inhabitants of the planet were to share the pattern of life of the richer countries (which of course in any case would be unfeasible given the scarcity of the planet's resources)

II.B.3.5. And so the notion of development does not tend to improve the conditions of life of most human beings, but rather it tends to expand the production and trade market run by a handful of public and private players. The term "development" is correct if it defines the development of the market and not that of the peoples. This interpretation is in perfect harmony with the project of a "new world order" launched by President Bush at the end of the Gulf war, an expression which is misleading in two ways: far from being innovative this order has reigned since the conquest of America, but it has been able to take on new forms throughout the centuries, without weakening at all the predatory nature of the initial model. The ambiguity arises also out of a verbal analogy with the new international economic order of the 1972-1975 period, but while the latter aimed at creating more equality among the peoples, the new world order of 1991 had the purpose of preserving a domination that has been in existence for five hundred years.

4. War Law

II.B.4.1. As a result of circumstances, Vitoria's lessons consist of two parts: *De Indis recenter inventis* and *De iure belli.* These two parts are closely interlinked: the «discovery» of the new lands 'offered' to the application of the *jus communicationis*, is indissolubly linked to the violence deemed necessary to overcome the resistance of the peoples of America. The title of Grotius's famous – *De jure belli ac pacis* - turned the terms around but retained the distinction which was to remain traditional in international law, War Law and Peace Law. War law remained an essential part of international law for a long time.

II.B.4.2. The idea itself of a War Law seemed to imply that violence between states and peoples could be regulated in the same way in which the State, thanks to its coercive institutions, had succeeded in establishing peaceful relations between its subjects.

War Law as well consists of two parts, the *jus ad bellum,* which intends to regulate recourse to armed force, and the *jus in bello,* which attempts to restrict its practice only to those means which are considered legal.

II.B.4.3. The State of nature, which preceded the formation of the first organised societies, authorises any form of violence or, more precisely, it is characterised by an absence of laws which instead did appear in the first organised societies. At the beginning of the sixteenth century the appearance of a new branch of Law, namely international law, consists in subjecting relations between states to legal provisions and institutions similar to those which allowed those same states to become consolidated.

II.B.4.4.1. Progress of War Law has been very slow and for a long time this nurtured doubts about the legal nature of international law: indeed a regulated constitution is considered as an essential element in order to be qualified as a legal order or as a coercion order (*Zwangsordung*). But does a regulatory system which does not succeed in regulating recourse to violence between its members deserve to be qualified as a legal order?

II.B.4.4.2. Before making decisive progress after the First World War, the *jus ad bellum* doctrine experienced a real eclipse.

The just war theory had theological or moral roots: the secularisation of natural law and, in the nineteenth century, the influence of Positivism contributed to its decline. At the end of this century, the dominant doctrine agrees with the opinion attributed to a military theorist, whereby «war is simply a continuation of policies pursued by other means». What reigns between States is the law of nature, in the sense of a ruthless nature, which allows the strong to annihilate the weak.

Furthermore, the *jus ad bellum* governed only the relations between Christian or civilised nations (supra, II.B.1.5.) and on this aspect as well these regulations were outdated even with respect to the way in which Vitoria applied them.

II.B.4.4.3. Obviously the theological or natural law doctrine of a just war was widely criticised. It included two elements, the right of self-defence, which was seemingly very solid, and the right to re-dress an injustice suffered (*injuria*), which was more fragile.
We have already seen (Int.3.3.2.) the criticism to this second application of the just war doctrine put forward by Vitoria. The Spanish theologian is however aware of the lacuna in his doctrine, that is of the absence of an authority superior to the States, capable of deciding whether a war is just or not. Hence the idea which was to prevail in the nineteenth century, whereby both belligerents could very well be convinced of waging a just war.

The other flaw of this doctrine is obviously that, in any case, the conflict is settled by having recourse to arms. The just war doctrine thus resembles the judgement of God of the medieval ordeals. Just as international law consolidates already acquired situations, whatever the strength of the conqueror's motives, doctrine confers a strength to arms which is merely a semblance of legitimacy.

II.B.4.5. During the second half of the nineteenth century, the *jus in bello* made more evident progress, incorporated in the three conventions annexed to the final Act of the 1899 The Hague Peace Conference and in the thirteen conventions annexed to the final Act of the 1907 The Hague Peace Conference.

II.B.4.6.1. It was only after the First World War that, thanks to the *jus ad bellum*, the idealist principles of perpetual peace developed in the eighteenth century (*supra* B.1.4.) were put into practice. There is no doubt that the reparation imposed on the German Reich by the Treaty of Versailles may be considered as a law imposed by the winners on the vanquished. It did however put forward a new idea, namely that war for aggression is illicit. In an opinion drawn up by Hermann Kantorowicz for the government of the Weimar Republic, but published in 1967, the German author applies his *Freirechtslehre* doctrine to the question put to him (*Die Kriegsschuidfrgage*). This doctrine, which had major similarities with the rights of people, meant to prove that well before 1914 public opinion did not agree with classical doctrine, according to which a war for aggression was not contrary to international law. At the same time Hans Kelsen develops his theory of international law on the basis of the just war doctrine: war can only either be a crime or a legal means to right a wrong.

II.B.4.6.2. On 26 August 1928 fifteen States signed the Briand-Kellog Treaty in which they «solemnly declare that they condemn recourse to war to settle international disputes and that they will refrain from using war as an instrument of international policy in their mutual relations» (Art.1). Many other states join this Pact, and this confers on it the value of a common principle of international law.

II.B.4.6.3. After the Second World War, the ban on habitual recourse to armed force is provided for in Article 2, paragraph 4 of the Charter of the United Nations: «All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.»

II.B.4.6.4. One of the fundamental principles that emerges from the above mentioned article 2, paragraph 4 is the illegality of the conquest of a territory through armed force, which represents a deviation from international law as applied until then.

II.B.5.1. Despite the formal terms of article 2, paragraph 4 of the Charter, many armed conflicts have followed one another since 1945. European public opinion paid little attention to this for a long time, because the major powers which had taken part in the two world wars, and which had involved also their colonial possessions, now lived in peace.

Until recently, these conflicts took place in countries in the southern hemisphere. The war between the various republics of Yugoslavia and the threats which involve some parts of what once was the Soviet Union have brought back war into Europe for the first time since 1945 (with the exception of the situation in Northern Ireland).

II.B.5.2. According to a report presented by Dan Smith at the forty-second Pugwash Conference on Science and World Affairs (Berlin, 11-17 September 1992), entitled *Market, Development, Conflict*, it is important to stress the elements that characterise the numerous present-day armed conflicts. These are mainly civil wars or internal conflicts. But although they may take on an ethnical or national colouring, the root causes of the revolt of some peoples lie in the unequal access they are given to wealth and power.

This same report quotes about twenty-one countries in which, between 1975 and 1985, violence of a political nature stemmed from austerity measures imposed on the government by the IMF or the World Bank.

II.B.5.3. After national liberation struggles, some of which are still under way, many countries have resisted against being integrated into the global trade market which does not offer satisfactory answers to their essential needs. While in the past wars were attributed to the mercantilism of the major economic powers and to the competing expansionary policies they pursued, present-day conflicts find their raison d'être in the world economic order that the major powers (which have protected themselves from internal wars, restricting themselves to purely economic rivalry) have succeeded in imposing on the rest of the world.

These armed conflicts, sometimes called «low intensity conflicts» since they do not endanger world peace, are deemed negligible because they are necessary for the establishment of a new world order.

II.B.6.1. The principle laid out in Article 2, paragraph 4 of the Charter of the United Nations has so far been respected by the major powers.

At the time when the Charter was adopted, the legal principle of sovereign equality of States went hand in hand with a double cleavage within the United Nations system: on the one hand the rivalry between the United States and the Soviet Union, strengthened by their belonging to two different economic systems, and on the other hand the contrast between developed countries and developing countries. The geographical image used – a double East-West, North-South axis– was misleading in the way it positioned the countries involved. Furthermore the two reference axes coincided only partially since the Southern countries were themselves divided by the East-West line.

At the time of the «cold war» the two super-powers never let themselves become involved in an open conflict, but they supported belligerents of the South in many armed conflicts or they directly led military operations against a country of the South.

II.B.6.2.1. The dissolution of the Soviet Union and the new republics joining the market economy have radically changed the United Nations system. Not only have Russia and the other former members of the USSR joined the market economy, but the former have given up the antagonistic position which it had occupied within the Security Council.

While recourse to the right of veto on the part of one or two main members of the Security Council had paralysed the action of the United Nations body specifically in charge of maintaining peace, the Gulf war has shown very clearly the extent to which the United Nations system has changed: in this sense 1991 shall remain a key-year almost as much as 1492.

II.B.6.2.2. There are many arguments put forward to justify the collective action undertaken by the United States and their allies against Iraq.

a) The first can be linked back to the just war doctrine. The aggression and occupation of Kuwaiti territory by Iraq certainly violated Article 2, paragraph 4 of the Charter, which made it possible to qualify the legal evaluation of the injustice (*injuria*) committed by the Iraqi government in terms of positive international law. However, for a war to be just, while it aims at re-dressing an international illicit act, it must also meet the principle of proportionality; and if in order to re-establish peace and re-dress the initial wrong, less drastic means than war are available, then it is mandatory to use such means. The decision to exercise force on Iraq by using arms on the other hand was made without a serious assessment of the efficacy of the economic sanctions previously imposed by the Security Council.

b) The military operations unleashed against Iraq, which did not spare the civilian population, could have been conducted in accordance with chapter VII of the Charter which provides for the organisation of an international armed force under the command of the Secretary General of the United Nations. This possibility was not implemented in 1990, nor has it ever been used at all.

c) The action of the United States and their allies found formal justification in the sibylline wording of Security Council Resolution n° 678 (1990) adopted on 29 November 1990, which authorised the United Nations members who collaborated with the Kuwaiti government, to «use all necessary means» to ensure compliance with the previous Resolutions ordering Iraq to evacuate the Kuwaiti territory.

The authorisation, thus granted by the Security Council, undoubtedly comes under the exception of collective self-defence, which allows a State to seek the assistance of other States to re-establish its territorial integrity.

II.B.6.2.3. Apart from the legal formalism which allowed the Gulf war to be granted at least apparent legitimacy, it is indeed fair to question the statement according to which this war was, as the protagonists themselves maintain, a just battle under Law.

The mention of these dates together – 1492-1991 – is not fortuitous. Although five centuries separate the conquest of America from the Gulf war, the following similarities between the two events are evident:

- recourse to legal formalism, *a posteriori* in the first case, *a priori* in the second, without seriously assessing the *de facto* conditions to which the invoked provisions were to be applied and without considering the principle of proportionality;
- dissimulation of economic interests (the gold-fever of the Spaniards and the control of oil resources in the Middle East) behind a plausible cause: the *jus communicationis* and the liberation of Kuwaiti territories;
- in both cases, at an interval of five centuries, a war waged by the North against the South.

III. The International Legal System between Idealism and Realism

A. Doctrine, Positive Law and Effectiveness

III.A.1 International law bodies are essentially divided according to two doctrinal currents, one inspired by ideology, the other being more pragmatic or realistic (see above II.B.1.4). The following concepts belong to the first category: the principle of sovereign equality between states, the prohibition of the use of force unilaterally by one State against another State, the fields of competence of the Security Council and, above all, Chapter VII of the Charter that deals with the organisation of an armed action on behalf of the United Nations and the international means of protection of human and national rights. Declaration 1514-VX of the United Nations General Assembly in fact contains the provisions that deal with the establishment of a new international economic order.

The following concepts, on the other hand, stem from realism: the privileged status of the five permanent Security Council members, provisions that limit the competence of the International Court to those States that have accepted the Court's jurisdiction, the Statute of the United Nations financial institutions, which departs from the principle of sovereign equality between states in that prominence is given to those States that contribute most to the U.N..

III.A.2.1. A clear distinction needs to be made between the notions of realism and positivism. All or most of the rules listed in the previous point belong to positive law. The term "realistic" refers to the actual content of the regulations. Some facts have been taken into account in setting them forth. The overwhelming position of the five powers that emerged victorious from World War Two, and hope that a resolution agreed upon by the two superpowers would be complied with and put into practice; the refusal by states to accept the compulsory jurisdiction of the International Court of Justice; the economic power of the States that contribute significantly to the capital of the IMF and of the World Bank.

Most of the principles and provisions that can be qualified as idealist undoubtedly fall under the category of positive law. Their content is for the most part prospective and traces a future plan that has not yet been accomplished, or a plan that is still in its early

stages of implementation. Political and economic power relations aside, it can be said that these regulations trace an outline of what relations between States and peoples ought to be.

III.A.2.2. Among the idealist rules that are given above (III.A.I.) and whose list does not mean to be restrictive, there is one that features among those that have had a great impact in practice. Struggles for national liberation have made Declaration 1514-XV effective, even though some, such as the struggle being waged by the Sahraoui and by the East Timor people, on which the PPT has passed sentence, have yet to reach their objective. Also in other cases the right of peoples has been limited to external self-determination without it being extended to the right to choose their own political institutions and to exercise their sovereignty in social and economic matters.

It is easy to understand that rules whose content is the outcome of a power relationship and that consolidate the power of the dominant bodies will be endowed with an effectiveness that the rules proposing an ideal for the future cannot have, particularly when the implementation of such rules would require a redistribution of the existing balance of powers. If one thinks of the many resolutions issued by the United Nations General Assembly on the new international economic order or on the right to development, the vital question is not whether the resolutions issued by the General Assembly carry a compulsory force but, provided such force may be recognised, but how can their effectiveness be assessed.

III.A.3. The two categories of rules of international law can be distinguished from one another on the basis of their different effectiveness. Those classified as realistic are decidedly more effective than most of the idealistic rules.

III.A.4. The insufficient effectiveness of many rules of international law has a variety of causes, the two main reasons being that the relevant institutions do not have the means to impose compliance and the contradiction that exists between these rules and other rules endowed with greater effectiveness.

III.A.4.1. Article 2, of paragraph 4 of the United Nations Charter is a good example of the first case. The numerous armed conflicts that have occurred since World War Two have been, for the most part, an infringement by the head of one or more States of the ban on the unilateral recourse to arms. The deadlock of the Security Council, be it because it has not been able to take appropriate resolutions or whether those resolutions were not followed up by action, have resulted in the failure of the United Nations to keep peace.

Not only should it have been possible to point a finger at the aggressor and take the necessary steps to restore peace, but the violation of a rule of fundamental positive international law was never contradicted by a rule containing a derogation or an exception.

III.A.4.2.1. The situation is quite different in the case of conflicting rules. While this is not a typical situation in international law, the conflicting regulations are a familiar

finding for the jurists of domestic law. This is particularly evident with constitutional norms, which are conceived in such general terms that grey areas are frequently found at the boundaries of the various regulations. Examples of this are the constitutional protection of the right to property and the right to a home, or the conflict between contract bargaining for the employer and the worker's right to work.

When an ordinary legislator does not specify the relevant scope of freedom or of the agreed rights, it is up to the judge, or the constitutional judge in the case mentioned above, to settle the conflict.

Examples drawn from domestic legal systems nonetheless suggest that certain individual rights are more effective than others. Except for the case in which a particular law has granted precise rights to the tenant, it is difficult for the latter to impose his right to a lodging over the property rights of the landowner who wishes to evict him from the property. While the former right derives from a programmatic norm, the latter confers to the holder of the right all the prerogatives that have not been deprived by law.

III.1.4.2.2. International economic law is one of the best illustrations of how weaker rules are evicted by other rules governing the same field but that are more effective or are the only truly effective rules.
This can be easily seen by comparing the rules that govern commercial trade with those that deal with peoples' right to self-determination, with the failed attempt to bring a new economic order into being, and with the right to development. Commercial rules in fact place the borrower in a subordinate position against the lender, and they confer on property rights which are upheld by the state and, to a certain extent, by international law, the principle of permanent sovereignty over natural resources.

If the right to development were to be correctly interpreted, it would not merely aim at integrating the southern economies into the trade market, as is the case at the present time, which is dominated by the northern economic powers and sustained by the influence of their respective States. Such an interpretation would necessarily imply a redistribution of the decision-making centres, a fairer allocation of resources, the transfer of net funds from North to South, and a radical change not only in the way in which nature is being exploited but also in the wild pattern of consumption which is currently being presented as the sole means for raising the living standards of all peoples. A correct interpretation of the right to development would attach the same degree of importance to the dominating prosperity of the happy few and to the growing degradation of the living standards of the others. It would seek ways and means to reduce the inequalities that instead are continually exacerbated by the economic laws currently in force.

In short, were the right to development correctly intended, it would impose a complete review of the model that has hitherto been in force and bring about a radical change in the functioning of the dominating economies. Even those most favourable to the idea of an effective right to development are wary of such a radical change. They continue to sustain the illusion that a generalised trade market will eventually reproduce, on a

universal scale, the painless passage from the the nineteenth century liberal state to the social state of the twentieth century when a broad range of rights were granted to workers without the ruling classes losing any of their privileges or prestige.

Access to the market of new consumer categories has, instead, actually strengthened the position of producers. But no one has wanted to come to terms with the fact that the welfare state obtains a vital part of its resources by drawing excessively on the universal heritage of humanity, and that this predatory model would not be feasible if extended universally.

III.A.4.2.3. It is also possible to prove that some aspects of the effectiveness of contemporary international law, corresponding to legitimate national claims, have actually enabled the globalisation of the trade market.

This has been true in particular for the de-colonisation process and it has also produced advantages for the former colonial powers, that were freed of their administrative duties and released from having to maintain order in their overseas dominions. The 'mission of civilisation' was completed in the very moment in which, after having granted independence, the former colonies became integrated into the trade market. Decolonisation has also had the effect of opening up the market on a global scale, even though the economic influence of the former colonial powers has often gone on being prominent even after the achievement of independence by these countries.

In much the same way, the process whereby these Countries have repossessed their dominion over their natural resources has been paralleled by new strategies adopted by transnational companies whose activity is based on the transfer of technology and on exercising control over the supply chain and hence over the distribution and marketing of the natural resources of the States that have succeeded in having their permanent sovereignty acknowledged.

Those very same companies have also exploited the competition between producer countries to maintain control on the fixing of the prices of raw materials, which are negotiated in the trading places of the North.

III.A.4.2.4. The financial markets offer another example of the ability to adapt of the international banking system.
Before World War One creditors were guaranteed by trade contracts which contained a gold-standard clause or a reference clause to a strong currency.

The gold clause has been substituted by variable interest short term contracts whose rates are determined in London (London-Interbank, Offered Rate, LIBOR). Interest rate fluctuations have contributed considerably to the debt crisis. At the same time the servicing of the high interest rates fixed on the basis of the solvency of the borrower have brought about the situation in which the interest paid is so high that it is equivalent to the original debt but the borrower has not been freed of the debt itself.

The pressure exerted on borrowing nations by the IMF and by the World Bank have replaced the old 'gunboat policy' used by a handful of states up until the early twentieth century to oblige borrowers to extinguish their debts.

III.A.4.2.5. If one goes back to the origins of the *ius communicationis*, what clearly emerges is that the current system has managed to free itself of the contradiction introduced into the principle of natural law by the colonial monopolies.

Now everything appears to be more rational: indeed the pretext of evangelisation or the mission of civilisation are no longer viable. The global trade market has conquered a rationality of its own and can be presented as the miracle cure for underdevelopment; from the renewed utilitarian perspective this in itself is sufficient to justify the triumph of the free trade economy.

III.A.5. An analysis of the rational model underlying the world economic system entails two directions of development whose subject matter is respectively the legal instruments of coercion (infra B), and the distinction between the material content of the rulings of international law and the model of formal rationality on which they are founded (infra C).

B. The Legal Instruments of Coercion

III.B.1. We can start from the classical definition of law whereby law is conceived as an order of coercion (*Zwangsordnung)*. The error of the dominating legal doctrine consists in the conception of a single form of coercion, the coercion whose regulated use ensures compliance with a legal obligation both through the sanction imposed on defaulters and through the deterrence produced by the sanction.

Since the State exercises the monopoly of enforcement on its territory, for along time the legal standing of other legal systems has been denied recognition (in this case the international legal system which has lacked enforcement powers at a central level).

III.B.2.1. Since enforcement mechanisms have originated with the State, it is first of all necessary to see how such mechanisms work within the legal system of a State.
Let us take the distinction between criminal law and private law. In the case of criminal law the State courts inflict a punishment on an offender (either through a death sentence which excludes the condemned person from the living world, or through detention, which deprives the offender of his freedom, or through a fine that deprives him of a part of his wealth); in the case of civil sentence, the debtor is compelled either to fulfil his obligation, or to transfer a portion of his property or to service a debt.

In financial law the relationships between criminal and private law are particularly close. Many violations against financial law are sanctioned by the Criminal Code and are often accompanied by a sentence to pay compensation to the damaged party. Vice

versa, the imposing of a fine and civil sentences have a common effect, namely they draw on the wealth of the offender.

III.B.2.2. The State and its institutions therefore act as the guarantors of the laws that govern the workings of the market.
Inasmuch as the State does not have direct control over the choice of the economic policies that are in force, but it merely embodies the needs of the global trade market into its domestic legal system, namely the respect for the right to property and for contractual obligations, the State often becomes the helpless agent that regulates a market whose rules were set without its contribution. The liberal State and those who are obliged to follow market rules therefore place their institutions at the service of a global market economy. The State's formal sovereignty is respected since the State agrees to carrying out enforcement actions within its national territory over which it exercises its monopoly.

III.B.3.1. International financial relations are substantially removed from the coercive power of the State.

Many of them are decentralised in that they concern the internal relationships of international groups of companies and also because the different parties are convened before a board of arbitrators that can be qualified as being transnational, and who ignore the enforcement of the imperative provisions of State Law in favour of general principles of law which have the ‘sacredness’ of contracts and they prevail over the exceptions attributed to the parties by the protective provisions envisaged in the respective State Law of the individual parties.

Transnational arbitration is particularly significant in that in general it is invoked for a special type of agreement, namely the contracts between a State and a firm from another state (State Contract). When a State accepts such a clause, which is generally imposed by the other party, it renounces the possibility of resorting to its own law courts.

III.B.3.2. International financial transactions, those that are carried out in foreign currency (see above, II.A.3.2.) are completely beyond the jurisdiction of State Courts. The rules of this market have been dictated by private transnational banks. A State wishing to gain access to this form of loan is compelled to follow these rules if it wishes to receive the funds, and in practise there have never been cases in which State Courts have been called upon to enforce a borrower's obligations.

III.B.3.3. It is necessary to discuss the nature of the typical forms of constraint used by the various transnational systems.

a) The simplest case is the power wielded by the decision-making centre of an international group of companies. (see above I.C.2.3.). There is a sort of divorce between the legal autonomy of the individual group entity and the power that the parent firm holds over the activities of its subsidiaries. This control does not have a precise legal connotation, but it derives from the

financial control exercised in the name of the common corporate interest of the group, in accordance with a private plan drawn up by the executive bodies of the group.

b) Transnational banking regulates lending conditions unilaterally. The contract characteristics attributed to the loans are purely formal in nature and the borrower has no choice but to comply with market conditions.

c) The contract clauses that attribute powers to transnational arbitrators are of a more complex nature.

Unless an *ad hoc* arbitrator is appointed, the parties normally refer to the rulings of an international arbitration centre such as the International Chamber of Commerce based in Paris. If the party that is found guilty does not comply with the sentence it risks being excluded from the list of international trade operators.

III.B.3.4.1. Not only are the main international trade transactions removed from any effective control by individual States, thus confirming the deterioration of the role of the State (see above I.D.), but the law that regulates international transactions is appreciably different from the coercion model that the State applies in the territory over which it has monopoly. Some describe this as *soft law* because these are rulings that are accepted by their recipients and do not require the intervention of state bodies to be effective. Actually, the concept of *soft law* as against law proper, *hard law*, which is a state monopoly, is misleading in that it casts doubt over the legal nature and effective strength of such systems.

There are many other examples of legal systems that are independent of the State, such as canon law and sports law and the coercion exercised by the institutions of such legal systems is different from coerced enforcement, which is a monopoly of the State. In fact, the coercion of the legal systems that are independent of the State is based on the expulsion of the rebellious member and is secured by the will or desire of not losing the advantages that are gained from belonging to the system.

III.B.3.4.2. With regard to the two points that have just been mentioned, transnational economic law is very similar to the international legal system : the latter too was formed through the acceptance by its main recipients, namely States, which do not abide by rules other than the ones accepted in their mutual relations and moreover the international legal system does not entail «sanctions» other than non-coercive mandatory measures.

The first aspect has already been addressed (*see above, II.B.1.2.*). Let us now consider the second one.

III.B.4.1. Even when an international jurisdiction sentences a State to remedy the consequences of an illicit international action, the complaining State has a writ of execution without there being an organised system of coerced execution. All of the

decisions of the International Court of Justice have not been enforced as they should have, but the sentenced State shall guarantee at least a partial execution of its obligations.

In any case, the sentence alone represents a form of satisfaction for the complaining State.

The same applies to specialised international jurisdictions, such as the European Court for Human Rights or the Court of Justice of the European Community.

Art. 192 of the EEC treaty, to which art. 187 refers, merely enforces the sentences of the Court of Justice «which imposes a pecuniary penalty on persons who are not States». At the present stage of development of Community law, neither the States nor the Commission could be subjected to an act of material coercion.

III.B.4.2.3. The modus operandi of international economic law, and in this particular case in the management of debt, is through persuasion; it is no longer necessary to resort to sheer force.

When in the nineteenth century the way in which the Ottoman Empire had managed its debt had led to its finances and administration being placed under the protection of a handful of leading European powers, the international financial institutions wrapped their iron fist with velvet, but in particular they cloaked the force of their coercion with the prestige of the international Organisation to which they belonged.

III.B.5.1. The main form of coercion adopted today is expulsion or the threat of expulsion.

The law of expulsion, which is generally preceded by a less radical measure, namely suspension, appears in the texts of many international organisations, in particular in Articles 5 and 6 of the United Nations Charter and in Articles 7 and 8 of the Statute of the Council of Europe.

The Member states of the Council of Europe end up executing the decisions of the European Court as requested because they want to retain the respectability which comes from being a member of this international organisation. Coerced enforcement is not necessary for the member states of the EEC either, which execute the judgments of the Court of Justice, even if at times the sentence has to be reiterated. Even more so, the Commission submits to the decisions of the Court when the latter has proved it wrong.

III.B.5.2. When expulsion is not expressed in an official text, the mere fear that the States and private financial operators have of being cut off from the market, of which they are necessarily a part, suffices. The will to reject the debt, by proving that it has already been serviced through the payment of usurious interest, has remained an empty wish, since the state that were to adopt such a drastic measure would be precluded

access to the credit market managed by private banks. The law of the market is an iron law : you are not allowed not to accept it and you cannot refuse it.

III.B.5.3. Thus, State sovereignty appears to be a purely formal notion as much as that of the equality of states.

The competition that sets in among states and is a consequence of the competitive nature of the market actually does not allow for their actions to be co-ordinated effectively, as we have seen in this case with the un-coordinated negotiations that the debtor states have opened up with their creditors.

The right to development has merely given apparent legitimacy to the accession of the States to the prevailing development pattern which is imposed upon them.

III.B.5.4. To different degrees, each legal system calls on compliance by its recipients and it coercively submits those who try to refuse its laws.

The traditional nation state is a typical example of this combination of consensus and imposition. No human being has chosen the place where he/she was born nor the nationality of origin assigned to him/her.

A democratic society is one in which the participation of its citizens in the management of public affairs allows them to choose the political institutions and to elect their governors and, consequently, make consensus prevail over obligation.
Under an authoritarian regime or under a dictatorship, imposition prevails over consensus. This is a well known cause that leads citizens who love freedom to become exiled, and when a nation state represses some of its peoples, it becomes exposed to the danger of dismemberment as a consequence of the claim for internal autonomy or national independence by the oppressed peoples.

Still today, international law has not yet managed to set the rules for the protection of minorities, nor has it identified the cases where secession is legitimate. The force of arms has continued to be the decisive element.

III.B.5.5. Belonging to the global trade market is the consequence of what may be defined as an economic imposition that can be observed at two levels : the only model of development which is currently offered to the peoples of the South consists in their tighter and tighter integration into the market, according to rules that, disguised as objective laws formulated by the dominating economic science, are set by the most powerful players and supported by international organisations, in this case by the financial institutions of the UN.

Above and beyond the convergence of the private and public spheres already highlighted by the analogy of the models of imposition elaborated respectively by private players and by international organisations, there is no denying that the private sphere prevails over the public one: the international legal system contributes to the stability of the market and so far has managed to prevent the materialisation of

catastrophic forecasts, such as the crash of the financial market as a result of the debt crisis. This further confirms the progressive decline of the function of the state and of the ensuing deterioration of non-mercantile public services.

III.B.5.6. Most armed conflicts, civil wars and social unrest which often takes on violent forms that have caused bloodshed in the countries of the South in the past fifty years have been the result of the difficulty that these States have had in adjusting to market demands and of the violation of the fundamental rights of some minority groups, and at times even of the vast majority of the population. Not only that, the Gulf War, which no doubt involved economic causes, obtained the official backing of the United Nations Security Council.

In most cases, however, the procedures followed to obtain the adhesion of governments to the integration of their economy into the global trade market are apparently more peaceful than the ones which the *ius communicationis*, supported by the doctrine of just war, had introduced five centuries ago.

The current model is much more refined because it has been more skilful in dosing the right proportions of consensus and coercion.

C. The Distinction between the Material Content of the Rules of International Law and their Formal Rationality

III.C.1.1. The theological and philosophical approach of the first writers who «discovered» international law, following the conquest of America, is common knowledge. Vitoria, Suarez, Grotius, Hobbes, Spinoza : three theologians and two philosophers. The study of canon law had no doubt contributed to the legal culture of theologians. However, at times it is difficult to find typically legal elements in their works, according to the contemporary meaning of a rigorous epistemology, as opposed to the ones that derive from theology, the interpretation of the Scriptures, or from philosophy.

III.C.1.2. It would also be useful to engage in a semantic study of the terms that have been used to define international law over time.

The original term is an expression, which is familiar to Roman jurists and is well documented by Cicero, *jus gentium*, which designated the private institutions that were common to different peoples, and distinguished them from the citizens' law (*ius civile*).
In quoting a text of the Institutions, Vitoria replaced the term *inter homines* with *inter gentes*, in order to highlight the difference between the former concept which traditionally referred to private relationships and the new concept which aimed at expressing a relationship of public law between States and between States and peoples.

Vitoria's terminological innovation was not taken up by his successors, who instead did perceive the semantic evolution that he surreptitiously had introduced in a text of Antiquity.

The ancient expression *ius gentium* was to remain in use, but clad in a different meaning.

This is reflected in the translations of *ius gentium*- diritto delle genti, *law of nations*, *Volkerrecght*. It was only at the end of the eighteenth century that a utilitarian philosopher, Jeremy Bentham, forged the expression *international law*. In the nineteenth century, some called European public law a sector of law characterised specifically by its European origin and by the fact that only Christian nations or civilised nations were recognised as subjects of international law.

III.C.1.3. In the American and British doctrine of the late eighteenth century and early nineteenth century, international law covered two categories of legal relationships, those between states and the commercial transactions between the subjects of these States. Blackstone, Joseph Story, Phillmore and Lorimer are the most well-known representatives of this doctrinal current. The *law of nations* includes both categories of legal relations. The twofold foundation of international law inaugurated by Vitoria is still accepted by Story, a judge of the United States Supreme Court, when he attributes the development of the *law of nations* to *the combined influence of Christianity and Commerce*. Only Christian nations are subject to the *law of nations* and only the people who belong to their jurisdiction can benefit from the commercial relations that they govern.

III.C.2.1. The first summaries of international law were imbued with concepts of natural law, borrowed from Roman law, Greek philosophy, and medieval scholastics. The notion of derived natural law (*ius gentium*) has allowed to confer on existing political institutions, or on those that were to be created, a legitimacy that the use of armed force or the effectiveness of the law created by the conquering State alone would not have been able to guarantee.

The two main doctrines on the basis of which Vitoria justifies the conquest of America (of the Indies, according to his vocabulary) are the *ius communicationis* and the theory of just war (*bellum iustum*). Combined together, these two doctrines splendidly enabled the creation of a new merchant community in the commercial centres of Europe and were also to provide the future colonisers with a permanent justification.

More traditional and of theological or ethical inspiration, the doctrine of just war, whose weaknesses have already been described (*supra*, II.B.4.4.3), completed the argument based on the *ius communicationis*. Freedom of trade is so important that it justifies recourse to arms to win over the resistance of the peoples who should logically have been recognised the freedom not to entertain relationships, albeit peaceful ones with their invaders, if they did not want to. Such a use of violence in order to exercise a freedom is suspect *a propri*.

III.C.2. Before indicating the ideological function that natural law has taken on in this specific case, it is worthwhile considering the second justification of the conquest, namely the spreading of the Christian faith. There is surely a theological argument in favour of the conquest, which has been claimed by Vitoria's successors more often than he did. In the opinion of the conquerors, of Christopher Columbus and of Fernando Cortez, the religious argument is preponderant, because they were hardly accustomed to theological subtleties and because the argument of evangelisation offered an easy justification of the conquest, which was more suitable than the *ius communicationis*, which they proposed, to disguise the real motivations of the invasion.

Cortez also gave credence to an accusation launched against the Aztecs of Mexico which was later extended to other American peoples : the human sacrifices which they practised justified the civilising mission of the Spaniards. A work published in 1992 by a Swiss ethnologist (Peter Hassler, *Menshenopfer bei den Atzteken ? Eine quellen und uideologiekeritische Studie*) shows how weak the sources of reference were and the misinterpretations they gave rise to. During the same period, in the provinces of America and in the European territories conquered back from the Moors, the tribunals of the Inquisition tortured people into confessing human sacrifices committed in the name of the religions that the rulers of the time wanted to eliminate.
The idea of an armed Christendom, gathering soldiers, merchants and missionaries, will always remain a very serious responsibility of the Catholic church. Nor can one forget that the two events occurred at the same time : 1492 is also the year in which Granada was conquered back from the Moors, thus ending the last Muslim rule in Europe and marking the beginning of a systematic policy of persecution, forced conversion and expulsion of Muslims and Jews.

III.C.2.3. However, it would be incorrect to consider the evangelising mission as the main cause of the conquest. The secular justification of the latter, highlighted by Vitoria himself, soon prevailed, and it alone could ever have survived the secularisation of international law and secured its continuity throughout the last five centuries.

When he discusses the second justification of the conquest, the evangelisation of the Indians, Vitoria's embarrassment is rather evident.

He considers the use of force to convert the unfaithful as being evil and even sacrilegious. He only admits that the Spanish warriors paved the way for missionaries and that the king of Spain brought order to the conquered territories and claimed for the Spanish clergy the monopoly of evangelisation conferred by pope Alexander VI.

The use of armed force to open up the conquered territories to Spanish merchants entails fewer difficulties than conversion by means of coercion. Physical coercion is a typical sanction of state law and, once the doctrine of just law legitimated the conquest, even without such a justification, after the power of the king of Spain became consolidated in the overseas provinces, a new reality set in which gave absolute legitimacy to the coming into force of the law of the sovereign.

III.C.3.1. Hence, natural law was a convenient tool for justifying the conquest and the institution of a colonial order.

Natural law confers on *ius communicationis* the legitimisation of rational, prescriptive and objective thought. Vitoria senses the existence of a universal society governed by an objective principle, the free movement of people and goods. It does not matter at all that the conquerors hardly engaged in trade as it was intended in Europe's merchant cities, and that their main occupation was to sack the treasures belonging to the Indians and savagely exploit their gold and silver mines after having enslaved them.

Never has the contrast between the order of discourse and actual reality been so blatant. The predatory model introduced and retained for centuries in the provinces of America had nothing in common with the *ius communicationis* which was claimed in making reference to the trade relations among equals inspired by the commercial practices that had spread throughout Europe from the end of the Middle Ages.

III.C.3.2.1. Actually, the contrast went on much longer than some would have us believe. But before pointing out the many contradictions of the current system, it is worthwhile reflecting on the legal forms that international law has borrowed from Western Europe's internal law, in other words from Law *tout court*.

The notion of «general principles of law» is no doubt among the ones that best reveal the western origin of contemporary international law. It appears in Article 38.1.c of the Statute of the International Court of Justice which, by listing the sources of the law that this jurisdiction has to consider, adopts the following wording : «The general principles of Law as recognised by civil nations».

The notion of general principles is all the more significant because reference is made to them in many transnational economic contracts and because they have often been applied by international arbitrators. Now, such general principles derive from the convergence of the legal systems of the leading commercial nations : it is a form of modern *ius gentium*, whose elaboration is however limited to a specific geographical area.

III.C.3.2.2. The inspiring legal model is that of the Rule of Law : the general features are already evident in Vitoria and in other theologians of the Christian West. Also the absolute monarch is subject to laws, he is not *solutus legibus*. He has the duty of looking after the good of his peoples and is responsible for them before God.

Some rules are established that receive additional legitimisation from their conformity with natural law (for instance the rules of marriage or of sexual relationships) or with derived natural law (property or slavery, the mandatory force of contracts).

The main aspects of the Rule of Law have been clearly described by Hobbes and by Locke. Although the two seem to support different political philosophies - absolute

monarchy the former, the British constitutional practice consolidated by the «Glorious Revolution» (1688-1689) the latter - the analogies are deeper than the differences.

There are laws that those who are in power must comply with, some freedoms are granted to the citizens, the ideal model of the legal system is one with a body of regulations that aspire to being universal, anticipatory (law provides only for the future under the control of independent and impartial tribunals) and whose validity at the end of its evolution, that is in Kelsen or in Hart, is reduced to having respect for the rituals that have accompanied its production.

In this way Law would be freed from any axiologic model and led back to the mechanisms of its own positive nature. At the beginning of the nineteenth century, John Austin was a good witness of the evolution of legal formalism which goes from Locke to Kelsen, and, although he touches up the former and although he still upholds the existence of divine laws, he moderates its rigour under the influence of utilitarianism.

III.C.3.2.3. The parallel between the evolution of the western legal model and the extension of the merchant economy to the entire universe can be observed in the course of their subsequent phases. The rationality of economic law has a twofold meaning : its formal instruments have given trade the security and the ability to make predictions that it needed, its commercial tools, but the «progress» of western law is also characterised by the economy of the means put into effect. At the end of the twentieth century, western societies seem to be much meeker, more civil, more human than ever before.

Cruel and spectacular punishments are gone, war has been kept outside of the borders of hegemonic states, the respect for human rights is the subject matter of effective international instruments, the consent of citizens has prevailed over imposition. However, this image could be judged as being too idyllic especially if we consider the internal crisis that threatens western societies, a crisis that is not only economic but also institutional and moral, one of its causes being the introduction into the market of activities that had previously been banned (drugs, the economic exploitation of eroticism and sexuality), the citizens' loss of confidence in their political rulers. But the positive image that western societies give of themselves can be considered globally correct if it is compared with the situation in other countries : indeed, they have not lost their force of attraction, as demonstrated by the inflow of immigrants.

III.C.3.3. One of the attributes of the western legal model, which has not been discussed thus far, is its pretension to consistency.

The model has to be conceived in such a way as to eliminate any internal contradiction. Let us now look at some of these contradictions.

III.C.3.3.1. After the American revolution and the English revolution, the state has acquired new legitimacy. The people are no longer only the beneficiaries of the bounteousness of the prince ; now, instead, sovereignty emanates from the nation and

an equation is established between the State and the law (*Rechsstaat*) and between the State and the people (*Staarsvolk*). According to Hegel, the state incorporates the supreme idea of ethics. The law, considered as the emanation of the will of the people, acquires a new sacredness, which is now purely secular.

In the domestic system the Rule of Law is far from having acknowledged its own contradictions. In 1857, the Supreme Court of the United States decided that black people did not belong to the category of citizens protected by the Constitution of 1791 and by the Bill of Rights attached to it. Although the preamble of the Declaration of Independence states that, by right, all people are born free and equal and that the freedoms guaranteed by the Bill of Rights are proclaimed in universal terms (*No person shall be* ...), the majority of the Supreme Court (seven out of nine judges) made reference to the circumstances under which these instruments had been adopted by the thirteen founding states, most of which practised slavery, in order to give the constitutional concepts a restrictive interpretation; for this purpose, therefore, it is sufficient to decide that for the Constitution a black person is not a person.

But also the State is a *two-faced Janus*. The people's sovereignty that legitimates the State domestically is matched by its sovereignty as a subject of international law. The two notions of sovereignty suffer extraordinary distortions. The progress of the Rule of Law and of democracy in the countries of western Europe have not been judged to be incompatible with the continuation of colonial conquests. In this regard, one must go beyond the narrow horizon of 1492 and the situation of Spain and Portugal, that lived their «golden age» somewhat later than the other European countries.

England and the Netherlands, the cradle of democracy in Europe, have been great colonising nations. The Rule of Law had been established in France and Belgium in the nineteenth century, but the fourth Republic carried out colonial wars, namely in Algeria and in Indochina. Not unlike the American blacks who in 1857 were not considered as people according to the American Constitution, the colonial peoples had no right to the democracy which the leading colonial powers enjoyed in their domestic systems. Still today, the principle of the free movement of people is based on the same ambiguity.

Many international instruments and the political declarations of western governments state that each person has the right to leave the country of his/her residency or nationality.

But the same countries close their borders to migrant workers and to those seeking asylum even if they meet the criteria of the Geneva Convention of 18 July 1951 on the Statute of refugees.

III.C.3.3.2. Considered to be fundamental according to the United Nations Charter, the principle of equality of States does not withstand a serious analysis of their mutual relations and is but the expression of a legal formalism. Indeed States do not all have the same political weight and their economies obtain very different profits from the market economy ; and these differences are compounded by the legal inequalities

mentioned above (*Supra, III.A.I.*). A hierarchical list should undoubtedly be drawn up of the conflicting rules : the respect for the fundamental rights of peoples and of individuals should prevail over the enforcement of purely technical provisions, such as the Statute of international financial institutions, which are not an end in themselves but mere tools which should serve to improve the living standards of the majority of human beings.

However, these technical rules are not only the expression of a power or of an effectiveness, but their technical nature authorises blind enforcement, often deviating from the global aims pursued by the system to which they belong.

III.C.3.3.3. Another just as fundamental principle of international law as it currently stands, the sovereignty of states, is to be considered as being ambivalent.

On the one hand, the principle should allow the states to avail themselves of it within the framework of the international legal system in order to secure respect for the economic, social and cultural interests of the peoples they represent. Such a positive action by the States stands in the way of their subordination to the laws of the market presented as fatal and inevitable.
On the other hand, many States are distracted from taking a more combative attitude because their political institutions are not the expression of true popular sovereignty in their domestic system.

Since only States, and not peoples, are subjects of international law, and since according to a persisting pretence they are the only qualified representatives of their peoples, the alienation of the power of the State in the internal system (that some have called the «Creole Leviathan») has broken off communication between these peoples and the international institutions.

Hence, under both aspects, internal and external, the doctrine of sovereignty is a purely formal concept belonging to the sphere of words.

III.C.3.3.4. Although they are presented as participation in a global trade market, economic relations are so skewed that they wrongly boast that the principle of contractual freedom is in force: the alleged market is not a true system of trade and it does not offer a space that can become universal.

a) Contracts that are freely entered into should constitute the cornerstone of the trade market. The inequality of the parties and the weakness of the position of the States of the South and of their enterprises compared to the leading players of international trade are an open contradiction of that contractual model. At the time when the new international order was launched, the Economic and Social Council of the United Nations set up the Commission of Multinational Companies and UNCTAD made an effort to regulate the technology transfer. Not only have these initiatives not yielded results yet, but in both cases the legal instrument that was designed was a non-binding code of conduct.

The argument put forth was that it would not be realistic to impose upon multinational companies mandatory rules and subject technology transfer to these rules, because if businesses were restricted by imperative obligations, they would pull out of the countries in which such obligations were imposed.

The supremacy of the commercial networks, of technology and of know-how, in fact, allows those who hold such power to set the terms on which they are willing to negotiate. But then, what is left of contractual freedom ?

b) As of the ’60s, there has been a great deal of talk about unequal terms of trade. The notion of unequal trade is no doubt too weak to describe a market where the playing field is not at all level and whose participants play roles that are skewed from this point of view.

Already indicated with regard to the implementation of the *ius communicationis* (Supra, III.C.3.1), the deceptive nature of the transposition to the economic relations between North and South of the trade regulations practised in the merchant cities of Europe did not cease thereafter. The expression «unequal trade» is a euphemism that indicates the absence of trade, since the notion of trade implies a minimum of equality between the parties and a minimum of equivalence between their services.

c) The project for development preserves the illusion of transforming the current market into a universal market. Those who see clearly already know that such an extrapolation of the western development model would be intolerable, whatever the progress that could be achieved by technology, given the insufficient availability of natural resources, and it would have catastrophic consequences on an environment that is already extremely degraded.

But there is an even more cynical view, according to which the world’s three major economic groups should strengthen their mutual relations, abandoning to their fate the peoples that are not capable of entering into this market, which means the majority of the populations of the countries of the South.

Three catastrophic scenarios have already been outlined: competition among the great powers could once again be the cause of an armed conflict, the peoples of the South could rebel against the conditions to which they have been subjected and the military powers of the North could repress the rebellion with the force of arms. The world-wide economic system has succeeded in holding its contradictions in check, but for how long will this still be possible?

IV. The Rights of Peoples

The first significant colonial undertaking of modern times, the conquest of America, opened a new cultural horizon. However, while the European countries created their own distinct institutions, such as the nation State and an embryonic form of international order, they also began to master new technologies and, for the first time in history, they started an indiscriminate exploitation of the natural resources in their overseas possessions. The colonised peoples saw their own institutions overturned by force of arms and, as in the case of American Indians, they became the victims of the greatest genocide in history.

Recourse to the doctrine of just war allowed the conquest to be legitimised with no consideration for the massacres that accompanied it.

Five centuries later, the model of domination that was inaugurated in 1492 has lost none of its force, even if the means it adopts are sometimes less violent than was originally the case. The centres of economic and political power have multiplied and today they include the U.S.A., Japan and the EEC. The most powerful States dominate key positions within the U.N., especially in the international financial institutions and on the Security Council as was demonstrated by their support for the Gulf War. Indeed, 1991 was no less significant a date than 1492, given that this war was also a show of the armed force held by the countries of the North against those of the South.

The global trade market, of which Vitoria's *jus communicationis* provided an early prefiguration, obeys laws imposed by a handful of economic players, and the promises of the right to development have been reduced to the insertion of the countries of the South into a system that has been imposed on them. The rise of this market has been accompanied by an overturning of the public sector by the private sector; what is known as international economic law is in reality a collection of rules imposed by the same economic players and their enforcement power lies in the fact that the States or companies that rebel against them are threatened they will be expelled or they actually are expelled.

Through the system of international debt, considerable sums have been channelled from the countries of the South to bankers in the North, thus financially strengthening the economic development of the richer Countries. This process is similar to that of the transfer of gold and silver from colonial America to the financial markets of Europe in the sixteenth and seventeenth centuries.

Of course, the Tribunal cannot limit its verdict to such negative observations. Consequently, it will propose that a certain reading and interpretation be given to the process that began with the Conquest of America and that has developed since then, and will make some suggestions for radical changes in the organisation of the relations between peoples.

The conquest of America and its legitimisation as a paradigm of modernity

The Conquest was not simply a political and military undertaking limited to occupying a territory, it was also a cultural and religious conquest and, as such, it generated a complex ideological structure which aimed at legitimising and interpreting the Conquest itself. As a result of this elaboration, which developed over the following centuries, the whole undertaking with all its ramifications of meaning, not only marked the start of the modern age but also stands as a paradigm or model for modernity.
This would not have come about had justification for the Conquest been sought only in old mediaeval concepts regarding the universal power of the Emperor or of the Pope. However this did not happen; the reflections started by sixteenth century Spanish theologians and jurists went much further. Vitoria in particular, by rejecting justifications put forward on the basis of the traditional classifications of that time, performed a far more refined ideological operation – namely by giving an illusory picture of reality – and proposed a different order of reasoning. He supplied a theory of legitimisation based on mystifying the *conquistadors*' specific interests to the point that he made them appear to be universal rights. Three elements stand out in his construction: the concept of humanity as a society of equally free and independent sovereign States; the theorisation of a series of natural rights attributed to all peoples and to all States, among which the fundamental right of each individual human being or group of people to enter into contact, communicate and trade with any other and to move to any part of the world; finally, the assertion of the legitimacy of war as a just punishment for anyone who, in opposing the exercise of these fundamental rights, violates the world order that is founded upon them. The violence perpetrated against the native people of America and their submission by force were, in fact, justified, according to Vitoria, by the resistance they put up against the Spaniards' right to communicate and trade.

The essential outlines of the paradigm that still holds sway in our own world today are as follows:
The planet as a field open to the appropriation of resources and unified by commerce and the movement of goods, a global market based on trade;
the purely academic universality of rights, rights that are anyway unequal – in other words their nature is such that they can only be exercised by some, while others are inevitably excluded (the right to migrate or communicate, the acquiring of lands and riches, being meaningless for native peoples);
the implicit but unambiguous translation of diversity into inferiority of anyone who is different, and who is thus bound to be absorbed or destroyed by those who have a more advanced domination technology;
sovereign States as the exclusive subjects of international law, whose purely formal equality in reality hides relationships of dominance and the overpowering of some by others;
and finally, war as the ultimate sanction and the basis of an order that has thus been built, the material creation of a world unified by unequal trade.

The construction of a State system based on war

With its starting point in Vitoria's basic ideas, this paradigm has evolved and become more refined over the course of a painful historical process that has lasted almost five centuries during which the ambivalent aspects of the Spanish theologian's thought have been developed in a regressive sense. Throughout this period, a process of secularisation has occurred, law has been separated from ethics and has become positive law, the nation State has come into being and progressively asserted itself as the universal form for the organisation of political power, subject to no regulations other than those dictated by its own interests. Part of this process has been the onset and spread of nationalism and imperialism, another part has been the rise of the legally constituted State in Europe, and also the birth of the nation state in Europe, of modern western democracies, the declarations of rights and constitutionalism. And at the same time, the limitation of powers – and hence of State sovereignty – in the domestic system and its being subjected to the law as a guarantee of citizens' rights, has been accompanied by a progressively increasing absolutism of the external sovereignty of the State. In other words, the more the State was being internally subjected to the law, the more it was asserting itself as a legibus solutus subject in its external relations with other States and, above all, with the so-called 'uncivilised' world. In fact, the centuries during which the Rule of Law was developing were also the centuries of colonial expansion, of the domination of entire continents by the modern States where the rule of law had been established. Human rights, proclaimed as being universal in the Declarations, Constitutions and Charters of the eighteenth and nineteenth centuries, bear the stamp of State favouritism: they are not extended to non-citizens and the rights of peoples from other cultures are ignored the idea being that with regard to them the West only has a 'civilising mission'. The 'state of nature', superseded in each of the western countries, is reproduced in international society where States act as 'artificial wolves', even more ferocious and more destructive than men in the state of nature as perceived by Hobbes.

War is the natural condition for such a society and thus becomes the basis for political action to such an extent that during this century, Carl Schmitt has identified the very essence and 'criterion' of politicians, in the countering of the 'friend-enemy' entities, , which thus becomes irredeemably fixed in a dimension of domination and war and, consequently, thus restoring public relations between to the wild state.

The tragedy of World War II, against which even the horrors of World War I paled away, represented the final act of this evolution.

The Reversal of this Trend Embodied in the Foundation of the U.N. and the Declaration of the Universal Human Rights

It was at this point that at the global level, there was a start of conscience. The U.N. Charter and the foundation of the United Nations are an expression and

interpretation of this movement of conscience. For the first time, the groundwork was laid for an authentic worldwide organisation; the legitimacy of the States was linked to respect for universal human rights and to the promotion of the material conditions required to make those rights effective; international solidarity was asserted as a duty to bring about justice between nations and, for the first time in history, war was proscribed.
The rejection of war became a fundamental rule for the new legal world order. Peace became the supreme goal pursued by the international community.
Starting from these principles, a comprehensive body of supra-state rules were developed, that protected human rights, recognised for all individuals even vis-à-vis their own State. From this moment, State sovereignty ceased to be absolute and States began to have obligations under international law with respect to both the world community and their own citizens.
In practice, a first draft of a worldwide Constitution was drawn up whereby the international community moved away from the state of nature to the civil state, at least at the regulatory level. At the same time there developed, between peoples on all continents, an evermore widespread awareness of the irrevocable value of the principles enshrined in that Constitution and of the ethical and political code they invoked. It is this very ethical and political dimension that the Tribunal intends to invoke in judging the de facto situation in which the world finds itself today, thus embodying the requests coming from oppressed peoples and individuals.

Persistence of the Limitations and Abuses of the Old World

Firstly, it is impossible to ignore the fact that many rules that were fashioned according to the old rationale are still part of international law: the continuing recognition of States as the privileged and, in practice, almost exclusive subjects of international law; the absolute pre-eminence of the great powers, in open contradiction to the proclaimed equality of States. Furthermore, the break-up of the anti-fascist alliance and the onset of the Cold War substantially paralysed the U.N. for more than thirty years, thus preventing the Security Council from using force in order to maintain peace.
But an even more burdensome heritage from the past weighed on the United Nations' project of emancipation. When the victorious allies of the Second World War proclaimed the ideology of human rights, this ideology did not refer to individuals in the concreteness of their historical circumstances and hence to the differences that distinguish them. Rather, the ideology referred to an abstract and undifferentiated individual, fashioned once again on the inhabitants of the strong western States whose needs, aspirations, collective representations and whose economic, social and cultural concepts were presented as being inherent in all the people of the world. Also reflected in that ideology were the political and social concepts which started to assert themselves in the progressive culture of Europe in the late nineteenth century, concepts that had inspired the experiences of western democracies, especially in Britain and France.

From this abstraction an improbable idea was proclaimed of the advent of a universal history that was to involve all the peoples of the earth in the conquest of the same material future, of the same rights, all united by the same idea of progress. This linear and optimistic concept of history that was at the basis of the ideology of human rights, resulted in setting as an illusory goal for all the peoples of the earth the pattern of western democracies and the results they had achieved. This view ignored the specific nature of the historical process by which that model had been formed, the price that had been paid to achieve it, the conditions that had enabled it to come about and the struggles that had marked its progress. Nor did it face the problem of whether such a result could be achieved in circumstances different from the specific conditions that had brought it about. Furthermore, alongside that model and those results, western democracies have imposed their own lifestyle and, especially, their own social and economic organisation as a universal model and a criterion for evaluating other peoples. Once again, indeed, western societies have imposed themselves as the yardstick of progress.

The Ideology of Development as a Factor in the Impoverishment and Downgrading of the Majority of Peoples and an Instrument of Self-preservation for the Privileged Minority

Soon the problems of the poverty and exploitation of the majority of the world's peoples were incorporated into the model of 'development': Everything depends on the fact that the most of mankind has not yet completed the path of western development; all problems will be solved once the peoples of the world are raised to the status of the consumer society. Rostow's theory of the stages of economic development celebrates this ideology, inducing most of mankind to run a race towards unreachable goals. Indeed, if squandering resources were not a privilege and eighty percent of humanity were able to consume with the same greediness as the other twenty percent, the earth would not survive.

Consequently, at one and the same time by conceiving the institutional and cultural model of western society as being universal, the minority of the international society expresses its project for self-preservation thus setting the stage for perpetuating their economic hegemony and for exploiting the as yet 'undeveloped' peoples. The results of this hegemony are before everyone's eyes: economic growth in non-industrialised countries has not come about except for a few isolated areas. And even where growth has taken off, it has hardly ever improved the living conditions for the majority of the peoples involved. In any case, the governments of the Countries engaged in pursuing «development», have often considered economic growth as a priority over the protection of the rights of the individuals and peoples that they rule and therefore many Countries have expressed regimes that oppress large sectors of society, hence betraying their people's deepest aspirations and its need for authentic emancipation.

In Latin America in particular, not only have dictatorial regimes held sway for extended periods of time, making use of blood-baths and torture as a means of

government, but even the democracies themselves, brought into being after harsh popular struggle, resulted in purely formal democracies, strong in imposing the sacrifices and deprivations demanded by the market on their people and weak in protecting their sovereignty and in reacting against the demands and obligations imposed upon them by external economic and political powers. And moreover, in order to dampen the reaction of these democracies, the latter have often had recourse to the illegal activities of the secret services – the CIA in particular – to direct or indirect military intervention and to pressure exercised by starting and fuelling civil wars.

Furthermore, economic growth has often led to the destruction of the traditional fabric of community life without replacing it with other forms of association, and consequently it has simply brought about the disintegration of the living conditions of these peoples. This phenomenon has proved to be even more destructive in regions where economic growth has not occurred at all.

The mechanism preached by the West and which was supposed to support development has, at an economic level, caused Third World countries to accumulate enormous debts with banks in industrialised Countries and with international financial institutions as documented by the Peoples' Permanent Tribunal in 1988. At the same time, at the level of mankind's relationship with nature, this same mechanism has caused grave severe alterations to the planet's ecosystem which, according to the experts, are no less a threat to human survival than a nuclear war. The illusion of reaching western living conditions has become ever dimmer as the gap widens between the rich part of mankind and the rest of the world. In those countries conventionally described as 'developing' countries, there now exist huge numbers of people who live in subhuman conditions and who are utterly excluded from any process of development as was already recognised fifteen years ago in reports by such international institutions as the International Reconstruction and Development Bank.

The New Imperative of Modernisation and the Expulsion of the Weakest from the World and from Life

In the face of these results, the West has, for some years now, abandoned its message of 'universal progress' even at the ideological level, substituting it with a generic imperative to 'become modernised' and with the glorification of the market as the arena for competition and natural selection of the 'best'. The collapse of the Eastern Bloc has opened new spaces to this wave of neo-liberalism. However, what is presented as a process of horizontal and vertical modernisation of the world economy, is in actual fact a process of structural expulsion of the majority of the world's population. Indeed, the technological progress achieved through automation and the creation of new materials that replace traditional raw materials bestows its benefits only on the holders of economic power while the periphery becomes even more impoverished as a result of the exclusion of human labour and of the traditional natural resources. According to the data supplied in 1991 by the United Nations Programme for Development, 20% of the world's population receives 73% of global revenue

while the poorest 20% receives only 1.4%. Only 20 years ago, this latter figure was 2.8%, in other words, in only two decades the income of the poorest part of the world's population has been halved.

This process has also affected the working masses of the countries of the North: in the EEC countries, the number of unemployed has grown considerably over the last 20 years and now stands at 30 million. However, it is in the South that exclusion has made a truly dramatic impact: In Africa the collapse in living conditions is now touching tragic levels. In Latin America it is sufficient to recall that the drop in exports caused by the technological revolution, the transfer of a considerable part of its economic surplus to the developed world (374 million dollars in the 1980s alone as payment of the interest on its debts) and the enormous sums of capital transferred to the North have had the effect of halving the average income per inhabitant of the continent compared with the levels of 20 years ago, which in any case along the poverty line. The unemployed and the underemployed of the subcontinent have grown from 136 million workers in 1970 (41% of the working population) to 184 million (45% of the working population).

The result of this situation of growing collective impoverishment is the ever-greater economic, social and political instability of the world. Exclusion generates conflict and tensions that find expression in the general degradation of community life both in the South and North of the planet. An eloquent demonstration of this are the growing waves of immigrants, both legal and illegal, moving from Africa and Latin America, and now also from eastern Europe, towards the U.S.A. and the EEC. The developed countries, oblivious of the *jus migrandi* asserted at the time of the conquest, are heavily committed to defending themselves from these migratory waves which cause social and political instability in the countries of destination and at the same time impoverish the countries of departure, which lose their most qualified workers.

The magical virtues attributed to the world market are thus revealing how deceitful they have been. Not only is it not a global market, despite the fact that it has attracted the whole of the world into its sphere, not only does it exclude the free movement of individuals, but it increasingly shows that it is restricted only to the developed areas of the planet with respect to which the rest of the world is a mere secondary appendage to be abandoned to its fate after having pillaged its resources and destroyed its culture. In some cases, the mechanism entails the destruction of entire peoples, the symbolic case being that of the Indios of the Amazon rainforest whose destruction following the disruption of their habitat and the merciless exploitation of their territory – documented by the sentence of this Tribunal on the Amazon (Paris, October 1989) – represents the epilogue of the genocide that began with the Conquest of America. In this way, an objective form of violence spreads throughout the planet, giving the lie to the illusion of the regulatory and balancing capacities of the market.

However Serious the Crisis may be, it can be Overcome serious the crisis may be, it can be overcomeserious the crisis may be, it can be overcomeserious the crisis may be, it can be overcomeserious the crisis may be, it can be overcome

In these conditions the very democratic ideal is less and less feasible.
An evaluation regarding the promise of peace is no less negative. Peace has been safeguarded only among the wealthy countries of the North and the major powers. But since World War II the rest of the world has not been spared the terrible scourge of war: it is estimated that since then almost 200 wars have been fought, with a toll of over 20 million victims. The doctrine of «National Security» and «low-intensity conflicts» reveal an attitude of addiction, of trivialization of war and its inclusion among the current instruments of international relations. With the conflict in the Gulf, war was garishly heightened intensity and it was also formally legitimised once again. And today it is raging in the very heart of Europe.
The parable of modernity is thus concluded. The West abandons the prospects of lay salvation that had accompanied its hegemonic rise to power. The centres of imperial power are tempted to withdraw into themselves or even wage an economic war between themselves. The world, which with the end of the two opposing blocs, with growing interdependence and with the speed of communication has become a global village, is more than ever before prey to disintegration thrusts that are no longer controllable were the current situation to persist.
Nonetheless, in the face of this scenario, one must not surrender to a pessimistic resignation. Aside from its contradictions, a deep trait of modernity is the awareness that this world is built by people who are responsible for its fate. Economic and social processes are not removed from the conscious and voluntary action of human beings. The situation described thus far can be modified. If it clashes, as it does, with the widespread feeling harboured by most of humanity, with the ethical and political principles with which it has identified and which are at the basis of the elements of innovation contained in the United Nations Charter, in many modern Constitutions and, in an exemplary manner, in the international conventions for the protection of human rights and of peoples that constitute the sources of the new law of the human community, then we must act on this feeling in order to start a process of liberation and ransom.
Today we are living an epochal crisis which is no less radical than the one that swept across the world at the time of the conquest. The objective non-sustainability of an asymmetrical and unequal system of international relations, based on the dominion of one or few powers, and the intensification of universal communication, make the plan for global integration based on law more feasible than ever before. And they make it feasible because the immediateness and the intensity of this communication, together with the unfulfilled promises of international law - equality, economic justice, universal human rights and rights of peoples, peace - have unleashed a general crisis of legitimisation which, in the long term, cannot be tolerated by the dominating political systems themselves, whose identity and survival is ultimately based on democratic legitimisation.

Reinstating the Legitimacy of State and International Systemsthe legitimacy of state and international systemsthe legitimacy of state and international systemsthe legitimacy of state and international systemsthe legitimacy of state and international systems

Today, this crisis of legitimacy is shaking the very foundations of the modern State, which for five centuries has dominated and shaped policy, gearing it towards war, and which has been exported all over the world during this century. The nation state as a sovereign subject is now being challenged both from above and from below : from above, on account of the processes of privatisation, internationalisation and deregulation of the economy and by the massive transfer to supranational organisations of most of the functions that in the past had motivated its birth and development, namely military defence, governance of the economy, monetary policy; from below, on account of the centrifugal forces and the processes of disintegration triggered, often in violent forms, by the very development of global communication which makes the other major function which it has historically had increasingly difficult and precarious, namely the function of internal peace-building and unification. Today, such a crisis can be overcome only by valuing the subjectivity of peoples or of the different human communities that live in each nation state, acknowledging and enhancing the different identities, with the awareness that differences enrich humanity.

The Tribunal believes that an alternative to this world disorder is indeed possible and is based precisely on the new awareness of the oppressed peoples which are struggling to emerge as historical subjects. In fact, these peoples radically challenge the current organisation of the world which tramples over their fundamental rights to life, to freedom and to non-alienated development ; they assert energetically their right to self-determination, which they view as inseparable from the right to identity and are taking action to defend it in increasingly unitary and organised ways.

The theoretical and practical acknowledgement of the right to self-determination of all peoples, and in particular of those who, like native peoples, are not supported by a state organisation, must become today the foundation of the new world order. The basic importance of this right is manifested more clearly in the struggles of the peoples that assert the many concrete implications of this right: the right to political autonomy, the right to participate actively (at the domestic and international levels) in the drafting of the laws that concern them, the right to economic self-management, to the land and to the control of natural resources, the right to cultural, ethnic and religious identity and to educational autonomy.

For the public authorities and for the international community, the legal recognition of these rights carries with it the duty to reverse the historic tendency that has prevailed up to the present time and it also implies the duty to return, at least partially, to the original peoples the land that was taken from them. It implies, furthermore, the duty to stop any ongoing process designed to subdue those peoples, in economic, cultural or religious terms, even if only in the form of "integration" or "evangelisation". And it entails a radical change in the relations among all peoples, which are to be founded on mutual respect in that we are all members of the same human family and hence founded on authentic equality and communication.

From this standpoint, and almost as if history had its revenge, the very indications provided by Fransisco de Vitoria have paradoxically taken on the opposite meaning and can be turned around and used against the current system based on dominion and privilege. Let us begin with the assumption of the "communitas orbis", namely of mankind as a subject of law which can be proved true today through the elaboration of a world-wide constitution capable of securing political, social and jurisdictional guarantees to the Charters of fundamental rights. Secondly, many of the rights of peoples stated by Vitoria to the benefit of the conquerors against many helpless peoples subjected to plunder and destruction, and that the West should base its policy on: the "*ius societatis et communicationis*", the "*ius peregrinandis"*, the "*ius migrandi"*, that Vitoria stated on the grounds of our all being human beings. Thirdly the prohibition to wage wars when they are "harmful for the whole of mankind", as all wars now are given their magnitude and destructive power (as seen with Iraq).
Then there is a fourth lesson that comes to us from Vitoria as from all the great classical thinkers of juridical philosophy and modern politics: namely that juridical science and in particular internationalist science, related to the artificial and positive nature of modern law, have a regulatory dimension to them; this means, just as occurred in the past for the Rule of Law, that new models and categories need to be elaborated tailored to guaranteeing fundamental rights and peace that are as yet deprived of effectiveness.
This approach can be pursued by recovering the alternative elements of current international law, by organising them into a consistent regulatory structure and filling in the gaps that prevent their implementation. To accomplish this goal a radical attitude is required scientific and political arenas.
Only in this way can the turnabout in prospects be accomplished which assigns to the peoples the role of subjects of law, removing them from subordination, the status ascribed to them by virtue of the concept of modern State. And in truth this is the idea underlying the Universal Declaration of Peoples' Rights adopted in Algiers on 4 July 1976.
Western culture must contribute to this turnaround in standpoint.
A characteristic trait of this culture, as is true of any culture that claims to be "universal", is its ambivalence, and hence the capacity of producing critical thinking. Indeed, Western certainties are always accompanied by doubts that the dominant culture marginalises or represses but which nevertheless are always available as a resource for those who wish to question the dominant values. Doubts accompanied the ethnocentric categories of the conquest right from the beginning:

from Erasmus of Rotterdam to Bartolomeo de Las Casas, from Montaigne to Giordano Bruno, the questioning of the false universalisations of the West, which are now embodied in Anthropology, has had illustrious precedents. On the basis of this critical thinking it is now possible to cleanse the category of human rights of its ethnocentric and often excessively mystifying connotations and, consistently with the evolution that the idea underwent in international fora after 1948 under the impulse of non-Western Countries, make of this category an essential instrument to protect the dignity of human beings in flesh and blood, who are not separable from their cultural and historic contexts and from the communities to which they belong. Human rights and the rights of peoples thus appear to take the form of protection of human dignity. And human dignity appears to be threatened not only by the conduct and behaviours traditionally recognised as being harmful, but also by economic decisions and strategies that current opinion in the Western world considers as being irrelevant for the protection of human rights.

It is the jurists' task to work out the most appropriate protection techniques in the face of these increasingly severe threats to the fundamental rights of human beings. Just as, at a more general level, it is the task of jurists to develop the progressive elements of international law, fill in the gaps that prevent the more innovative provisions of the Charter from becoming effective, and overcome the heavy 'mortgages' that the old order still imposes on the international relations system.

V. Some Proposals

In order to move in this direction it is necessary to:

1) Democratise the U.N. bodies by eliminating the privilege of the status of permanent member in the Security Council, strengthening the power of the General Assembly, and establish a second General Assembly representing peoples and minorities where the voice of the representatives of native peoples that are struggling for survival and autonomy can be heard.

2) Attribute the status of irrevocable and hierarchically overruling rules of general law ("*ius cogens*") to the repudiation of war and to all the regulatory expressions of fundamental rights, namely those that protect the human community (mankind) as a whole and as individuals and group components, and that protect its relationship with nature. Such rules must become the parameters of the material validity of all regulatory acts, of all decisions produced by any internal or international body and of all private international contracts. Only in this way will it be possible to prevent the Security Council from deciding to wage a war, or that the decision of an international financial institution may attack the essential assets of entire communities.

3) Expand the scope of application of the rules of "*ius cogens*" to include not only the right to self-determination and the principles contained in Resolution 2625 of the United Nations General Assembly, but also the rights to the environment and the provisions concerning the establishment of a new international economic order, which should provide for a rule envisaging sanctions against the building up of

unjustified wealth (enrichment), stating the rule that the provisions on the fundamental rights of individuals and peoples should be interpreted in the light of the principle of their interdependence and indivisibility.

4) Adopt, also on the basis of the Nurimburg principles, an international Penal Code envisaging sanctions for the violation of fundamental rights committed by those who act on behalf of States or of international organisations.

5) Without contradicting the traditional principle that prohibits any interference by a State or a group of States in the affairs of another State, assert the existence of a duty of solidarity at the following conditions: a) that the need to protect the fundamental rights of individuals and peoples is justified; b) that the procedures and means adopted are peaceful in nature; c) that the exercise of the duty of solidarity is exercised exclusively under the control of the competent international bodies, after democratic reforms have been introduced.

6) Make it compulsory and feasible that subjects other than the States - individuals, peoples, minorities - can activate the jurisdiction of the International Court of Justice whose competence should involve the nullification of rules or decisions that go against the "*ius cogens*" provisions and in particular that go against fundamental rights and the principle of peace, and it should also involve issuing judgement on international crimes and applying the relative sanctions on governments.

7) Implement Chapter VII of the UN Charter by establishing and regulating the bodies provided for therein as the sole holders of force that can legitimately be used in international crises, envisaging that recourse to the measures it provides for be necessarily preceded by a true implementation of the peaceful procedures as indicated in Chapter VI.

8) Promote disarmament of the States immediately after the destruction of all nuclear weapons.

9) Prohibit the production, trade and stockpiling of war weapons outside the control of the United Nations.

10) Take this occasion of this fifth centenary of the conquest to cancel the entire debt of Third World Countries, starting with Latin America and Africa, as a symbolic gesture of compensation for the colonial expropriation to which the Countries of the New World were submitted, as had already been requested in the Decision of 29 September 1988 issued by this Court in its judgement on the policies of the International Monetary Fund and of the World Bank.

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The Tribunal is aware of the fact that the above measures do not affect the order of material relationships that determine the state of the world denounced here. In

addition, the adoption of such measures may probably find an insurmountable obstacle in the currently predominant material relationships. Nevertheless this does not undermine the duty of indicating such measures and of being committed to having them adopted.

The subject matter of this session of the Tribunal was the investigation of the relationship between Conquest and international law. In the course of the session evidence was provided demonstrating the links between them, but what also emerged was the important role that ideologies, Law and the institutions have played and still do in the creation and consolidation of material relationships. Promoting a commitment in the spheres of Culture, Politics and Law is hence a way for contributing to the defence of the human community that is being threatened by the current material relationships and by the systems in which they operate.

It is for this very reason that, in order to implement the measures proposed above, the Permanent Peoples' Tribunal makes an appeal not only to jurists and to the academic world, but also to the peoples and to all those who suffer and struggle against the multiple forms of oppression of our times.